Rethinking Expropriation Law: Compensation for Expropriation

COLLOQUIUM REPORT

7-9 DECEMBER 2016

1. Introduction

The Groningen Centre for Law and Governance (GCLG) and the University of Cape Town collaborated with the Global Land Tool Network and True Price to convene the fourth annual colloquium on Expropriation Law in Cape Town. The annual meetings of this project concentrate on narrowly defined aspects of expropriation, and facilitate discussion amongst international academics and other experts on shared issues in Expropriation Law. The project gives delegates the opportunity to participate on the global platform, alongside leading scholars in the field of expropriation law.

The meetings have attracted scholars of international repute across the globe, and have provided opportunities for emerging researchers to publish alongside renowned scholars. Previous conferences have resulted in several publications: Rethinking Expropriation Law I: Public Interest in Expropriation and Rethinking Expropriation Law II: Context, Criteria and Consequences of Expropriation (2015, Boom/Eleven and Juta Law); Expropriation Law in Europe (2015, Wolters Kluwer); "Expropriation and the Endurance of Public Purpose: Lesson for South Africa from comparative law on the change of expropriatory purpose" (2015) European Property Law Journal 4(2) 115.

The fourth annual colloquium of this project convened at the University of Cape Town from 7-9 December 2016. The actual organisation was done by an organising committee composed of Hanri Mostert, Louie van Schalkwyk (University of Cape Town), Jean du Plessis and Gianluca Crispi (GLTN Secretariat and UN-Habitat), Pietro Galgani (True Price), and Bjorn Hoops, Nicholas Tagliarino and Leon Verstappen (University of Groningen). The conference focused specifically on certain problematic aspects arising from the compensation requirement in expropriation legislation of a number of foreign legal systems in a broad perspective. It provided a platform to identify ways in which problems relating to compensation can be addressed, and in the process, serve the furtherance of good governance standards. The organising committee solicited eighteen specific contributions from scholars working on expropriation compensation, which contributions were presented during the conference over a two-day period.

2. Conference Outcomes

The conference achieved four specific outcomes:

1) It facilitated discussions amongst international academics and other experts as to shared issues in Expropriation Law pertaining to compensation matters. It focused on certain problematic aspects arising from the compensation requirement in the legislation of a number of foreign legal systems in a broad perspective.

2) A selection of the papers presented at the colloquium will be published as an edited collection in 2017 by Juta & Company (Pty) Ltd. The authors have already submitted a first draft for this purpose, which will be edited and sent for peer review.

3) The Dutch Land Governance Multi-Stakeholder Dialogue has initiated the development of a protocol on fair compensation in case of land tenure changes, expropriation in particular. This protocol will serve as an international guide to the various actors operating in the field of expropriation, such as affected people, governments, project developers, financers, donors and civil society organisations in cases where fair compensation needs to be determined. The input of stakeholders and experts is crucial for the development of the protocol. The colloquium was an important platform for stakeholder and expert engagement. For this purpose, an entire session of the colloquium was dedicated to a discussion of the development of a protocol on fair compensation in cases of legitimate land tenure changes. The protocol on fair compensation will provide objective guidance or "best practices" for valuing land and compensating landholders affected by expropriations and other legitimate land tenure changes. The report of this session's proceedings will be submitted for consideration by the Dutch Land Governance Multi-Stakeholder Dialogue in 2017.

4) Students who, in 2016, registered for the University of Cape Town's LLB final-year elective course, *Advanced Property Law: Expropriation*, were invited to attend the colloquium. As part of this course, the students were required to write a research paper on a theme of their choice within the general parameters of expropriation law. The students also had to present their research in poster format. These posters were published in a booklet, which was distributed to all conference participants. The top ten posters were also exhibited during the conference. The conference provided an excellent platform for students to engage and interact with experts in the field of expropriation law.

3. Solicited Contributions

This sections provides a summary of the eighteen solicited contributions presented at the conference.

3.1. Keynote Address: Prof Hanoch Dagan

The keynote address, delivered by Prof Hanoch Dagan from the Tel-Aviv University in Israel, was entitled "Eminent Domain and Regulatory Takings: Towards a Unified Theory". Prof Dagan argued that the powers of eminent domain and of regulatory takings are essential to the functioning of a modern state, properly encumbered by duties of promoting its citizens' welfare and their common projects. However, these powers also raise serious concerns, given the potentially detrimental and devastating consequences of their application in terms of efficiency and, even more significantly, fairness. These powers or, more precisely, the distributive underpinnings of their application, explicitly or implicitly shape an underlying scheme of social responsibility that, in turn, affects our understanding of the civic pact underlying our citizenship and community membership. The compensation requirement of both eminent domain law and the doctrine of regulatory takings significantly affects these dramatic issues. Therefore, notwithstanding the differences between these two doctrines, considering them in tandem may generate important lessons and potential cross-fertilization.

Prof Dagan's address served as an attempt to take the first steps in this promising direction. The address was divided into two parts; each one seeking to distil from each of these two doctrines a lesson potentially helpful to the other. In regard to each one, he considered three propositions that, although foundational and, in most cases, relatively uncontroversial within its "natural habitat," are still largely

absent from many if not most discussions of the parallel doctrine. With all six propositions he aimed to demonstrate the plausibility of the proposed transplantation, as well as its eventual significance.

3.2. Session 1: Property & Politics – Is Fair Compensation Full Compensation?

This session focused on the correlation between fair compensation and full compensation. What is considered as 'fair' is to a great extent dependent on the understanding of the concept of property and the political and historical background of each jurisdiction. For example, a liberal view might equate fair compensation to full compensation, whereas a more socialist view would regard less than full compensation as fair. The determination of fair compensation is therefore intertwined with politics and political philosophy. This session examined which (political) factors influence the concept of fair compensation.

3.2.1. Dr Antonie Gildenhuys

Dr Gildenhuys is a retired judge of the South African High Court and Land Claims Court. His presentation was entitled "Full Compensation, Fair Compensation & Politics". Expropriation of property creates an imbalance between the interests of the expropriated owner, who has lost his property, and the expropriating authority, that has acquired it. Fair compensation aims to rectify this imbalance. He argued that fair compensation will usually be equal to full compensation, although in some circumstances it can be less.

