



Comments on Timor Leste's Draft Transitional Land Law and Expropriation Law: A Human Rights Perspective

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Unique historical factors make the issue of land rights particularly complex and divisive in Timor-Leste. The task of clarifying and determining in law the status of and rights to land presents a formidable challenge. Establishing legal authority for the state's power to expropriate land, and placing legal limits and conditions on that power, is also a complex and sensitive endeavor. The ways in which the legal regime ultimately addresses prevailing ambiguities, contestation and insecurity, and the degree to which it recognizes and protects the variety of rights and interests at play, will be central factors in defining the character of Timor-Leste's development. The Special Regime for Definition of Ownership of Immovable Property and the Expropriation Law will have serious implications for the power dynamics that determine control over, use of and access to natural resources and will have tangible and enduring repercussions for social, economic and cultural aspects of people's lives. The extent to which the extant spectrum of tenure rights and arrangements are legally recognized and respected will have profound implications for the degree to which Timor-Leste's future development will be characterized by equity, distributive justice and the fulfillment of human rights or, conversely, by inequality, discrimination and marginalization. The equitable protection of land rights, including through a legal guarantee of secure tenure for all and the establishment of legal limits on, and safeguards against, the State's power to evict people and expropriate land, will provide a foundation for the peaceful, stable, prosperous and inclusive development of Timor-Leste.

Overview of relevant human rights obligations

In 2003 Timor-Leste ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), amongst other core human rights treaties. Upon ratifying these treaties, the State undertook to take steps to adopt such legislative measures as necessary to give effect to the rights recognized therein.¹ The three land-related laws will have direct and enduring

¹ ICCPR, article 2(2). Other human rights treaties articulate the duty somewhat differently but each treaty places primary importance on the obligation to adopt and amend existing legislation with the aim of creating a legal regime that is consistent with and gives effect to human rights duties. (See for example, the ICESCR, article 2(1) and CEDAW, article 2). The Constitution of Timor-Leste incorporates the rules provided in international treaties into the internal legal system following their ratification and after publication in the official gazette (section 9 (2)).

implications for the enjoyment of many of the human rights enshrined in these treaties. These rights include, inter alia, the right to an adequate standard of living, including housing and food (article 11 of the ICESCR), the right to work (article 6 of the ICESCR), the right to be free from arbitrary interference with one's home (article 16 of the ICCPR), and the right of minorities to enjoy their own culture and to use their own language (article 27 of the ICCPR).

The laws will have particular effects on women. As such the obligations of the State under CEDAW must be fully incorporated. In ratifying CEDAW Timor-Leste agreed to prohibit all discrimination against women, embody the principle of equality of men and women in its legislation, and to modify and abolish laws, regulations, customs and practices that constitute discrimination against women (article 2). Of particular relevance to the land-related laws is the duty of the State to accord to women the same rights as men, in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property (article 16). Women must also be accorded equal rights to administer property and to freely choose their residence and domicile (article 15). The laws must establish, both in principle and through appropriate processes, the right of women to "participate in the elaboration and implementation of development planning" and to "equal treatment in land and agrarian reform as well as in land resettlement schemes" (article 14(2)(a) and (g)). The duty on States party to ensure, on the basis of equality, that women participate in and benefit from rural development (article 14(2)), can only be meaningfully realized when women have secure tenure and equal access to productive resources including land.

The Government of Timor-Leste has an international law obligation to ensure that the three laws are consistent with and give effect to the human rights recognized in ratified international treaties.² Moreover, the Constitution invalidates any rules that are contrary to the provisions of these treaties (section 9(3)).

A number of international human rights instruments provide authoritative guidance on the implementation by States of their human rights duties with respect to matters concerning land tenure, management and distribution and the rights and limitations of the State with regard to expropriation. These instruments include, inter alia:

- The Committee on Economic, Social and Cultural Rights (CESCR) General Comment 4 on the right to adequate housing
- CESCR General Comment 7 on forced evictions
- CESCR General Comment 12 on the right to food
- Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
- UN Basic Principles and Guidelines on Development-based Evictions and Displacement

² To the extent that the laws are inconsistent with or contrary to human rights, Timor-Leste will stand in violation of its legal duties and will be held to account by its citizens and the international community through its examination by the human rights treaty bodies and the Human Rights Council.

