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The displaced claiming their rights in fragile states

Antonia Mulvey

To date, displaced persons in fragile and conflict-affected states have had little success in claiming their rights for housing, land and property violations. Creative legal thinking and strategic litigation has the potential to change this.

Although housing, land and property (HLP) violations are often triggers of conflict and obstacles to peace, there is very limited jurisprudence dealing with HLP abuses, and perpetrators of crimes against land and home are rarely held accountable. Over the last decade the world has seen a steady increase in the prosecution of international criminal cases with the establishment of the UN tribunals for the former Yugoslavia in 1993 and for Rwanda in 1994, and cemented by the establishment of the International Criminal Court (ICC) in 2002. While the extent to which more recent international tribunals have provided effective remedies for victims and their families is questionable, it cannot be denied that they have attempted to establish an international forum for criminal accountability.

Taking a lead from the UN tribunals, some domestic courts have held individuals accountable for their crimes by way of the concept of universal jurisdiction. This principle allows any state to bring to trial persons accused of an international crime, regardless of the place where the crime was committed, the nationality of the perpetrator or the nationality of the victim. Nonetheless, this positive progress in seeking international accountability has mainly ignored grave violations of HLP rights. This is despite the fact that the ICC includes a number of international crimes that encompass HLP rights violations, as do the jurisdiction and jurisprudence of the Tribunals of both Yugoslavia and Rwanda.

In fragile states, access to redress within the country where the violations took place often appears impossible. In these situations, foreign courts can be an important adjunct to everyone's right of access to justice. Apart from the legal challenges in litigating against human rights violations in the international arena and

the more practical challenges, cases are often not clear-cut, they are politically sensitive, there is no legal precedent and it is difficult to predict the outcome. This paints a bleak picture, so what can be done to change the situation?

It should be a priority of the international community to deal with these injustices and increase displaced people's access to justice. The presumption often held is that litigation can only be undertaken where there is a functioning judicial system and some semblance of the rule of law. Fragile states generally have neither and litigation in HLP cases has therefore been presumed to be impossible. That presumption is incorrect. Every day the law is being challenged and creatively used by skilled lawyers around the globe. This is changing our ability to hold international and cross-border perpetrators accountable for their actions. International law is being used creatively to protect the powerful, namely the state and transnational corporations, and now it must be used to protect the powerless, the displaced. However, rarely does the legal action available for the well-placed become available for the displaced. There are obstacles. Few international lawyers have any contact with displaced persons and it is also the case that humanitarians, who do have contact with displaced persons, may perceive pursuing legal avenues for accountability as a possible obstacle to their ability to provide assistance to those most in need. A further fear is that the intervention of lawyers might make an already complex and difficult situation worse.

Development actors may have a different objection to the intervention of international lawyers in HLP cases. Their focus is to develop the institutional capabilities of a given state and related actors and to implement

longer-term institutional projects. These actors are working in tandem with the state and may be unwilling to contemplate cases against state actors and others associated with the state which could impede their ability to undertake their development work. Nevertheless, displaced people should be given all their legal options and it is for them to decide whether they wish to seek redress.

Where and how could perpetrators of HLP crimes be held accountable?

There are creative ways in which legal action could be used to address injustice for displaced persons in fragile states. These could range from the use of civil and administrative litigation in domestic courts and the use of regional courts such as the African Court of Human and People's Rights to the use of criminal prosecution using universal jurisdiction in foreign courts. In some fragile states, there may be perpetrators who hold dual nationalities, including European passports, and this could be a means to hold them accountable in European jurisdictions.

State expropriations of land in South Sudan, Afghanistan and the Democratic Republic of Congo (DRC) provide good examples of how international litigation might help locally displaced persons and victims of HLP abuses. In each instance, the state has expropriated land and leased it to multinational corporations or entities owned by other states such as China and Saudi Arabia. Land has been taken for resource extraction and agriculture without local consultation or compensation. The result has been that the people living on the appropriated land have been forcibly displaced.

In all three countries, there has been little regulation of the use of the land and minimal return to the state in royalties and taxes, although there have usually been substantial personal gains for state officials. Mining companies and other resource-extraction enterprises are taking advantage of weak governance to exploit the natural resources without having to comply with the more rigorous regulation that comes with stronger governance. Even where there are laws

constraining the actions of mining companies, they often go unobserved.