The right to compensation is founded upon the principle of equality in the bearing of public burdens. Less than full compensation could place a disproportionate burden on the expropriated owner in having to bear the shortfall. Some circumstances under which fair compensation might be less than full compensation are not controversial. These include the well-known principle that any enhancement or depreciation in the value of expropriated property which can be attributed to the purpose for which the property was expropriated, must be disregarded. Where land is expropriated to achieve social justice, economic reform or land reform, the political and social exigency thereof might justify less than full compensation. Although this might be fair under some circumstances, it might cast a disproportionate burden on the expropriated owners in others. There exists an intractable conflict between the necessity of land and other reforms and the constitutional entrenchment of property rights. The conflict is best addressed on a political level, but with full regard to the Constitution and to all legal and social imperatives.

3.2.2. Mr Jean du Plessis

Mr Du Plessis is based at the Land & GLTN Unit at UN-Habitat. His presentation was entitled "A continuum of land rights perspective on compensation for expropriation". He reported on theoretical and practical work being done by UN-Habitat and partners of the Global Land Tool Network on the continuum of land rights approach to tenure security, as an alternative to the dominant focus on titling of individually held private property as the ultimate form of tenure security, or the end goal of land tenure reforms. He also refered to earlier research done for the book "Losing your Home: Assessing the impact of eviction" (UN-Habitat, 2011). The underlying problem explored in his presentation was the implications of divesting land and housing of their full social, cultural and economic functions and treating them primarily as "ordinary assets" or commodities. The presentation demonstrated that this approach not only has unjust and inequitable consequences, but that it is also not feasible to administer in many developing contexts. This has important implications for the development of an appropriate conception of and workable policies on compensation for expropriation.

3.2.3. Dr Rachael Walsh

Dr Walsh is an Assistant Professor of Law at Trinity College, Dublin. Her presentation was entitled "Constitutional Silence: A Pathway to 'Democratic Discounting' of Compensation?". In the context of a Constitution that does not specifically address the issue of compensation for expropriation (specifically, the Irish Constitution), she analysed the manner in which a model of compensation has evolved that allows for what she termed 'democratic discounting' as determined by the political branches of government. In doing so, the presentation analysed the role of a 'progressive' constitutional property clause layered upon common law principles of private property law in developing such a model of compensation. It applied that 'democratic discounting' model to contemporary challenges for compensation in expropriation law to illustrate its operation and implications for the development of expropriation law. Overall, the presentation focused attention on the question of who should decide what matters in relation to compensation for expropriation. While the substantive principles to be applied in determining 'fair' compensation are often considered and debated academically, that analysis must also attend carefully to the appropriate distribution of decision-making power concerning compensation.

3.2.4. Mr Khomotso Moshikaro

Mr Moshikaro is a lecturer at the University of Cape Town, South Africa. His presentation was entitled "Expropriating property that has value as opposed to expropriation of value: When is this just & equitable compensation?". He argued that, although all property entails value, the value should not define the compensation upon expropriation. Some property may be difficult to value in monetary terms. Not all compensation need sound in money, nor should all compensation be for the full value of the property. However, government must provide some form of compensation in all instances of expropriation.

3.3. Session 2: Who determines compensation?

This session focused on the individuals or institutions that determine the amount of compensation to be paid; be it the administration, the courts, a jury, (a panel of) experts), etc. Many systems provide for experts to play an important role in determining compensation. This session also discussed how these experts should be recruited and what the parameters of their roles should be.

3.3.1. Prof Elmien du Plessis

Prof Du Plessis is a lecturer at the Faculty of Law at North West University, South Africa. Her presentation was entitled "Who determines compensation in South Africa?". She focused on the various role-players that determine compensation for expropriation. Initially, the presentation highlighted the technical aspects if this issue, then continued to investigate how the constitutional values translates into practice (if at all). The presentation also investigated the difference between "value" and "compensation" in the context of South African expropriation law. Even though these concepts are clearly distinguishable in law, they are often conflated in practice.

3.3.2. Prof Yifat Holzman-Gazit

Prof Holzman-Gazit is a Professor of Law at the College of Management, Academic Studies in Israel. Her presentation was entitled "Compensation for Expropriation and the New Function of Quasi-Judicial Appraisers in Israel". Her presentation focused on the process of valuation that takes place in compensation claims in Israel. In 2009 the Israeli legislature created a new legal status for real estate appraisers, known as quasi-judicial appraisers (QJ appraisers). Under the new law, QJ appraisers serve in effect as judges in claims submitted by landowners challenging the amount of compensation offered by

the expropriating authority. QJ appraisers are authorized to take evidence and to determine whether the proposed compensation is just, and, if not, what would be fair compensation. The determination by QJ appraisers is essentially final. The Israeli reform of QJ appraisers is innovative and unique. In no other Western economy have real estate appraisers been granted the status of judges. The purpose of this paper is to examine the new role of QJ appraisers under Israeli law, and to shed some light on its implications for the field of compensation for expropriation

3.3.3. Prof Jacques Sluysmans

Prof Sluysmans is a Professor of Law at Radboud Universiteit Nijmegen; and a practicing lawyer and partner at Van der Feltz in The Hague. His presentation was entitled "How compensation defines its determination". He argued that compensation defines the way in which it should be determined. A fair system ensures that court fees do not bar the parties from seeking redress in court. Experts should be independent and continue to build their expertise.

3.4. Session 3: Rules for Fair Procedure

The last session of the day focused on how regulation can ensure fair procedures in the calculation of compensation. The discussion determined how competing interests of property owners, on the one hand, and expropriating authorities, on the other, can be balanced to ensure a level playing field when determining compensation in expropriation cases. The session also investigated possible procedures for appeals against compensation determinations. Furthermore, it focused on the economic development obligations of companies following an expropriation.

