



## African Human Rights and Access to Justice Programme

### Legal Opinion Case No. 30

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#### Summary of Opinion

**An amendment to the Constitution of Cote d'Ivoire differentiates against foreigners and their descendants by restricting their rights to enjoyment of property on the mere basis of their nationality. This different of treatment constitutes unfair discrimination and violates the right to freedom from discrimination. Furthermore, it violates the rights of foreigners to compensation in case of deprivation.**

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The right to property is duly recognised in the Ivorian Constitution of the 1<sup>st</sup> August 2000<sup>1</sup>. Article 15 of this Constitution states that

“the right to property is guaranteed to all, no one may be deprived of their property except in case of public interest and subject to a just and equitable compensation”.

However, the law on Rural Land Ownership<sup>2</sup> provides that the right to property on rural land granted to foreigners before the entry into force of the law cannot be inherited directly by their heir (article 26)<sup>3</sup>. This provision of the Rural Land Ownership Act (hereinafter RLO) contravenes the provisions of the Constitution which provide for the right to property. The right to property comprises of several components including the right to transfer one's property by way of will, statute or other means.

It is clear that the RLO violates the Ivorian Constitution. Similarly, it is pretty obvious that it contradicts several standards and principles of international human rights law concerning the right to property.

Nevertheless, it is important to recall that the right to property has been identified as one of the most controversial human rights, if at all it has to be recognised as such<sup>4</sup>. The controversial nature of the right to property and the difficulties to achieve an agreement on its content explains its non-inclusion in both the United Nations Covenant on Civil and Political Rights and Economic, Social and Cultural Rights, save to the extent that culture has been defined to mean ‘cultural property’<sup>5</sup>.

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<sup>1</sup> In addition the Constitution in its preamble “proclaims its adherence to the Rights and Liberties as defined in the Universal Declaration of Human Rights of 1948 and in the African Charter of Human and Peoples Rights of 1981”. These two instruments guarantee the right to property respectively in their article 17 and 14.

<sup>2</sup> Law No 98-750 adopted on 23 December 1998.

<sup>3</sup> The heir of a foreigner can only inherit its land if he has the Ivorian nationality in accordance with article of the law which submit land ownership to the Ivorian citizenship.

<sup>4</sup> See for a discussion on this point Theo RG Van Banning, *The human right to property*, 2002, pp 33-57.

<sup>5</sup> See n 4 above pp 43-47.

Despite its controversial nature the right to property has been recognised in regional human rights conventions<sup>6</sup>, in the Universal Declaration on Human Rights (UDHR)<sup>7</sup>, as well as in ILO Convention No. 169.<sup>8</sup>

Therefore the analysis of the provisions of the RLO will be done in the light of the standards set up by the African Charter on human and Peoples rights (1), the European Convention on Human rights, the Inter American Convention on Human rights (2) and the universal Declaration on human right as well as other global human rights instruments (3).

## 1. The African Charter on Human and People's Rights

The right to property is guaranteed under article 14 of the African Charter. It provides:

“the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provision of appropriate laws”.

This provision protects the peaceful enjoyment of one's property. Article 14 must be read together with the provision of article 2 of the Charter, which provides that

“every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group[...] national [...] or other status”.

This presupposes that the right to property shall be equally guaranteed to all, citizens and non-citizens. In the case of the Cote d'Ivoire, the RLO prevents foreigners to inherit property, land property from their ascendants. The African Commission in two cases, one involving Zambia and the other Angola held that measures based on the mere grounds of nationality is a violation of article 2 of the African Charter<sup>9</sup>. As a result, the provisions of the RLO by discriminating between nationals and foreigners constitute a violation of article 2.

Cote d'Ivoire in 1992 ratified the African Charter on Human and Peoples' Rights and is therefore under the obligation to respect, protect, promote and fulfil the right under the Charter<sup>10</sup>, in relation to persons within its territory, which term includes permanent residents. However, on observation it is quite clear that the provision of the RLO shows a difference of treatment between nationals and foreigners (from neighbouring countries that have for years lived in Cote d'Ivoire) in the enjoyment of the right to property

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<sup>6</sup> African Charter on Human and Peoples' Rights, European Convention on Human Rights and Inter-American Convention on Human Rights.

<sup>7</sup> The drafters of the International Bill of Rights were able to agree on the contents of the right to property in the UDHR but failed to reach an agreement concerning the ICCPR and the ICESCR that explains the absence of the property right provision under the two later instruments. This may be due to the non-binding nature of the UDHR. See n 4, p 33 – 56.