One way to address such violations would be to target agribusinesses, mining and oil companies in their home countries. For example, their contracts with the South Sudanese government should be made public wherever possible, and they should be reminded of where they have signed up to voluntary codes, such as the 2003 Equator Principles.¹ Transnational corporations that rely on their good name among consumers may be especially susceptible to the impact that transnational litigation may have in the court of public opinion. Initial manoeuvres suggesting that litigation is being planned may also be a way to impose accountability on regulators by reminding them of the public's expectations that they will hold corporate entities to internationally accepted standards of conduct.²

The extent of rule of law in a fragile state is a key issue in determining which goals are achievable through domestic litigation and in which cases international litigation should be undertaken. Weak rule of law in countries such as DRC and South Sudan makes undertaking domestic litigation risky but should not rule it out as a strategy. There are gains to be made by challenging the state and using its formal institutions, even – or perhaps especially – where they are corrupt and underdeveloped. For example, could the state of South Sudan be challenged domestically for its role in land grabbing?

Equally, it might be possible to use regional conventions to challenge European states or agents of the state who have expropriated land unlawfully in fragile states. The European Convention on Human Rights (ECHR) was found to be applicable to actions taken by British troops in Basra (Iraq), where the UK assumed the exercise of some of the public powers normally exercised by a sovereign government. The ECHR may now apply when agents of a member state are exercising authority and control within other territories where that same member state is exercising some public powers; for example, there may

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be cases of land expropriation in Afghanistan where the ruling would be applicable.

We can learn also from creative litigation and judgments from other regional courts in non-fragile states and should be inspired to create new precedents in fragile states that will provide access to justice and protection to the displaced. In Botswana, the case of the San people, forced off their land and into resettlement camps, was taken successfully before both domestic courts and the African Commission of Human and People's Rights. Both courts found in favour of the San and their judgments were mutually reinforcing. In Panama, the case of the displacement of tribal peoples resulting from construction of the Bayano Dam has been taken before the Inter-American Commission of Human Rights. The ruling there will hopefully provide the opportunity to articulate new arguments regarding the property rights of displaced and indigenous peoples.

The influence of external actors on fragile states could also be addressed through litigation cases over donor accountability and aid effectiveness. The hugely expensive Pergau Dam in Malaysia, for example, was financed with British taxpayers' money in order to secure a major arms deal; a landmark judgment found British aid for the dam unlawful.

Third-party states could also be held accountable for violations of international law in fragile states. It can be argued that states which have both signed and ratified the Geneva Conventions have a positive obligation to prevent the violation of international law. They also have a requirement (in the form of a negative obligation) not to support ongoing violations by another state. This obligation is reinforced in customary international law, as articulated in the ICRC guidelines on humanitarian law (Rule 144), the International Law Commission Articles on Third State Responsibility (Articles 16 and 41) and decisions by the International Court of Justice. This would lead us to conclude that strategic litigation could be conducted domestically in third states to ensure that a state complies with its legal obligations to take action against a state where it

breaches the rights of displaced persons under the Geneva Conventions.

Strategic litigation is not just a tool of last resort and its audience often is not just a court. Litigating international humanitarian law obligations not to maintain or support violations of other states can be useful even where the court determines it does not have jurisdiction to rule in a case; the litigation can bring important facts to light, as in a case involving the health impacts of the attack by UK and US forces on the Iraqi city of Fallujah in 2004. Through litigation, documentation was obtained that enabled people to receive appropriate medical attention, even though the case was ultimately dismissed.

The way forward?

It is time that state actors, international organisations, transnational corporations and non-state actors are sent a strong signal that impunity for crimes against land and home will no longer be tolerated and that they will be held accountable for their actions, even in fragile states. Innovative impact litigation can be used to obtain redress for human rights violations and in doing so help displaced persons return home or even prevent them being displaced in the first place. Litigation can be used as a tool to protect, even where the rule of law is not functioning. If a court is not available locally then efforts should be directed towards courts abroad. The value of litigation is not (only) the chance of winning but in the litigation itself.

Risk-free litigation does not exist but international treaties give everyone whose human rights have been violated the right to a fair trial and impartial court. That is a right that we must all defend.

Antonia Mulvey mulvey@legalactionworldwide.org is Executive Director of Legal Action Worldwide (LAW³) www.legalactionworldwide.org and is a Visiting Scholar at Columbia University Law School.

1. www.equator-principles.com

2. See also 'Protect, Respect and Remedy' Framework for Business and Human Rights <http://tinyurl.com/UN-BusinessHRFramework>

3. LAW is a network of prominent human rights lawyers and advisors providing innovative legal assistance to the least represented in fragile and conflict-affected states.