3.4.1. Mr Gianluca Crispi

Mr Crispi is a legal specialist in the Urban Legislation Unit of UN-Habitat. His presentation was entitled "Expropriation as a tool for the acquisition of public space in cities". He argued that public spaces are an essential component of the urban fabric. They facilitate movement and connectivity, provide space for infrastructure, and enhance community cohesion, civic identity, and quality of life. At the international level, the importance of public spaces has been recently recognized by the New Urban Agenda (NUA), the Sustainable Development Goals (SDGs) and by the International Guidelines on Urban and Territorial Planning (IGUTP). A recent study conducted by UN-Habitat on the land that cities dedicate to streets and green areas found that the amount of public space is decreasing virtually everywhere in the world. One of the main reasons for the inadequate provision of streets and green areas is the over-reliance of cities on expropriation to acquire land for public space. The power to expropriate land exists in most nations of the world, but it is not the most effective way to deliver public space for several reasons: expropriation is economically costly since cities do not have the financial resources to compensate land owners with the market value of the land needed to have an adequate supply of public space. Expropriation is politically costly and never a popular measure with voters. Expropriations are usually easily challenged and are subject to long and expensive proceedings in the courts during which the level of compensation is usually determined through lengthy negotiations with the landowners. Lastly, it might be problematic when building a major infrastructure to assemble multiple plots belonging to different owners and each of these can turn into a separate process. UN-Habitat believes that cities need a larger tool kit of instruments to provide an adequate amount of public space.

3.4.2. Dr Liz Alden Wily

Dr Liz Alden Wily is an independent land tenure expert. Her presentation was entitled "Decolonizing Compulsory Acquisition for Modern Agrarian Governance". She argued that compulsory land acquisition

can no longer afford to be executed by agrarian governments without consensual decision-making with those affected. Nor can this be limited to indigenous peoples. Democratization of procedure is an important entry point to decolonization of received law norms around eminent domain built upon circumstances that do not apply in developing economies. Her presentation focused on Africa, where majorities may lack formal recognition of their property interests or the community-based regimes through which those rights are sustained. In these circumstances recourse to the courts is unrewarding and for most, impractical. While underway, tenure reforms protecting such rights are demonstrably taking time to achieve. Resistance to narrowing the scope of public purpose is palpable. Yet most African states have pledged devolutionary democratization, opening grounds for procedural reform. The presentation highlighted the urgency hereof. Multiplying land takings across the continent are a lightning rod for injustice, poor governance, and sharpening popular awareness of inappropriate property norms, helping crystallize grievance and violent conflict. Retuning inherited eminent domain procedure to local agrarian realities could punch above its weight in contributing to fairer property rights recognition, good governance, and social stability, all critical for a safer majority agrarian world.

3.4.3. Mr Marcello de Maria

Mr De Maria is a PhD student at the University of Reading and a junior researcher and data analyst at the Land Portal Foundation. His presentation was entitled "The Economics of the Fair Compensation in Transnational Land Deals: An Efficiency Analysis". The debate over the optimal compensation mechanisms related to land acquisitions is not new in economics. Nevertheless, the existing literature addresses mainly the case of land expropriations and takings for public purposes focusing on the national (domestic) level. Yet, the recent wave of transnational large-scale land acquisitions requires a new specific theoretical framework that goes beyond national borders and considers a different range of actors, behaviours, tenure regimes and outcomes. His presentation focused on filling this gap by developing an original bargaining model for compensation in the context of transnational land deals. The model assumes perfect information and zero transaction costs, yet property rights over land are not clearly identified. The results suggest that, theoretically, a second-best solution – that is, a solution preserving the rights of local communities affected by large-scale land acquisitions, the government's interests, as well as the investor's ability to achieve some positive profit at the same time – exists. However, the fair compensation – even assuming that the Free, Prior and Informed Consent principle holds – does not come for free, reflecting the costs of tenure insecurity for the society as a whole. Using the model as a reference, the main factors that might hinder or foster the achievement of the fair compensation in the context of transnational land deals were discussed.

3.5. Session 4: Factors of Compensation; Value of Land

The first session of the second day investigated the various factors influencing the calculation of compensation. Market value is perhaps the most common factor. The discussion attempted to determine what market value is and how it is determined in different legal systems. The session also focused on other factors influencing the calculation of compensation, including decrease in value of non-expropriated property, loss of income, sentimental value, etc.

3.5.1. Dr Shai Stern

Dr Shai Stern is an associate professor of law at Bar Ilan University Law School in Israel. His presentation was entitled "Restoring Justice in Expropriation Law". In most cases, the compensation requirement presents a measurement to provide justice in expropriation processes. While multiple Western constitutions and expropriation laws specifically require the compensation to be just, they nevertheless say little, if any, about the underlying conception of justice or how justice should be pursued. A closer examination of courts' judgments as well as scholarly discourse on the quest for justice in expropriations

reveals a muddled discourse, in which justifications of different nature pull to different normative as well as positive conclusions. This Article suggests a conceptual change in expropriation laws' remedial scheme by embracing restorative justice as the underlying conception of justice in expropriation law. Establishing expropriation law's quest for justice on a restorative conception of justice provides a coherent and circumstances' attentive normative framework, as well as practical instruments, to overcome some of current law's most significant challenges.

3.5.2. Mr Nicholas Tagliarino

Mr Tagliarino is a PhD student at the University of Groningen in the Netherlands. His presentation was entitled "Avoiding the Worst-Case Scenario: Whether Indigenous Peoples and local communities are vulnerable to expropriation without compensation". His presentation examined whether national expropriation and land laws in 30 countries across Asia and Africa put indigenous peoples and local communities at risk of expropriation without compensation. In particular, he investigated whether national laws ensure that communities are eligible for compensation, and whether eligibility requirements effectively close the door on communities seeking compensation. The analysis was based on an assessment of national-level expropriation and compensation procedures. It also drew on research findings from the legal-indicator data available on LandMark, a global platform of indigenous and community lands. The analysis measured national expropriation and land laws against a set of "compensation security" indicators. The indicators inquires whether laws impose restrictions on the rights of communities to receive compensation upon expropriation. The indicators were developed based on the principles established in the Voluntary Guidelines on the Responsible Governance of Tenure (2012) (VGGTs). By measuring national laws against international standards, and examining whether these 30 countries' national laws provide potential loopholes through which governments may expropriate community land without compensating affected communities, the presentation highlighted legal gaps that must be filled in order for the VGGTs to be adopted in these 30 countries.