- UN Declaration on the Rights of Indigenous Peoples
- ILO Indigenous and Tribal Peoples Convention 169
- UN Guiding Principles on Internal Displacement

The Constitution of Timor-Leste also vests in the people a number of fundamental rights, liberties and guarantees that must be upheld by the three laws. Most pertinently these rights include the right to work (section 50), which can be affected by the physical and economic displacement resulting from evictions and expropriations; the right to private property, which should not be used to the detriment of its social purpose and can only be expropriated for public purposes following the provision of fair compensation (section 54); the right to a house of adequate size and satisfactory standards that preserves family privacy (section 58), especially important following an eviction or expropriation; and the right to cultural enjoyment and an accompanying duty to preserve, protect and value cultural heritage (section 59), which is often intrinsically linked to “place” and land. The Constitution also enshrines the principle of equality between women and men (article 17). It also guarantees access to courts to all for the defence of their legally protected rights and interests, and holds that justice shall not be denied for insufficient economic means (article 26). Also relevant is the constitutional duty of the State to preserve and rationalize natural resources and promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy (section 61).

Key recommendations

The draft laws contain many important legal clarifications and a number of rights protections. The Draft Special Regime for Definition of Ownership of Immovable Property establishes a clear hierarchy of claims to property, enshrines the principle of gender equality and contains important special protections for those subject to eviction. The Draft Expropriation Law establishes authority to expropriate immovable property conditioned on a number of procedural and substantive protections and entitlements and confers on former owners the right to reclaim expropriated land that has not been used for the intended public interest purpose or that is no longer being used towards that end. However, in a number of respects the laws are inconsistent with Timor-Leste’s international law obligations and constitution and do not meet the standards set by human rights instruments. Unless these crucial aspects of the drafts are addressed, the laws will risk exacerbating inequality, impoverishment and landlessness.

The key recommendations set out below to amend the draft laws prior to their introduction to parliament reflect the human rights obligations of Timor-Leste and the principles, fundamental rights and guarantees enshrined in the Constitution. The recommendations also draw from international instruments, policies and guidelines, global “best practice” and the findings of scholarly research germane to the draft laws. They also incorporate the opinions of participants of a one-day workshop on the draft Special Regime for Definition of Ownership of Immovable Property held in Dili on 17 December. This report

should be read together with the accompanying article-by-article analysis of the two draft laws.

Draft Special Regime for Definition of Ownership of Immovable Property:

The main recommendations in relation to the Draft Special Regime for Definition of Ownership of Immovable Property are:

1. Women's rights with respect to land should be strengthened by supplementing the equality of rights provision (article 4) to prohibit any form of discrimination, including with respect to ownership, acquisition, management, administration, enjoyment and disposition of property; by mandating presumptive joint titling over marital property in the names of both spouses; and by incorporating throughout the legislation a requirement for special due process measures to empower women during decision-making processes and in seeking access to justice on land issues.
2. Consistent with section 2(4) of the Constitution, the law should give a stronger and broader legislative recognition to customary tenure governance systems in Community Protection Zones (CPZs). The special attachments and dependence on the land and natural resources of communities, including in CPZ areas outside community property, should be recognized and the existing continuum of tenure rights, including access and use rights, should be given legal recognition and protection. This has particular importance for women who are more likely to have secondary access and use rights, rather than rights akin to ownership, and depend on common resources such as forests and water-sources.
3. The powers of the State, and the limits of those powers, with respect to CPZs require clarification. Stronger, clear and enforceable safeguards against abuse and exploitative activities that restrict or interfere with customary rights and other existing uses of land and resources within CPZs should be incorporated. Legislative safeguards should aim to fully respect, protect and fulfill the human rights of individuals, and collective rights of communities, who depend on or otherwise use the resources therein.
4. The law should recognize the special collective attachment and dependency on their ancestral land of communities and honor the social, economic and cultural value of these lands. While there is no universally accepted legal definition of indigenous peoples in international law, it is arguable that each of the individual language-based ethnic groups within the Timorese population that have a special collective relationship with their ancestral land constitutes an indigenous group for the purposes of international law. This would give rise to special rights and protections for these groups. Consideration, based on thorough consultation with these groups about their self-identification, needs to be given to whether special collective rights, including the right to own, use, develop and control their

