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Human Rights, Human Wrongs, and Archives / Derechos humanos, injusticias humanas y archivos

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Resumen

No debemos perder de vista que es esencialmente importante centrar la atención sobre las injusticias –el mal, crímenes contra la humanidad, desapariciones, genocidio- y sobre los documentos de archivo de estas injusticias. Pero al contemplar la frase “archivos y derechos humanos” sólo en esos términos, pasamos por alto el conjunto enormemente importante de documentos que no están relacionados con crímenes de Estado, ni están en manos del Estado y son vitales para proteger –y no sólo para luchar contra su pérdida– los derechos humanos.

Primero repasaré brevemente las categorías de derechos definidas en la Declaración Universal de los Derechos Humanos. Después me centraré en uno de esos derechos –el derecho a la propiedad, concretamente en el derecho a poseer y usar la tierra– considerando la gravedad del tema, los conflictos en curso y los recursos archivísticos que deberían estar disponibles para proteger el derecho a la propiedad. Para terminar, sugeriré una serie de obligaciones que tienen los archiveros en cuanto a derechos humanos y archivos en el sentido más amplio

Abstract

The focus on wrongs —evil, crimes against humanity, disappearances, genocide— and the archival records of wrongs is fundamentally important and we must not lose sight of that. But by looking at the phrase “archives and human rights” in only those terms, we miss the hugely important sets of records that are not related to State crimes, not in the hands of the state, and are vital to protect— not only to contest the loss of—human rights.

First I will quickly review the categories of rights as defined in the Universal Declaration of Human Rights. Then I will focus on one right—the right to own property, and specifically the right to own and use land—and consider the seriousness of the issue, the on-going conflict, and the archival resources that should be available to protect the right to own property. Finally I will suggest a set of obligations that archivists have for human rights and archives in the largest sense.

Palabras clave: derechos humanos – archivos – propiedad – derecho a la tierra

Keywords: Human Rights – Archives – Own Property – Land Right

When we hear the phrase “human rights,” we think of human wrongs: of evil, of crimes against humanity, of disappearances, perhaps even of genocide. The post-Cold War decades have seen an explosion of truth commissions, international courts, national judicial proceedings, and reopenings of old cases (in October 2011 alone, old cases were re-opened in Germany, Peru, Poland, and Thailand). The exposure of state crimes is a usual first impulse in a State transitioning from a more repressive regime to a less repressive and more democratic one, whether in Tunisia or Argentina, Chile or Lithuania. But by making human rights synonymous with crimes by states, we obscure the larger picture of human rights: the diverse civil and political and social and economic and cultural rights that are outlined in the Universal Declaration of Human Rights.

The international archival profession has followed this general tendency to look narrowly at archives and human rights. Let’s look at the development of the current consciousness of archives and human rights in the international community and see where this narrow focus arose.

To the best of my knowledge, the first open discussion of the worldwide problem of the archives of repressive regimes—and principally the police archives of those regimes—was at the International Conference of the Round Table on Archives (CITRA) held in Mexico in 1993. In a surprise to almost everyone, a session on co-operative strategies within government to advance archival goals turned into a lively session in which delegates talked about the problems in handling of records created by intelligence and security agencies. Countries from Germany to Brazil urged that a study of the international practices in handling the archives of political police should be undertaken “as a matter of urgency,” and the Conference resolved “that appropriate action be undertaken” by the International Council on Archives (ICA) “to identify the various aspects of the management of security and intelligence archives.” A UNESCO representative was present at the session, and subsequently ICA received a grant from UNESCO to do a study of the handling of the archives of state security services in former repressive regimes. Antonio Gonzales-Quintana led an international team which prepared the report published in 1997 (which he has now single-handedly revised and updated). It has been enormously influential in the archives world.

The second major step was the 2003 CITRA in South Africa on the theme of human rights, and from that came the ICA Working Group on Human Rights. Since then many other initiatives have been completed in the international archival community. We have had an international conference on archives and human rights in The Hague in 2010, many sessions at regional and national archives meetings, and a large and rapidly growing archival literature on the subject. But if we look at the content of these programs and articles, we find the focus on wrongs again: World War II and its aftermath; actions of police in dictatorships in Central and South America, Europe and Africa; crimes of military units; and unspeakable medical experimentation.