3.5.3. Dr. Mike McDermott

Dr McDermott is the managing director at Global Property Advisory. His presentation was entitled "Market value when there is no Market: Eesh, hawu, what to do?". Hundreds of millions of people are moving into urban informal settlements from rural areas. Being a servant of its citizens is a necessary precondition for any state's sustained legitimacy. Therefore, the state has a responsibility to provide its citizens with services as soon as practicable. The supply of the required infrastructure will almost certainly require expropriation and therefore compensation. At the same time, the laws in most countries are now changing to recognise the market value of unregistered lands and of other heads of compensation. Enlightened laws do not necessarily enlighten valuation methodologies. Valuations for expropriation can be controversial even in the most transparent and efficient of markets. Where markets are opaque or non-existent, what is to be done? McDermott highlighted that a number of recent initiatives have attempted to address this problem. After providing examples of the kinds of issues being faced, his presentation reported on how such matters are being addressed through global initiatives such as the Global Land Tenure's initiative on the valuation of unregistered lands. It also provided examples of matters that are of legitimate concern in terms of satisfying the overweening principle of compensation, the "before and after" method: no one should be worse off after having their property expropriated than they were before.

3.5.4. Mr Simon Ong

Mr Ong is the Deputy Chief Executive (Land, Corporate, Geospatial & Data) at the Singapore Land Authority and the Commissioner of Lands. His presentation was entitled "Land Acquisition in Singapore: Factors of Compensation". Land Acquisition has played a pivotal role in the national development of

Singapore. It has helped to urbanise Singapore from a rural settlement in the 1960s to a cosmopolitan and globalised city-state today. The Land Acquisition Act was amended in 2007 to compensate affected property owners based on market value as at the date of gazette. Mr Ong's presentation gave an introduction to the Land Acquisition Act in Singapore and how the statutory compensation is determined.

3.6. Session 5: Compensation in the Context of Reform

The last session of presentations discussed how the objectives of land reform impact on compensation issues in expropriation cases. It investigated whether zero compensation is appropriate and justifiable where land is expropriated. The focus was also on how governments can collect the funds required for compensation upon expropriation of land and how the financial structure of such a compensation system works.

3.6.1. Prof Heinz Klug

Prof Klug is a Professor of Law at the University of Wisconsin Law School in the United States and an Honorary Senior Research Associate at the School of Law at the University of the Witwatersrand in South Africa. His presentation was entitled "Land Reform, Restitution and the Question of Compensation". The question of compensation was a key issue from the beginning of the constitutional debate over property in South Africa's democratic transition. Fear that the constitutional protection of property would lock in the benefits of apartheid and reproduce racial inequality led to calls that property not be given constitutional protection at all. When it became clear that the political transition would not go forward without some protection of property rights the negotiators settled on a formula that was designed to both ensure that the legacy of apartheid be addressed – through processes of restitution and land reform – and that the burdens of this process not fall solely on individual property holders but that it be shared more broadly by the provision of reasonable compensation. While an initial call for a wealth tax to produce a fund for equalization was rejected, the property clause adopted did include a set of factors to ensure that the compensation given did not simply incorporate apartheid's spoils for that systems beneficiaries. However, the decision to adopt a market-led land reform and to provide market-based compensation as matters of government policy and reconciliation post-1994 has in part prevented a more equitable distribution of land in the two decades since. These policies are now reflected in the interpretation of the property clause by the courts and is leading to calls for the consideration of a wealth tax designed to achieve a redistribution that might produce a more sustainable system of property rights in the future.

3.6.2. Ms Nina Braude

Ms Braude is a Candidate Attorney at Baker & McKenzie. Her presentation was entitled "A 'Uniform Procedure' for all Expropriations? Customary Property Rights and the 2015 Expropriation Bill". She argued that the 2015 Expropriation Bill introduced a notion of "uniformity" that can be very dangerous, especially when property rights over land are diversified. The Bill contemplates protection of customary tenure systems, but in the context of the common-law paradigm. She argued that the Bill should provide an additional consultation procedure for instances of expropriations of communal land.

3.6.3. Dr Maartje van Eerd

Dr Van Eerd is a Senior Expert in Housing & Social Development at the IHS Erasmus University in Rotterdam, The Netherlands. Her presentation was entitled "The process & impact of development-induced displacement: acquisition, expropriation, compensation & resettlement in times of reform". It focused on the process and impact of development-induced displacement and resettlement in the urban

context. In the current era of economic liberalization and fast economic development of many countries in the global south, the speed and the scale of development and infrastructure projects is increasing, thereby displacing many of the urban poor from city centres. Her presentation questioned development that displaces. It also interrogated the interpretation of public interest as a justification for displacement. Furthermore, it investigated the principle of compensation, what is just and fair compensation and for whom? Finally it presented two case studies, one from India and one from Nigeria, to illustrate the changes and scale of displacement.

4. Plenary Session – Compensation protocol

The final session of the colloquium took the form of a plenary discussion. The aim of the session was to provide input on the development of a protocol on fair compensation. The session included a report on the progress of the first phase of the project, a review of existing international guidelines and the findings of a stakeholder consultation on the key challenges from the field that call for additional guidance on compensation.

The session consisted of discussions on four substantive aspects of the protocol. Firstly, it focused on the inclusion of purpose and process requirements in a compensation protocol. Secondly, it questioned how to address changing and delayed projects. Thirdly, it interrogated how issues of compensation for informal right holders should be addressed. Finally, it investigated issues surrounding compensation for collective tenure rights.

4.1. Background on the compensation protocol project:

In 2016, the Dutch Land Governance Multi-Stakeholder Dialogue initiated the development of a protocol on fair compensation in cases of land tenure changes, expropriation in particular. This protocol will serve as guidance to the various actors operating in this field, such as affected people, governments, project developers, financiers, donors and civil society organisation in cases where fair compensation needs to be determine

The final session of the Conference aimed at presenting the progress of the first phase, a review of existing international guidelines and the findings of a stakeholder consultation on the key challenges from the field that call for additional guidance on compensation.