lands, territory and resources, should be enshrined in the law, as per the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

5. Due process rights in relation to the systematic cadastral survey should be strengthened. The cadastral survey and registration system must be accessible and understandable for disadvantaged people, including those who are illiterate, indigent or otherwise face marginalization and exclusion. The systematic cadastral survey must be conducted on the basis of full access to information provided in appropriate languages, through suitable methods and fora, and participatory processes that promote gender equality.
6. The legislative status of customary rights to land and special adverse possession should be elevated above claims by the State to immovable property unless there is a legitimate public interest reason underpinning the State's claim.
7. Holders of hak milik and propriedade perfeita should not automatically trump special adverse possessors or previous secondary rights holders currently in possession. The provisions granting a higher status to title-holders above possessors (articles 41 and 43) are questionable from a human rights perspective since they are likely to benefit an elite who may have received titles under dubious circumstances. This provision could lead to the displacement of significant numbers of people, which is particularly problematic given the housing shortages, the absence of a comprehensive resettlement policy beyond the relevant provisions of the draft law, and minimal capacity within government institutions to deal with resettlement needs.
8. The law should mandate that the regime for compensation and reimbursement shall not place undue or unmanageable economic burdens on households and will comply in full with the human rights obligations of the State, including by ensuring no regression in the enjoyment of economic and social rights.
9. Households displaced as a result of the application of the special regime of ownership, that are otherwise without access to an alternative residence, must be guaranteed access to adequate housing (as defined by the Committee on Economic, Social and Cultural Rights in General Comment 4) under the law. This requires either the payment of an amount of compensation that is sufficient to secure adequate housing on the market or provision of alternative housing in a suitable location with secure tenure and meeting other international law requirements. This guarantee, including a definition of 'adequacy', reflecting international law standards and the constitutional right to a house, should be made explicit in the provisions for special protection against eviction. The obligation to ensure access to alternative adequate housing remains even after the stipulated 18-month moratorium period elapses. The current housing shortage in Dili and elsewhere, the subdued real estate market in most parts of the country and the lack of available land for resettlement need to be taken

into account. These factors mean that 18 months could expire without those subject to eviction having secured alternative housing.

10. Disadvantaged households, including widow-headed households may require special assistance in accessing alternative housing. Provision should be made in the law for such assistance to disadvantaged households, including through special support from the Ministry of Social Solidarity, which may include logistical and financial assistance.
11. Legal protections to fully respect the human rights of affected people in the process of eviction must be incorporated into the chapter that governs the process of administrative eviction. In order for an eviction to be consistent with international law it must comply with the legal protections before during and after the eviction as established in CESCR General Comment 7 and the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.
12. Due process rights that address and challenge power asymmetries should be secured for disputants using the Cadastral Commission. Most importantly 1) provision should be made for access to legal aid for indigent disputants; (2) a reasonable deadline should be placed on the Cadastral Commission's decision-making process; (3) written reasons should be provided by the Cadastral Commission for its decision; and (4) the decisions of the Cadastral Commission should be made public.
13. Serious inaccuracies and process flaws during the cadastral survey and registration of claims under the Ita Nia Rai program have been identified. (See USAID evaluation and report by Rede ba Rai.) Pursuant to article 86 of the law all registered claims under this process are deemed valid. People who consider that they were wronged by the process or not afforded due process because of mistakes or transgressions of the surveyors should have the right to submit a statement of ownership to contest competing statements.