The focus on wrongs and the archival records of wrongs is fundamentally important and we must not lose sight of that. But by looking at the phrase “archives and human rights” in only those terms, we miss the hugely important sets of records that are NOT related to State crimes, NOT in the hands of the state, and are vital to protect—not only to contest the loss of—human rights.

First I will quickly review the categories of rights as defined in the Universal Declaration of Human Rights. Then I will focus on one right—the right to own property, and specifically the right to own and use land—and consider the seriousness of the issue, the on-going conflict, and the archival resources that should be available to protect the right to own property. Finally I will suggest a set of obligations that archivists have for human rights and archives in the largest sense.

1. Categories of human rights in the Universal Declaration of Human Rights

The Declaration begins with three Articles that follow the 18th century political philosophy of rights: Article 1 establishes the rights of fraternity, Article 2 the rights of equality, and Article 3 the right to liberty. After these introductory articles, the categories of rights in the Universal Declaration are grouped in three major sections: personal security and legal rights; civil and political rights; and economic, social and cultural rights.

The personal security and legal rights (Articles 4 through 12) ban slavery, torture, and arbitrary arrest and assert positive rights to recognition as a “person before the law,” equality before the law, and the right to be presumed innocent until proved guilty. Article 12, which establishes a right to be protected against arbitrary interference with privacy, family, home or correspondence, functions as a hinge between the Declaration’s first Articles focusing on legal rights and judicial processes and later Articles dealing with civil and political rights and economic, social and cultural rights.

Civil and political rights are defined in Articles 13 through 21. They include the rights to freedom of movement (including across borders) and residence; to seek and “to enjoy in other countries asylum from persecution”; the right to a nationality; to marry and found a family; to own property; to have freedom of thought, conscience and religion; to freedom of opinion and expression to peacefully assemble; and to take part in the government of one’s country.

Article 22 is the cornerstone of the economic, social and cultural rights in the third section (Articles 23-27) of the Declaration. These rights include the right to social security, to work and receive equal pay for equal work, to form trade unions, to rest and leisure, to an adequate standard of living, to education and social protection for children, and to participate in cultural life and share in the arts and sciences.

The final three Articles, like the first three, are broad statements of responsibilities of States and international bodies for the rights enumerated and the duties of individuals and groups for those rights.

As even this abbreviated list of the rights in the Declaration demonstrates, virtually every aspect of life is touched upon and the archives that are relevant to these rights are vast indeed.

2. Battlefields and promised lands

Next let me turn to the right to own property and to use it to demonstrate the range of resources that archives hold that safeguard this right. Before looking at the archives, however, I want to establish why this right is so important and why I believe it is a major cause of tension and outright conflict in today's world.

Here is what Article 17 says: 1) *Everyone has the right to own property alone as well as in association with others.* 2) *No one shall be arbitrarily deprived of his property.*

According to Johannes Morsink, the leading scholar on the drafting of the Universal Declaration of Human Rights, the discussions on Article 17 “were some of the most openly philosophical ones in which the drafters engaged.” Coming at the onset of the Cold War, the debates over the questions of property were especially fraught. The drafters distinguished three types of property: personal property, including that which is essential for living (such as household furniture, utensils and articles of personal use); real property (land); and profit-making enterprises (the modes and means of production). Essentially, the drafters were trying to linguistically encompass rights to property, whether the person was part of a capitalist, socialist, communist, or mixed economic system. The result was some of the simplest and sparest language in the Declaration¹.

And yet the right to property, whether land or a work of art, remains one of the most contested issues nationally and internationally. Historically the right of women to own property or control it even if the title to the property is in her name has been controversial in many places. In some countries, classes of persons have been barred from owning property. Indigenous peoples fight for property rights in various nations. The recuperation of or fair compensation for property, whether land or personal effects or businesses, features in claims as varied as the compensation to the Uganda Asians deported by Idi Amin to the question of who owns the Jewish material found in the basement of the police headquarters in Baghdad.