4.2. Report: Towards a fair compensation protocol

Prof. Dr Leon Verstappen began the session by presenting the input document, co-written by True Price and the University of Groningen, which was commissioned by the Dutch Land Governance Multi-Stakeholder Dialogue in 2016 (Ministry of Foreign Affairs of the Netherlands). The input document established a participatory process for developing a protocol on fair compensation in case of land tenure changes, expropriation in particular. Verstappen posed a series of questions to the audience, including:

- Should the protocol focus on rural land or only certain countries?
- Should the protocol only apply in developing countries or should it apply globally?
- Who should be the target audience of the protocol (e.g. NGOs, civil societies, governments)?
- What should be the relationship between this protocol and other existing international standards/ guidelines and national legislation?

He noted that the protocol should be focused on fair compensation, but there are important pre-requisitions to fair compensation, including genuine public purpose and due process. He noted that the protocol could be a living document, which may change over the years. He also noted that the protocol should be flexible and subject to changing circumstances that arise in the future. The protocol should be developed following a multi-stakeholder approach involving companies, investors, governments, civil societies, academia, and other stakeholders. The protocol should not duplicate guidelines and other documents that already exist. Drafters of the protocol need to understand that there is no global legislator that will make this document legally binding, but we want to make it as effective as possible. The goal should be to achieve buy-in and consensus from multiple stakeholders. These are only guidelines but drafters could adopt a 'comply or explain' rule that we recommend stakeholders follow.

Verstappen noted that it will be difficult to shape the protocol in a way that will cover all cases. However, there should be some guidelines in place. The protocol must be contextualized so that it can be used in a variety of scenarios and cases. One of the participants proposed that the protocol could provide lots of options, possibilities, examples, and ways to deal with different situations.

Please note that the following transcript paraphrases the key points made by the participants. The transcript does not directly quote the speakers, and any mistakes in paraphrasing are unintentional.

For full discussion, see footage on Land Portal's YouTube channel (link is external).

4.3. Inclusion of public purpose and process requirements in the compensation protocol

Due process and genuine public purpose have emerged as crucial pre-requisites for fair compensation in a compulsory change of land tenure rights. A comprehensive list of problematic aspects is defined in relation to these pre-requisites. Which of these problematic aspects should be included in a fair compensation protocol? Guidance for each aspect could range from simply stating that existing binding or voluntary norms must be adhered to, to summarizing how they can be applied; from pointing out best practices to filling in normative gaps with a new, negotiated standard. On the other hand, some aspects may be left out of scope, either because too complex, too broad, or because they could hardly be mitigated by additional guidance.

Dr Ernst Marais chaired the first plenary discussion. It consisted of a preliminary dialogue on public purpose, as well as purpose and process requirements relating to the substantive requirements for expropriation. Mere compensation cannot justify an expropriation – there needs to be a valid public purpose. There needs to be a way in which the objective of the expropriation is realized; procedure should be just and fair.

Questions posed to the participants concerning "genuine" public purpose included the following:

- What is the primary justification for expropriation?
- How broad do we want to define purpose for purposes of Protocol?
- Should we limit to age-old public purpose justification (e.g. road, schools), or should we include public interest?
- Could we also address the danger of economic development purposes in the protocol?
- Should we extend the definition of "public purpose" to include land reform?

- Which public purposes justify the increase in compensation?

Dr Shai Stern stated that the purpose and process are very important. In the land reform context, the purpose is changing from focal point of compensation. Process can become part of the remedy, and if managed the right way, we will be able to turn the process into a remedy, and save public money this way. We must try to understand the negotiation process, and the impact on the landowners other parties. We may be able include the process as part of the remedy the protocol is trying to provide and then use the protocol when making decisions on compensation. We can include instructions on the process and save public money by reducing delays in the process. The protocol must speak in legalist and economic terms, in a way for lawyers and economists to understand.

Mr. Bjorn Hoops suggested that we need to include a public purpose requirement in protocol, but we need it to be flexible. We should focus on procedural government aspect and the role of the competence of national legislation when involved with the definition of purposes. Rather look at procedural and governance aspects of it. We need to examine the role of the legislature is – how specific a purpose needs to be. When the purpose is more specific in legislation, it enables judges to apply new purposes to a case. This way, judges can provide better protection from arbitrary expropriation. If there is no specific public purposes in legislation, courts will defer the authority's decision on what constitutes a public purpose.

Dr. Liz Alden Wily highlighted that there is an implied presumption that public purpose equals necessary public ownership. Do all lands set aside in public interest have to be owned by the state? This is fundamental to the process. Does public land i.e. land that is set aside for public purposes need to be put in the hands of the state? Land could be used for public purposes (e.g. protected areas) and could also be owned and managed by communities or local landholders. Few laws have taken a progressive step on appropriately distinguishing between public, private and community land. A major issue is how to define the relationship between public land, community land, and private land. Perhaps the protocol should could question this presumption. Critical for the "process" is determining how best to use the land, and questioning whether putting expropriated land in hands of state is really needed. The protocol should suggest alternatives to expropriation, which don't involve forcibly removing affected populations.

In response to Dr Shai Stern's comment, Prof Hanri Mostert argued that we should not dismiss the therapeutic process so quickly; there is something to be said for developing guidance on a process which divests someone of land ownership. In response Dr Shai Stern said that if you use therapeutic language in a document it won't be accepted by financial stakeholders. The protocol must be written in a way that legalists and economists will accept.

Dr Mike McDermott highlighted that several countries articulate the public purpose precisely in law, but there is much work that need to be done of the ground. The civil countries where they articulate the process (e.g. Azerbaijan), but how can we hold governments accountable for making fair decisions on what constitutes a public purpose?

Mr. Jean du Plessis argued that, at a certain point, the decision needs to be made to expropriate. But in many cases, there may be alternative mechanisms to expropriation. Other mechanisms may better suited. How do we hold judges and decision-makers accountable for the decision to expropriate? We must able to ask a decision-maker (e.g. a judge) why expropriation was the chosen the mechanism? Expropriation is a very expensive and a blunt tool to achieve what it is trying to achieve. It is a big portion of local budgets, and we need to explore alternatives.