Draft Expropriation law:

The Draft Expropriation law requires substantial revisions in order to comply with the GoTL's international human rights obligations and safeguard against the exacerbation of poverty and food insecurity, and the instigation of rural landlessness, loss of access to common resources and social disarticulation, amongst other foreseeable adverse impacts. The draft law is not well-suited to the unique circumstances of Timor-Leste, and particularly the characteristics of rural areas and populations and land use patterns of rural communities. It does not address fundamental issues pertinent to the powers and limitations of expropriation in Timor-Leste, particularly with respect to community property and broader community protection zones. In its current form, the law has the potential to aggravate socio-political fault lines and trigger conflict. In its conferral of procedural protections and substantive entitlements the draft falls far short of international law standards, the policies of international

development agencies³ and best practices as recognized in academic literature.⁴ **As such it is recommended that the Draft Expropriation Law be subjected to a thorough and extensive process of redrafting and public consultation.**

The main recommendations in relation to the Draft Expropriation Law are:

1. The continuum of rights to land and natural resources that exist in Timor-Leste should be recognized by the law. Protections and entitlements under the law should explicitly extend to non-ownership rights, including usufruct and access rights. The definition of "interested parties" in article 6(1) should incorporate these forms of tenure arrangements. Women are more likely to have these types of "secondary" non-ownership rights. Unless protections are extended to groups currently enjoying these types of rights, many people who depend on land or other natural resources and assets that are subject to expropriation, but who are non-owners, will be left vulnerable to (deeper) impoverishment, affecting their right to an adequate standard of living, including housing and food, amongst others. People with non-ownership rights should have entitlements under this law commensurate to the entitlements of registered owners and reflecting the economic, social and cultural value of the particular rights enjoyed.
2. It is unclear whether and through what process the State can expropriate community property and whether expropriation proceedings need to be triggered in order for the State to use broader areas within CPZs for public interest purposes. These issues need to be clearly addressed in a human rights-compliant manner in the law. Given the special collective attachment and dependence on their land of rural communities living under customary land governance systems, the law should contain particularly strong procedural protections and substantive safeguards to protect them from displacement and dispossession and secure their right to participation in decision-making about the use of their land and resources for development projects. (See for example the UN Guiding Principles on Internal Displacement (1998) article 9, which extends particular obligations on states to protect against the displacement of such groups.) On the basis of thorough consultation, it should be carefully considered whether the special rights of indigenous peoples with respect to the use of their lands, including the right to give or withhold free, prior and informed consent (FPIC) for certain decisions, should be enshrined in the law (see, in particular article 10 and 32 of UNDRIP).
3. In accordance with international law requirements and the standards of international development agencies, the law should contain strong obligations on the government to explore, through robust assessments, all viable alternative project designs to avoid, where feasible, or minimize

³ See for example the World Bank's Operational Policy 4.12 and the Asia Development Bank's Safeguards Policy Framework: Annex 2 Involuntary Resettlement (2009).

⁴ See for example the many instructive essays in Michael M. Cernea and Hari Mohan Mathur (eds) (2008) "Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing," Oxford University Press.

expropriation and displacement (see for example, the UN Basic Principles and Guidelines on Development-based Evictions and Displacement and World Bank OP 4.12).