Now let me turn to a specific kind of property: land. Land holding and land use systems around the world often lead to conflict. Hernando de Soto, co-chair of the UN High Level Commission for the Legal Empowerment of the Poor, says, “For developing countries without an adequate legal property system, peace itself is on the line.” But land questions are not only found in developing countries. Let us move around the world in a brief look at some land issues.

Rights of indigenous peoples are a major issue in the Americas. For example:

1. Chile. The homeland of the Mapuche Indians is in the south of Chile. After democracy was restored, a law adopted in 1993 said that an indigenous community that could show it held title in the late 19th century could be eligible to have its lands returned. That assumed that (1) titling occurred throughout the country and (2) records of the titles existed and were authentic. The government has purchased some land and transferred title to the Mapuche (although far from the amount that the Mapuche claim as ancestral

¹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, Philadelphia: University of Pennsylvania Press, 1999, pp. 139-156.

lands). Meanwhile land occupations, arson, clashes with police, obstructions of the Pan-American Highway, and other violence continues².

2. Brazil. Brazil is notorious for widespread forgery of title deeds, particularly in the Amazon basin, and for violence related to land use. Until 2009 Brazil lacked a central land register; at that time, Imazon, an NGO that promotes sustainable development in the Amazon, estimated that only 4% of private land in Amazonia was covered by secure title deeds³. A large government program to regularize titles is underway, but according to news reports it is going very slowly.

War and conflict leave land issues in their wake.

3. Israel/Palestine. Land ownership, along with the right of return of refugees, are the core issues in the continuing conflict.
4. Cyprus. According to the International Crisis Group, “The property issue is one of the most intractable knots in the settlement of the Cyprus dispute.” It notes that in the decades since the mass displacements, which affected an estimated one-fifth of the population on the island, “many properties have been assigned to new users by local authorities, sold, destroyed or significantly developed.”⁴
5. Sierra Leone. In May 2009 after 14 members of the lands ministry were sacked in a corruption crackdown, Agence France-Presse reported, “Land conflicts are rife with ownership often unclear because many people were internally displaced during the war and records were lost.”⁵
6. Rwanda. Over 90 percent of cases the court in the Gasabo District received were related to land, “most of them involving expropriation issues and titles on property,” The New Times reported in March 2009⁶. Several donors are now carrying out land reform and “land dispute management projects” in Rwanda.
7. Burundi. As tens of thousands of refugees returned to Burundi, many land disputes arose between returning refugees and residents. According to Amnesty International, land disputes in 2010 “were commonplace and sometimes resulted in violent confrontations between people, including killings.” Because some of the refugees fled as long ago as 1972 and Burundi law permits title to vest after 30 years, the title questions are complex and a national land commission attempting to resolve them is overwhelmed with cases.⁷

² <http://www.economist.com/node/14816728>; <http://indigenousnews.org/2011/10/14/for-eight-hours-mapuche-prevent-logging-trucks-from-working-on-ancestral-lands/>. All websites referred to in this report were last accessed on 7 November 2011.

³ <http://www.imazon.org.br/publications/the-state-of-amazon/the-risks-and-the-principles-for-landholding>

⁴ http://www.observatori.org/paises/pais_69/documentos/210%20Cyprus%20-%20Bridging%20the%20Property%20Divide.pdf

⁵ <http://www.google.com/hostednews/afp/article/ALeqM5jBCW8lr5Hdb05W6VpAZnV8YbLyNw>

⁶ <http://allafrica.com/stories/200903200104.html>

⁷ <http://www.amnesty.org/en/region/burundi/report-2010>

8. Colombia. Two-third of the 3.3 million Colombians officially registered as internally displaced claim to have lost land when they fled, *The Economist* reported in September of 2010.⁸ In June 2011 Colombia enacted a law to provide financial compensation to victims of the current armed conflict and to return land to displaced persons, and the first 88 families received property titles.

Changes in government systems create land controversies.