Dr Rachel Walsh said that we need options or alternatives to expropriations. We need to develop a better understanding of what truly constitutes a public purpose. She argued that this work needs to be grounded in empirical research on the impact expropriations have on affected people. Three requirements to fair compensation needs to be included in the protocol: public purpose, due process, and fair compensation –

must refer either to all three requirements for expropriation, and not mention compensation alone. If we include only compensation in the title, it inherently skews the focus if only compensation is mentioned in title of the protocol, regardless of what is said in the body of the text.

Prof Yifat Holzman-Gazit questioned the relation between the protocol and legislation – will it be part of legislation in the future, or an interpretative tool? This is a question that cannot be answered in advance, but should be held in mind. What should be the relationship between this purpose and the law of the land? If the law of the land defines public purposes, maybe we should define purposes in the protocol.

Dr Leon Verstappen highlighted that the same difficulty was faced with the Voluntary Guidelines on the Responsible Governance of Tenure (VGs). The VGs deals with legitimate tenure rights but does not define what are "legitimate tenure rights." This is a problem that we must be addressed when developing the protocol on fair compensation. By using multi-stakeholder approach, we hope to develop a sufficiently effective tool. By using banks, pension funds, civil societies, NGOs, and governments, we hope it will be useful. However, developing a legally binding tool is simply not possible.

Dr. Ernst Marais discussed the procedural requirements for expropriation. He posed the following the questions to the participants:

- What kind of factors should be set out in process for calculating compensation – constitution factors, or others?
- Or should it left over to particular jurisdiction to decide on factors?
- If expropriation infringes customary law right, what should be the process?
- What factors should be set out for expropriation decision-making processes?

Mr. Bjorn Hoops proposed to divide the procedure into a planning part and an expropriation part. For example, we should address cases where projects are prepared in secrecy and then the state approaches owner to acquire land. And also we should address the issue of whether the expropriation is actually necessary. Planning in a participatory way would make procedure a lot more effective. Preparations made in secrecy are complete, and, without prior consultation, no minds can be changed. Participation should be included as early as possible.

Ms. Maartjie Van Eerd highlighted the issue of how to ensure all different groups within communities are well-represented in the planning process.

Dr. Mike McDermott argued that timing is of the essence – always look at the person receiving compensation, look at the before and after principle. Timing of compensation can destroy the whole effect of restoring livelihoods.

Mr. Henk Smith mentioned that, typically, payment is only made years later, and beneficiaries do not receive payment. This is major issue that protocol needs to address. Dr. Liz Alden Wily reinforced Mr Smith's comment, looking through constitutions in Africa, only 16 require prior payment of compensation. Delays in payment are major issues. Many claims in Africa are outstanding. In many places, this a massive problem. Compensation payments made prior to eviction is necessary in Africa and Asia. Process is really where emphasis should lie. Planning must happen as early as possible with public purpose, and we need to bring the affected people back into the process.

4.4. Changing and delayed projects

In cases of interruptions or major changes to the proposed plan during a project's lifetime, how should rights to land, property, food, sustainable livelihood, safety and security of affected people be protected? Prof Mostert chaired this discussion. She asked whether the process of consultation with interested parties occurs before or after the planning of the project. Consultation after the project's planning is complete may be too late. The consultation should come before decision-making on planning occurs. To facilitate this discussion, Mostert asked the session participants to explain the consultation process in their various countries.

Dr Rachel Walsh set out the position in Ireland. Generally, prior to expropriation, consultation occurs in the planning process not only with affected parties but also with third parties. Before getting to the point of notice to expropriation, land in Ireland needs to be zoned, and consultation with any third party interest must occur.

Professor Yifat Holzman-Gazit explained that in Israel, the Committee hears why the land is needed for a public purpose, whether there are alternatives, but only provides recommendations to the Minister of Finance. The judicial review of the decision is limited to the legality of the expropriation and proportionality, but does not examine the compensation decision.

Prof Verstappen warned that if consultation occurs too early it will instantly affect the market, which will influence the compensation that should be paid.

Prof Hanri Mostert proceeded to the question of reacquisition rights in cases where there is a change of public purpose or delay in the realization of public purpose. Mostert presented Hoops' research in a diagram, which provided a spectrum of country approaches to reacquisition in cases where projects are delayed or abandoned.

Mr. Bjorn Hoops added that on one side of the spectrum, you have the United States which doesn't offer a right to reacquire unless the authority acted in bad faith. In the Philippines, if a new purpose does not realize or constitute a genuine public purpose, then reacquisition rights may be granted.

Mr. Nicholas Tagliarino advised that Bangladesh and India have legal issues relating to reacquisition rights. In India, if land is completely unutilized after 5 years, then reacquisition rights may be granted to the previous affected family. In Bangladesh and other countries, the land reverts back to the government if the land is not used for a public purpose, but it is not automatically granted back to the affected persons.

Professor Yifat Holzman-Gazit added that in Israel, the Authority does not have to indicate timeframe for the project, resulting in 25/30 year delays. Courts are highly reluctant to regard a 25 year delay as an undue delay. In 2010 the law changed – the authority has to specify a time frame. The authority must specify the process for the project and has up to 15 years. Change of public purpose can happen – by notifying the owner – but if its purposes becomes private, the land must revert back to owner. The new law also address situations where more land is expropriated than what is needed. If the land was not used, it must be returned to the owner in its current condition.

Professor Jacques Sluysmans explained that in the Netherlands, people do not only have a right to reacquisition, but can also apply for additional compensation. The landowner decides.

Dr. Antonie Gildenhuys raised the issue of land reform in South Africa. Labour tenants are, by law and under certain conditions, entitled to claim ownership of the land they occupy. The South African Government invited labour tenants some years ago to submit claims. Many claims were received. Unless a claim is settled between the parties, the claimed land must be expropriated in order to transfer

ownership thereof from the existing owner to the labour tenant. The expropriation process takes place in the Land Claims Court. Despite receipt of the claims, the Government Department concerned did very little to prosecute the claims. Very few claims reached the Land Claims Court. Some claims vanished into thin air. The Land Claims Court yesterday issued an Order requiring the Department to submit a plan, with time frames, on how they will manage the claims. It is important for the success of land reform initiatives that methods be developed to deal with delays.