<sup>8</sup> . See ILO Convention No. 169 of 1989, which is very important for the rights of indigenous peoples.

<sup>9</sup> See Communication 71/92 *Rencontre Africaine pour la defence des droits de l'homme v Zambia*, Communication 159/96 *Union InterAfricaine des droits de l'homme, Federation Internationale des ligues des droits de l'homme, Rencontre Africaine pour la defence des droits de l'homme, Organisation nationale des droits de l'homme au Senegal & Association Malienne des droits de l'homme v Angola*. These cases concern mass expulsion of West Africans without recourse to lawyers from Zambia and Angola.

<sup>10</sup> Communication 155/96, *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*, para 44.

and an interference in the peaceful enjoyment of the right to property because an important aspect of the right to property is the possibility of the owner to transfer his/her freely property to another person.

The African Commission in a case against Nigeria stated that the right to property necessarily includes the right that one should not be dispossessed of his/her property<sup>11</sup>. Therefore, the RLO by preventing foreigners from passing their property rights to their heirs limits the exercise of the right to property. In addition, the RLO discriminates against foreigners by restricting their right to property on the mere basis of their nationality. This is a violation of article 2 of the African Charter.

However, the right to property is not absolute. The Charter provides that it can be limited in the interest of public needs or in general interest of the community and in accordance with the provisions of appropriate law. Despite the fact that no compensation is required under article 14, the limitation of the right to property should comply with 2 requirements. First, the limitation must serve legitimate purposes namely, the interest of public needs or the general interest of the community. Secondly, the limitation should be done in accordance with appropriate laws.

Concerning the legitimate purposes, the RLO has been presented as serving a need of organising rural land ownership in Cote d'Ivoire which was very disorganised and had been the source of conflicts between Ivorians and foreigners and even among Ivorians themselves. The RLO was supposed to establish a clear legal framework to introduce certainty in the rural land law regime, which is very important to the economy of the country<sup>12</sup>.

Therefore this law can be considered to serve the interest of public need or the general interest of the community.

Actually, this argument can be linked together with articles 20 and 21, which recognise the right of the people to freely dispose of its natural resources. In terms of article 21 (4) of the Charter, States are entrusted with the right to dispose freely of their wealth and natural resources in the name and interest of the people. Therefore, the enactment of the RLO can be considered to be in line with the exercise of this right by the State. Again, article 21 (2) provides for the right to recovery of property and compensation in cases of dispossession of the people. The inclusion of this provision in the African Charter reflect the wrongs of colonisation and show the determination of African States to preserve and recover their natural resources.

In the case of Cote d'Ivoire, the RLO can be described as the exercise of the right to recovery of resources which had once been taken away from the Ivorian people by foreigners. However, the issue here is to know if there is a problem of dispossession of resources.

The second criterion set up by the African Charter concerns the existence of appropriate laws. This element raises a range of questions. For instance, what is called an appropriate law? Shall the appropriate law be compatible with the international standards concerning the right to property?

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<sup>11</sup> Communications 105/93, 128/94, 130/94 & 152/96, Media Rights Agenda & Constitutional Rights Project v Nigeria

<sup>12</sup> The economy of Cote d'Ivoire is based on agriculture, which represents 66% of the export revenue generated by the country. This sectors also employs two-thirds of the active population. See Case study of land law in Cote d'Ivoire, a paper presented at the Regional Workshop on Land Policies in Africa, Kampala, Uganda, 29 April – 2 May 2002

From the jurisprudence of the Commission, one can conclude that the expression in ‘accordance with the law’ include in article 14 of the charter refers to international laws<sup>13</sup>. It therefore means that the law providing for the limitation of the right to property should comply with the standards and principles of international human rights law.

Actually, an essential standard in international law concerning the right to property is the obligation to compensate in case of deprivation of property by the state. This principle has been well expounded by the Permanent Court of International Justice (PCIJ) as well as the European Court of human rights<sup>14</sup>. According to the PCIJ, it was a principle of international law that any breach of international engagement including the violation of the right to property involves an obligation to make reparation<sup>15</sup>. This principle is principally to influence the protection of foreign private property.

As a result, a law which provides for the deprivation of property without compensation cannot be considered to be an ‘appropriate law’. Therefore, the RLO, which deprive foreign heir from their right to property without compensation, is not an appropriate law and violates the African Charter.