9. Eastern Europe. The retitling of property nationalized during the Soviet decades continues, two decades after the changes in government.
10. Tanzania. During the twentieth century Tanganyika (the mainland part of the nation) endured: German colonial rule and land titling, British colonial rule, independence, collectivization into cooperatives (the ujamaa movement), and a return to individual property holdings. The Asian merchant class in Dar es Salaam, for instance, now is reclaiming their buildings.

Colonial rule and the change from colonial to independent government created land title problems. Colonial regimes used one of three interpretations of indigenous land rights: (1) deny that indigenous peoples had any ownership rights at all; (2) accept that indigenous peoples owned all land until alienated by sale or concession; (3) recognize indigenous ownerships of land “actually used” with all remaining land falling to the colonial power. Furthermore, colonial regimes tended to individualize land titles that were, in many societies, considered collective property, leading to conflict after the colonial power departed.⁹

11. Zimbabwe. The independence agreement between the U.K. and Zimbabwe governments avoided resolving the future land ownership structure, with the horrific consequence of land invasions and violence.¹⁰
12. Ethiopia. Colonialism divided pre-colonial groupings, with the result that members of the same group may have very different land titles, depending on which colonial power claimed the territory on which they lived. Ethiopia had three different land titling systems within today’s state.¹¹
13. Southeast Asia. Regions were sometimes so divided by colonial powers that it is difficult to obtain a region-wide perspective on land titles. In Southeast Asia, for example, lands were titled by colonial administrators from Britain, France, Portugal, Spain and the Netherlands.

⁸ <http://www.economist.com/node/17043061>; <http://www.bbc.co.uk/news/world-latin-america-13542244>, http://www.incoder.gov.co/file/Boletines%20II/boletin46_15_06_11.pdf

⁹ James Belich, review of Stuart Banner, “Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska,” *American Historical Review*, December 2008, pp. 1472-1474.

¹⁰ Phyllis Johnson, “Subterfuge under the Chandeliers,” <http://www.sardc.net/editorial/newsfeature/09511209.htm>

¹¹ S.F. Joireman, “Property rights and the role of the state: Evidence from the Horn of Africa,” *The Journal of Development Studies*, October 2001, Vol. 38, Iss. 1, http://econpapers.repec.org/article/tafjdevst/v_3a38_3ay_3a2001_3ai_3a1_3ap_3a1-36.htm

International land purchases further complicate land titles.

14. Called by *The Economist* “outsourcing’s third wave,” today richer and stronger countries buy or lease for long periods farmland in other countries to supply their own populations with food or biofuel. A study by the International Institute for Environment and Development said the terms of the agreements are “usually unacceptably vague, while traditional land-use rights are frequently ignored.” After a British company acquired forestry rights in Tanzania, a local farmer asked, “How come others are selling our land?” The transaction had been done over the heads of the residents. The International Food Policy Research Institute (IFPRI) reported in 2009 that between 15 and 20 million hectares of farmland were either acquired by foreigners or under discussion for sale between 2006 and 2009: that is the size of France’s agricultural land or a fifth of all farmland in the European Union, *The Economist* says. IFPRI further reports that in Madagascar, negotiations with Daewoo to lease 1.3 million hectares “reportedly played a role in the political conflicts that led to the overthrow of the government in 2009.”¹²

Like foreign purchases, tourism is also affecting persons with no clear title to their land.

15. After the tsunami that ravaged Southeast Asia in 2004, 50 families that survived in Nam Khem, Thailand, protested when “a well-connected tycoon rushed in to grab the valuable beachfront,” but the residents had no documented property rights to resist the acquisition.¹³

So who holds records of land ownership and use? First we need to look at the functions that are involved. Records relating to land document:

- *holding (occupancy, possession, surveying and boundary marking),
- *transferring (acquiring, disposing, separating such as granting easement or leasing, valuing),
- *managing/using (cultivating, irrigating, conserving, abandoning),
- *regulating (controlling access),
- *taxing (assessing and appraising, collecting, foreclosing), and
- *expropriating (evaluating, taking, compensating, adjudicating).