Dr. Rachel Walsh showed that the UK and Ireland is at the bottom left hand quadrant of Hoops's diagram – no scrutiny of the change of purpose takes place. The public authority can sell the property to private persons. There is no possibility for retransfer to original owner.

Prof Hanri Mostert asked the participants what their recommendations are.

ProfJacques Sluysmans argued that a good system would provide that former owners have a choice of what to do especially where there is a long time between the expropriation and change of purpose. The owner should be able to reacquire the property or ask for additional compensation. If the former owner wants to reacquire the property, it must repay excess compensation received.

Dr. Mike McDermott: argued that in cases where there is a delay of more than one year, the land / purpose should be deemed as abandoned. Many countries in Africa are affected.

Dr. Hanri Mostert asked what if compensation was received for loss of income or relocation under the original expropriation. Should compensation cover the legal costs to effectuate expropriation? What about improvements to the property or subsequent devaluation?

Mr. Nicholas Tagliarino stated that compensation should reflect the economic activities associated with the land. The expropriating body should be required to look to similarly situated lands to establish estimates of financial loss.

Dr. Shai Stern argued that expropriation preserves the relationship between the owner and the land. This is not the appropriate way. Once expropriation has been realized, one must consider whether the owner remains envolved. Reacquisition rights could have absurd consequences. If something is built on land that can no longer be used, should it be returned to owner? We should think about making a clean break upon expropriation.

Dr. Hanri Mostert accepted that having a clean break is one way to go. The argument for a clean break is based on the premise that the state acts in good faith and that is not necessarily so in all countries.

Professor Yifat Holzman-Gazit stated that there is always resentment against cases of delay and unused land. Would the participatory process deal with this created tension? If you have not agreed to expropriation, it is difficult to have a clean break after expropriation.

Mr. Bjorn Hoops argued against the clean-break argument. It would not be appropriate in cases of illegitimate expropriation projects which experience delays No obligation to reacquire, but this should be an option, and there should be additional compensation for illegitimate projects once there is delay. There should be no obligation to reacquire, but an option to reacquire, against additional compensation.

Dr. Liz Alden Wily advocated for a focus on land transparency and accountability. In most countries, the power to take the land and not having to return it, presents an open invitation to take as must land as the government wants. Usually affected people still use a portion of expropriated land. If viable, the land should be returned. However, the problem with reacquisition is that excess compensation must be paid back to the government. Most people spend the money and will not be able to return it. Alden Wily

cautioned that the protocol drafters should work on the assumption that it applies to states that have a lack of transparency and accountability, not the "perfect state".

4.5. Eligibility of informal rights holders (chair: Professor Jacques Sluysman)

This session focused on identifying clear criteria of eligibility for compensation and guidance on mapping the existing mosaic of tenure systems along the continuum of land rights. Requirements and general principles exist in international hard and soft law to protect informal tenure and use right-holders. How should a protocol be established to help satisfy these requirements in practice? The discussion was led by Professor Jacques Sluysmans. He posed several questions to the participants: How should we address the issue of eligibility? How do we establish who is a rights holder? How do we address issues of urban dwelling vs. farm land? Also private person vs. corporation?

Mr. Nicholas Tagliarino argued that the protocol should address the registration requirement and how that is a hurdle in terms of gaining recognition. In 5 of the countries assessed in his 30 country study of Asian and African legal frameworks, informal customary rights are recognised automatically. We should prescribe in the protocol a consultation process where expropriating company or government goes into affected areas. We should require expropriating bodies to do proper due diligence. During this process women and men should be consulted differently to provide a gender-sensitive approach. This should be addressed in this protocol.

Dr. Maartje van Eerd stressed that those affected (poor and vulnerable) by the expropriation should benefit from the development (e.g. shareholding).

Mr. Henk Smith highlighted that in many countries, informal property rights are not recognised. It is regarded as not civilised enough, where people hold settler rights and we treat them as if the land is not recognised. How do we address this and give monetary values and the relations that exist in those local systems?

Dr. Rachel Walsh stated that there is a de facto connection between the individual and the land – this important factor should be accounted for in the protocol. We should look beyond legal rights such as squatters, so that those should not be left out of the scope of the protocol.

Dr. Liz Alden Wily confirmed that we are making progress globally in respect of customary rights. Let's not look backwards in time. Protocol must be clear on what we are paying compensation for. The protocol must provide examples of best practice.

Mr. Jean du Plessis highlighted that organisations that use tenure is overwhelming and this must be mentioned in the protocol. Security of tenure for women is a particular concern. The difficulty lies in the implementation. Many instances of emerging tenure types exist which do not have an immediate place in law. This is due to the crisis in urbanisation. How do you incorporate this issue in society? The numbers of informal tenure rights holders are overwhelming. There is a crisis in rural areas where these rights are not being recognised. The problem lies in the issue of legitimacy; there needs to be guidance and standards.

Dr. Mike McDermott argued that native title land has the same value as freehold title land in Australia. He proceeded to discuss a recent Australian case where compensation was awarded for extinguished native titles.

Dr. Antonie Gildenhuys asked how we deal with cases where the same land is occupied by more than one community, each having its own chief. Or with cases where a person acquired ownership of land registered in the name of another, through prescription? In response, Prof Jacques Sluysman stated that,

in the Netherlands, if the owner obtained his or her rights through prescription then you should be entitled to compensation.

The next question asked to the participants was whether the negative impacts suffered by those who live in close proximity to the expropriation project should be taken into account.

Dr. Liz Alden Wily stated that the language in many constitutions and laws do cover that situation – a best practice in this regard should be addressed in the protocol. It is not only the owner but also those with an interest in the property that should be addressed.

Dr. Antonie Gildenhuys argued that there may be several legal interests in the same land affected by expropriation – for example, interests of an owner, tenant, servitude holder, bond holder etc. In some jurisdictions, the property is valued as unencumbered by separate interests; such value is thereafter apportioned between the various interest holders. In other jurisdictions, each interest is valued separately; the total thereof may exceed or be less than the value of the property as unencumbered.