## 2. The European and Inter-American Conventions

Although these conventions only apply directly to Europeans and Americans countries, the African Commission by virtue of article 60 and 61 can refer to the standards set out in accordance to their provisions<sup>16</sup>.

While the right to property is recognised under article 21 of the Inter-American Convention on human rights, it is not provided for under the European Convention. However, the Protocol 1 to the European Convention on human rights corrects this situation by recognising the right to property.

In terms of article 21 of the Inter-American Convention, the enjoyment of the right to property is recognised to everyone<sup>17</sup>. This includes both national and non-nationals. Nevertheless, paragraph 2 of article 21 provides that the right to property can be limited under three conditions, namely the payment of just compensation, the existence of reasons of public utility or social interest and according to the forms established by law. The clear reference to the right to compensation is the difference between the Inter-American Convention and the African Charter, which does not directly or specifically provide for it.

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<sup>13</sup> See communication 101/93 Civil Liberty Organisation (in respect of the Nigerian Bar Association) v Nigeria, communications 105/93, 128/94, 130/94 & 152/96, Media Rights Agenda and Constitutional Rights Project v Nigeria and communication 212/98, Amnesty International v Zambia.

<sup>14</sup> See *Carbonara v Italy*, 30/05/2000, para 67.

<sup>15</sup> *Chorzow Factory case*, (1982) Pub, PCIJ Ser A, n. 17, p 29

<sup>16</sup> These provisions allows the Commission to draw inspiration from other general and special international conventions as well as international norms on human and peoples rights, customs generally accepted as law and general principles of law.

<sup>17</sup> Article 21 states that

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society
2. No one shall be deprived of his property except upon payment of just compensation for reasons of public utility or social interest and in the cases and according to the forms established by law
3. Usury and any other form of exploitation of man by man shall be prohibited by law

The first Protocol to the European Convention in its article 1 recognises the right to peaceful enjoyment of possessions<sup>18</sup>. The jurisprudence of the European Court and Commission on human rights is very comprehensive on the right to property. According to the Court, article 1 of the Protocol 1 comprises three different rules<sup>19</sup>. The first of a general nature elaborate the principle of the peaceful enjoyment of property. The second rule addresses deprivation of possession and subject it to certain conditions. The third rule recognises that States are entitled to control the use of property<sup>20</sup>.

The European Court insists on the need to differentiate among interference to the right to property between deprivation of property and mere control of its use. The rationale behind this provision is that in the case of deprivation of property through expropriation, compensation is required<sup>21</sup>. The *Sporrong and Lonroth* case establish the 'fair balance' principle or test on two complementary sources. The first is the general balance between the enjoyment of individual rights and the protection of public interest. The second is in the substantive content of 'law' understood to include protection against the arbitrary and disproportionate effect of an otherwise valid national law<sup>22</sup>.

Deprivation of property has been defined in the *Lithgow v UK* case as a situation where all the legal rights of the owner are extinguished by operation of law or by the exercise of all legal power to the same effect<sup>23</sup>. The application of this principle to the case of Cote d'Ivoire will mean that the RLO constitute a deprivation of the right to property because it prevents foreigners from passing their property right to the heir if the heir is not an Ivorian national. Consequently, this negates the principle of peaceful enjoyment of property.

The jurisprudence of the European Court and Commission allow for a large margin of appreciation on the reasons for the interference in the right to property. Therefore, the argument of rationalising rural land ownership and prevent conflict can be accepted as a legitimate reason to limit the right to property. For instance, the European court found that 'the taking of property in pursuance of a policy calculated to enhance social justice within the community can be described as being in the public interest'<sup>24</sup>.

However, the existence of legitimate purpose cannot waive the necessity or obligation the state to compensate in case of deprivation of property. As a result, according to the principle laid down by the European Court and Commission, the State of Cote d'Ivoire is under an obligation to compensate the foreigners, victims of a violation of a right to property under the RLO.

### **3. Universal Declaration of Human Rights and other global human rights instrument**

Article 17 of the Universal Declaration on Human Rights (UDHR) recognises the right to property and prohibits arbitrary deprivation of this right. The language of article 17 shows that the right to property is

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<sup>18</sup> The word possession has been interpreted by the European Commission and Court on human rights as guaranteeing in substance the right to property. See *The Marckx case*, judgement 13 June 1979, Publications of the European Court of Human Rights, Series A, N0.31, para 63.

<sup>19</sup> See case of *Sporrong and Lonroth* judgment of 23 September 1982, Publications of the European Court on Human Rights, Series A, No. 52, para 61.