¹² <http://www.economist.com/node/13692889>; <http://www.ifpri.org/publication/land-grabbing-foreign-investors-developing-countries>; <http://pubs.iied.org/pdfs/12568IIED.pdf>

¹³ Hernando de Soto, “What if you can’t prove you had a house?” January 20, 2006, <http://www.nytimes.com/2006/01/20/opinion/20iht-edsoto.html?pagewanted=all>

A great variety of people and institutions are involved in systems of landownership and use, for example:

*rights holders (individuals, wife/husbands, partner, corporations, joint stock companies, syndicates, trusts, estates, governments at any level)

*information and private services providers (private brokers, appraisers, surveyors, lawyers, insurers, title registrars, notaries, media)

*finance suppliers (banks, credit firms, individuals, public lenders, insurance companies)

*public service providers (educational institutions such as extension services, regulatory agencies that control uses; construction agencies such as roads office)

*adjudicators (courts both civil for property disputes and criminal, enforcement agencies such as property protection bodies, and administrative arms for zoning)

And all of these create records.¹⁴

In summary:

Land rights are a crucial international issue.

Records are essential for understanding land rights.¹⁵

Good records and good record-keeping may help reduce conflicts.

Records systems are persistent, and understanding inherited systems is important to understanding today's records.

Land records reflect the colonial records systems in the countries that were colonies, and it is therefore important to understand the colonial system in order to understand what was actually titled.

A basic description of the land records system and the non-government materials that support it is essential information for landowners and land users, government officials, community activists and human rights workers, lawyers, and academic researchers.

¹⁴ Lists adapted from Gene Wunderlich, "Creating Private Ownership and Markets in the Agricultural Land of Formerly Socialist Countries," in Gene Wunderlich, ed., *Agricultural Landownership in Transitional Economies*, Lanham, Maryland: University Press of America, 1995.

¹⁵ The need to prove ownership of land was a factor in creating royal archives in European states in the Middle Ages, and the core archival principle of provenance derives in part from the need to know with certainty what body had created the record of ownership of property.

3. Archivists, duties and human rights

As archivists concerned about human rights, we have three obligations: the obligation to respect, the obligation to protect and the obligation to fulfill.

The **obligation to respect** means that as we appraise records or consider acquiring private source materials we need to consider whether these items might be useful to someone trying to assert, protect, or recover rights. It is useful to ask whether the materials help answer questions such as: “How would I prove I exist?” “How do I prove I have the right to social security?” How do I prove I owned this property?” This does not mean that every record or personal paper that has a human rights impact must be retained permanently, for some of them (for example, records of medical treatments) need to be retained only for the period of time that the rights may be asserted, and often that is the lifetime of the person. But it does mean that archives must be careful when scheduling such records and ensure that they are retained appropriately.

The obligation to respect means that we are conscious of the possible uses of the materials when we describe them in our finding aids. We need to call attention to contents that could be of use in documenting rights. Instead of describing a series as “agricultural survey data sheets,” for example, the description could list the elements in the survey, such as name of person, hectares farmed, hectares owned, number and type of livestock raised, and so on.

The **obligation to protect** has two parts. The first is to ensure the physical and intellectual safety of the materials in the archives; the second is to ensure that there are adequate archival controls over materials that are not in an archives.

Let us use the land title issue as an example.

In India’s Nagaland, the Union home ministry and the Assam government “have lost all ‘original documents’ – comprising details of boundaries—of Nagaland,” the *Times of India* reported in September 2008. These official bodies “do not even have a valid ‘map’ of the state which ironically is in the throes of violence sparked by the demand to carve out Greater Nagaland by extending the existing boundaries.”¹⁶

Loss is only one problem. Another is fraud. In Uganda, a press report in 2008 said, “Fraudsters in Kampala are forging land titles with the latest technology largely because the government’s system of registering and keeping authentic land records collapsed nearly a decade ago.” With World Bank funding, the government is digitizing its land records and creating a “Land Information System,” complete with archival electronic storage for backup copies, which the government hopes will eliminate forgeries and alterations of title documents.¹⁷

The World Bank and other funders are supporting programs of digitization of land records in countries across the globe, from Ethiopia to the Punjab to Guatemala. Some of these projects include entirely new cadastral surveys using GPS systems. I talked with a man who was involved