4. The list of "public use" items that justify a taking (article 1(4)) should be qualified by a requirement that the particular use be necessary for the general welfare as determined on the basis of public consultations. For example, not all roads, schools, hospitals and dams are automatically in the general welfare even if they are intended for public use. The relevant agency should be required to demonstrate the genuine welfare justification for the expropriation-inducing project based on consultations with expected beneficiaries and other stakeholders about their development priorities.
5. Those required to sacrifice their land and homes for the development of the nation should be provided the opportunity to share directly in the benefits of development. There is a particular moral and distributive justice imperative for direct benefit sharing when the affected persons and communities are poor, which global experience shows to be almost always the case. The "consequence of expropriation" (article 4) should therefore be to ensure that interested parties (those whose lands and rights are expropriated) are placed in an improved situation with a better living standard than their prior situation. The "consequences of expropriation" for vulnerable people, including those living in poverty, should be to elevate their standards of living so that they no longer suffer impoverishment or other deprivations in the enjoyment of their human rights.
6. The law should adopt stronger procedural protections to guarantee meaningful consultations. For example, the process and means through which hearings occur should be accessible and made known through dissemination of notice and information about the hearings to the public using appropriate channels. Special measures should be taken to ensure that women are able to access public hearings and have ample opportunity to express their views. A gender consultation strategy should be required. Key information must be made available in all official and working languages of Timor-Leste and in the language(s) of the population(s) that will be directly affected by the project as a result of expropriation. The project purpose, design, public interest justification and potential adverse impacts on disaggregated groups should be described to the public both in a written and oral form.
7. In accordance with international human rights law obligations, special measures must be required to ensure access to information and meaningful consultation of directly affected persons whose rights to land may be expropriated or otherwise acquired or restricted as a result of the project. These measures should be separate and additional to the general public hearing consultations. Those who would be directly affected by the proposed project should be given the opportunity to suggest alternative project designs that avoid and minimize the use of their residential and productive land and should be provided with appropriate technical

information, advice and assistance in order to do so. Measures should be taken to ensure that women have the opportunity to be active participants of this process.

8. Environmental and social impact assessments should be mandatory for every project. Most pertinently for this law, a comprehensive evictions and displacement impact assessment with disaggregated data, must be conducted. The full economic, social and cultural impacts on affected persons and communities should be taken into account. This includes the costs of losing both natural (land, assets and other natural resources) and social capital (kinships, networks, local knowledge and know-how, location-based opportunities and resources). The results of the impact assessment should be presented to the public and made available for public scrutiny. The final determination of the public interest value of the proposed project, and indeed whether it should proceed, should take into account the eviction and displacement impact assessment as well as other social and environmental impacts. The terms of expropriation, including but not limited to the calculation of just compensation, should be predicated on the eviction and displacement impact assessment, with a view to fully securing the human rights and improving the living standards of people affected. Impacts on persons with secondary rights to the land, including informal rights, should be included in the assessment. Particular attention should be paid to the differential impacts on women and children and on vulnerable and marginalized groups.
9. Measures to ensure due process in relation to the inspection, which establishes the amount of compensation offered to interested parties (article 17) should be enshrined in the law. The inspection should occur using participatory methodologies, making sure that women have a meaningful opportunity to participate. Safeguards are necessary to ensure accurate measurements and assessments agreed to by interested parties. Distortions in these measurements are very common in expropriation practice, due both to weak capacity and corruption, and thus safeguards - especially a guaranteed meaningful right of participation - must be established in the law.
10. The market value of real property (article 19) is a poor estimator of the value of the property to the individual owner (or other rights-holder), especially in the Timor-Leste context, in which land has a strong social and cultural function in addition to an economic one. The valuation of property should take into account more than the market value of the land but offer a premium to the affected persons so that their situation can be improved as a result of the expropriation. This will shift the paradigm into one of voluntary acceptance rather than coercive expropriation by creating incentives to relocate and ensuring that those people who have to move to make way for the “public use” project are receiving direct benefits.
11. The calculation of “just compensation” should be based on a thorough impact assessment and predicated on the following elements:

- a. The value of the land and all assets and improvements (see paragraph 13 regarding the need for land-based rather than monetary compensation for people whose livelihoods are land-based);
- b. Full transactional and transitional costs;
- c. Any other applicable costs incurred in replacing lost land or access to land, assets and improvements;
- d. The value of the loss caused by interrupted productive activity (such as lost incomes or subsistence/ sustenance produce) until they can be restored (to be paid as an ex ante payment and regular payments until restoration);
- e. Appropriate compensation for loss of cultural/customary assets and sites, noting that this is particularly complex and sensitive and should be based on a culturally appropriate notion of “value replacement”;
- f. A premium to ensure that affected people directly benefit from the development initiative, where feasible through an ongoing project revenue sharing arrangement.