<sup>20</sup> See G. Afredsson and A.Eide (eds), *The Universal Declaration of Human Rights*, pp 367, 368.

<sup>21</sup> For a discussion on the question of compensation by the Court, see the case of *James and others*, judgment 21 February 1986, Publications of the European Court of Human Rights, Series A. 53-66, and in the case of *Lithgow and others*, judgment of 8 July 1986, Publications of the European Court of Human Rights, Series A. No. 102, paras 111-122.

<sup>22</sup> See *Belgian Linguistic case* A 6 p 32 (1968).

<sup>23</sup> DJ Harris, M O'Boyle, C Warbrick 'Law of the Europeans Convention Human Rights (1995).

<sup>24</sup> See *Holy Monasteries v Greece* A 301A, para 67-69 (1994).

not absolute and therefore foresees that persons can be deprived of their property under certain circumstances although this cannot be done arbitrarily.

It is important to separate arbitrary from illegally. This means that a deprivation of the right to property done in accordance national law can be held arbitrary if it doesn't comply with the standard of international human rights law, namely the existence of legitimate purposes and the payment of a just compensation.

Therefore, the RLO, which authorises a deprivation of the right to property without compensation to the victims, is a violation of the article 17 (UDHR).

UDHR also recognises the in its article 2, the right to non-discrimination based on nationality or social origin. Therefore, the deprivation of the right to property, which only affects non-nationals in Cote d'Ivoire is a violation of article 2 (UDHR).

Although the right to property is not recognised under the International Covenant on Civil and Political Right (ICCPR), mention should be made of its article 26 which provides that

‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, [...], national or social origin [...].

This provision offers a protection against discrimination in the enjoyment of all rights, including the right to property even though this right is not contained in the ICCPR. This was the case in communication No. 202/1986 *Ato Del Avellanal v Peru* concerning Peruvian legislation under which only a husband could represent matrimonial property before the court. In accordance to this decision, the RLO which discriminates between Ivorian and foreigners in the enjoyment of their right to property can be held to violate the ICCPR ratified by Cote d'Ivoire in 1992.

The right to property is also included in the International Convention on the Elimination of Racial Discrimination (CERD). In fact, article 5 of CERD sets forth the right of everyone to equal enjoyment of the right to property without distinction or nationality or origin. Cote d'Ivoire ratified this convention in 1973. The obligation placed on parties to this Convention requests that States should refrain from acts, which results in discrimination on grounds of nationality, sex, race, birth etc. Even though article 1(2) of the same Convention states that ‘this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens, right to property and right to inherit are excluded from this leeway by virtue of article 5.

One may say that the inclusion of article 5 after article 1 is to correct the anomaly that may be created by the provision in article 1 (2) of CERD. It is also right to conclude that these rights that are listed in article 5 are considered very germane to the existence of humans that it will be crucial if their enjoyment is curtailed by states.

The RLO creates a situation whereby foreigners in Cote d'Ivoire are discriminated against. Therefore, it is trite to conclude that Cote d'Ivoire by enforcing this law is acting contrary to its obligations under CERD.

CERD also recognise and protect the right to inherit. This is contained in the same article 5 (d) (vi) of the Convention. RLO restricts the right to inherit, as foreigners who are owners of land in Cote d'Ivoire cannot pass on the land to their heir. Retrospectively, RLO is in contradiction to the provisions of CERD as it restricts the right to inherit and it creates a distinction between nationals and non-nationals of Cote d'Ivoire. RLO is also contrary to the spirit of CERD as it excludes heirs of foreigners from inheriting.

## **Conclusion**

The critical survey of these regional and global human right instruments shows that the RLO violates the right to property in three regards.

First, it discriminates against foreigners by restricting their rights to enjoyment of property on the mere basis of their nationality. This different of treatment constitute a violation of the right to non-discrimination.

Furthermore, it violates the rights of foreigners to compensation in case of deprivation. The RLO clearly constitutes deprivation as it takes out the property rights of foreigners without any compensation.

Lastly, it limits inheritance rights of foreigner's heirs. This is of course not in tandem with the philosophy underlying the property regimes in international law. The word 'property' itself implies a right to pass the title from the current holder to the issues. It would be of no sense if inheritance was restricted. The other elements of property include the power to exclude others and therefore ensure peaceful or quiet enjoyment. Finally, property implies the power to alienate. All these rights also known as *choses in action* are inheritable in their nature. To think otherwise is to ignore the obvious meaning of article 14 of the African Charter.