¹⁶ http://articles.timesofindia.indiatimes.com/2008-09-10/india/27896579_1_assam-nagaland-border-home-ministry-vital-public-documents

¹⁷ <http://allafrica.com/stories/200803210788.html>; <http://www.ugandanconventionuk.org/?p=4588>

in one of these projects. He told me, “You know, some of the places where the land records were stored had dirt floors” (this was in a humid country). I asked, “What will happen to the records after they are digitized?” He replied, “They will go back where they came from.” “Have the country’s laws been reformed to accept a digital copy as legally valid?” I asked. “Not yet,” he replied. I didn’t pursue what provisions were made for the preservation of the digital copy because he made it clear that his responsibility was only to get them digitized. But the legally valid records are now presumable back in the dirt-floored building.

It appears that few national archives are involved in these projects on land records, some of the most important records in the government. Often the land records seem to stay indefinitely in the custody of the relevant ministry. Archivists need to become involved in the preservation of these records, including the digitized materials, whether or not they are transferred to archival custody; a law could be amended to permit archival oversight or an archives could informally negotiate within the government to ensure participation.

The International Council on Archives (ICA) needs to recognize the existence of these government archives outside the national archives and organize groups in which they can participate within the ICA structure. We need to bring these government-but-not-national-archives into the international fold and encourage them to use the standards and best practices of the international archival community.

Then we have the materials relating to human rights that are held outside the government, from records in employers, banks, insurance companies, medical facilities, non-governmental organizations, schools and other educational institutions, and in the hands of individuals: the list goes on and on. Furthermore, these materials are in all physical types, from the paper or parchment genealogy charts of noble families in Europe that show the pattern of inheritance to painted maps in Mexico that show 16th century land grants (mercedes de tierras) to bound volumes of transactions by notary publics to photographs documenting workplace conditions to email with an attachment that is a work contract. We need serious surveys within each nation to identify these holdings and, for the ones that are of importance to more than a single individual, create a guide using a standard format such as ISDIAH (International Standard for Describing Institutions with Archival Holdings). This will not only help understand the pattern and distribution of the materials, but will also permit periodic reviews by a designated national authority to ensure the appropriate preservation of the materials.

Finally, there is the **obligation to fulfill**. This obligation means that we make available those records and personal papers in our holdings to all those persons who need them to assert or reclaim rights. The draft Principles of Access to Archives, now open for comments on the website of the International Council on Archives, says in Principle 6:

Institutions holding archives ensure the preservation of, and access to, records that provide evidence needed to assert human rights and to document violations of them, even if those records are closed to the general public.

The *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005) of the United Nations High Commission on Human Rights declares that victims of human rights abuses and their families have a right to know the truth about the violations. The *Principles* emphasize the vital role that access to archives plays in learning the truth, holding persons accountable for human right violations, claiming compensation, and

defending against charges of human rights violations. The *Principles* state that each person is entitled to know whether his or her name appears in State archives and, if it does, to challenge the validity of the information by submitting to the archival institution a statement that will be made available by the archivists whenever the file containing the name is requested for research use.

Many archival institutions obtain and hold the evidence needed to protect human rights and to contest the violation of human rights. Persons seeking access to archives for human rights purposes are given access to the relevant archives, even if those archives are closed to the general public. The right of access for human rights purposes applies to both public and private archives.

* * *

As we saw at the beginning, the last three Articles of the Universal Declaration of Human Rights set the issue of rights within the context of responsibilities. The first element of Article 29 says, “Everyone has duties to the community in which alone the free and full development of his personality is possible.” Article 30 says, “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the right and freedoms set forth herein.” Archivists are duty-bearers for human rights when we select, we protect, we describe and we make available the materials entrusted to us. Articles 29 and 30 speak directly to us in our professional capacities.

The obligation to respect, the obligation to protect and the obligation to fulfill do not involve fundamental changes in archival practice. They do, however, require us to be mindful of the potential users of the materials we hold and the materials we know exist in other hands. They remind us to be vigilant, alert to any potential destruction of materials with important human rights uses. And, at the end, they simply ask us to be human.

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