12. For secondary rights holders, equivalent criteria should be established to place affected people in an improved situation.

13. Replacement land should be provided to people whose livelihoods are land-based. This is especially important for rural women. The near absence of a land market in rural Timor-Leste and the fact that rural families and communities are not used to managing large sums makes the presumptive payment of monetary compensation under the law, rather than the exchange of land through a comprehensive resettlement process, particularly problematic. Impoverishment, landlessness and social disarticulation as well as urbanization and an increase in poor urban informal housing settlements are highly foreseeable as a result. Replacement land should be as near as possible to the expropriated land and be of at least equal size and productive value, providing the same livelihood and other opportunities and resources as the expropriated land, unless agreed to by the interested parties. Replacement land should be selected through consultation with the affected persons or communities and should not infringe on the land rights of other persons or communities. If another community's land or resources are affected they should be given the opportunity to express their views and be involved in decision-making, including by withholding their consent in appropriate circumstances. Nearby communities should also be consulted.

14. Monetary compensation alone is also insufficient to address the material, economic, social, cultural and psychological impacts and losses and to prevent impoverishment and regressions in the enjoyment of human rights. Ex ante and ongoing support to rehabilitate livelihoods and to prepare for social and psychological adjustments of resettlement are

imperative. The law should make provision for such support and guarantee assistance, the details of which could be established in a comprehensive human rights-compliant resettlement policy.

15. Compensation should be paid separately to each interested party on just terms unless there is universal agreement for global payment. The provision from the distribution of global compensation (article 29) will give too much control to power-holders, usually men. Efforts should be made for women to have an equitable degree of control over compensation payments and the methods of distribution. Women and men should be co-beneficiaries of all compensation packages. Female-headed households, including single women and widows, should be entitled to their own compensation. (See the UN Basic Principles and Guidelines on Development-based Evictions and Displacement, article 62.)
16. The law should guarantee that acts of expropriation/ eviction (article 39) will not result in any affected persons being rendered vulnerable to violations of their right to an adequate standard of living, including housing or food, or any other human rights. (See, UN Committee on Economic, Social and Cultural Rights, General Comment 7 and UN Basic Principles and Guidelines on Development-based Evictions and Displacement.)
17. In order to safeguard against human rights violations, international law requires strict protections be put in place during an act of eviction as contemplated by this article 39. These protections should be incorporated into the law since it provides a legal basis to carry out an eviction. The protections set forth in the UN Basic Guidelines on Development-based Evictions and Displacement are:
 - The mandatory presence of governmental officials or their representatives on site during evictions. The governmental officials, their representatives and persons implementing the eviction must identify themselves to the persons being evicted and present formal authorization for the eviction action.
 - Neutral observers, including regional and international observers, should be allowed access upon request, to ensure transparency and compliance with international human rights principles during the carrying out of any eviction.
 - Evictions shall not be carried out in a manner that violates the dignity and human rights to life and security of those affected. States must also take steps to ensure that women are not subject to gender-based violence and discrimination in the course of evictions, and that the human rights of children are protected.
 - Any legal use of force must respect the principles of necessity and proportionality, as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and any national or local code of conduct consistent with international law enforcement and human rights standards.
 - Evictions must not take place in inclement weather, at night, during festivals or religious holidays, prior to elections, or during or just prior to school examinations.

- States and their agents must take steps to ensure that no one is subject to direct or indiscriminate attacks or other acts of violence, especially against women and children, or arbitrarily deprived of property or possessions as a result of demolition, arson and other forms of deliberate destruction, negligence or any form of collective punishment. Property and possessions left behind involuntarily should be protected against destruction and arbitrary and illegal appropriation, occupation or use.
- Authorities and their agents should never require or force those evicted to demolish their own dwellings or other structures. The option to do so must be provided to affected persons, however, as this would facilitate salvaging of possessions and building material.