Dr. Ernst Marais argued that if the burden is excessive, it shouldn't be included in compensation.

Dr. Rachel Walsh stated that in Ireland, only the impact on land that is part of the expropriated land (and not the impact of the project on adjacent land) is considered. Mr. Jean du Plessis followed by asking, in the UK context, what about tenants in neighbouring properties? What about benefits to the area or detrimental effects on human beings who have been working there for ages? Dr. Rachel Walsh continued that in Ireland, there are no entitlements to compensation for affected tenants. Compensation is only for the owner. In terms of the broader impact, tenants should have an opportunity to be heard prior expropriation. There should be a consultation processes with a right to be heard. Dr. Mike McDermott confirmed that the same applies in Australia. However, you need sophisticated market evidence.

4.6. Collective tenure rights

The final plenary session focused on collective tenure rights. Communal customary tenure systems allocate land between the members of a community. This is often not taken into account in compensation schemes leading to a high risk of elite capture, the appropriation of rights to a communal land to a few more powerful individuals. Elite capture is an unjust outcome and can escalate in violent conflicts. How should an international protocol specify measures to compensate for collective rights in a way that mitigates these risks? Mr. Bjorn Hoops, who led the discussion, posed the following questions: How do we address customary land tenure systems and unregistered customary land tenure? How do we calculate and determine compensation for members of the communities under customary law but who do not have registered title? What should be the procedure for determining who has a right to the acquired land?

Mr. Nicholas Tagliarino stated that the protocol should establish a guideline to address issues of elite capture. Transparency for how compensation decisions are made within the community is key. There is a potential risk of elite capture of compensation allotments by chiefs and other local authorities.

Dr. Liz Alden Wily mentioned that we need to be clear on what we mean by collective tenure. It is governed under community-based jurisdiction. There are 5 models on community-based tenure and the most dominant is where the jurisdiction is over the territory but within that there are family parcels of land and collective tenures of land. It is clear that the jurisdiction is the community and it is up to that community how it is distributed. One approach is for the community to define its shares first. If the law is clear, it has to be decided by 2/3rds majority and they decide if the land is going to be taken and through that procedure will decide how the compensation is distributed if applicable.

Dr. Antonie Gildenhuys pointed out that some communal lands are held under democratically elected bodies. It is the task of the expropriating authority to identify the person or body entitled to receive the compensation, and to ensure that all internal processes have been followed to authorise such person or body to accept the compensation. The internal processes and the efficacy thereof are regulated by their own laws and customs, and do not form part of expropriation law

Prof Leon Verstappen argued that in several jurisdictions, the local village is entitled to compensation for expropriation - whether they hand it over to the individuals who have the right in unclear. The protocol should recognise that these tenure forms exist and there should be a clear regulation as to who should be entitled to compensation in such a case.

Prof Elmien du Plessis referred to the Interim Protection of Informal Land Rights Act in South Africa. South African courts apply living customary law and have found that there is a system of accountability. There is recognition of communities and that all should be involved in compensation consultations.

Ms. Nina Braude warned against including anything in the protocol that is too descriptive. What is recognised is that local/indigenous needs should to be respected. However, we should not establish precisely how much compensation should be paid – instead the focus should be on what kind of compensation is appropriate. Also, we should decide whether this protocol is dealing with compensating loss of livelihoods etc. and the method in conducting consultations will all be different, depending on where you are situated.

Dr Liz Alden Wily suggested that the protocol should remind us that the procedure for compensation must be in accordance with certain principles. However, Dr Antonie Gildenhuys questioned whether it is part of the expropriation law or whether it is other governing law. Mr. Nicholas Tagliarino agreed and stated that it is important to think carefully about which laws should be reformed: the expropriation law or other laws (e.g. mining law).

Mr. Bjorn Hoops questioned whether it is necessary to include normative rules in the protocol to address the real risk of elite capture. Normative rules may interfere with community practices and may impact on the way in which the community accepts them. Dr. Liz Alden Wily stated that the intention of the protocol should be to lay out best practice in these cases and to establish what should be done. Prof Leon Verstappen confirmed that the document should be sensitive to certain circumstances and regions – it must be contextualised.

Mr. Bjorn Hoops asked whether these rules/guidelines should differ or depend on the tenure regime that is applicable.

Mr. Henk Smith found support from Mike McDermott's article - Extensive accountability mechanisms on the issue of compensation. The judgment shows shortcomings on the process as it is so much about the social boundaries of the communities and spatial boundaries where the social boundaries overlap or do not overlap. Those are two further issues that the judgment raises and is crucial in looking at formal or informal recognition issues.

Dr. Antonie Gildenhuys argued that the Protocol should include a provision that, where land is held by a community, corporation or other legal entity, the expropriating authority must ascertain which person or body is entitled, in terms of the laws and rules governing the procedures of such community, corporation or legal entity, to accept and receive the compensation. The expropriating authority should furthermore satisfy itself that all internal requirements have been complied with to entitle the person or body concerned to accept and receive the compensation.

Dr. Liz Alden Wily referred to highly populated countries, for instance India. For the purpose of landholding, a community is a legal person. Furthermore, you hold the land directly in your name. In Namibia, for example, a community group is considered a legal person. Malawi has abandoned the requirement for a legal entity to be formed. The protocol should have concrete examples of different ways of reaching collective title and the pros and cons of each. Mr. Jean du Plessis referred to a similar trend in urban areas, where people formed associations and they were being recognized.

Mr. Bjorn Hoops asked to what extent the state should interfere and measures to be taken in that regard?

Ms. Nina Braude argued that it is permissible to say that there are standards of transparency etc. However, can one really push this in terms of what you want people to do.? One needs to be wary of this.

Mr. Marcello De Maria stated that the protocol can go into more detail and description as to what jurisdictions and contexts it is referring to. Transparency may be applicable in the majority of jurisdictions. Differences in jurisdictions must thus be clear – the protocol should state that these are best practice in these specific contexts.