P.O. Box 5675, Berkeley, CA 94705 USA

Protecting the Right to Adequate Housing in Mega-Projects

Contact Information:

Rahul Rao, Frank C. Newman Intern
Representing Human Rights Advocates through
University of San Francisco School of Law's
International Human Rights Clinic
Tel: 415-422-6961
rsrao@dons.usfca.edu
Professor Connie de la Vega
delavega@usfca.edu

I. Introduction

The right to adequate housing is frequently violated by state actors through the implementation of large-scale development and infrastructure projects, or *mega-projects,* including mining, logging, oil-extraction, and *mega-events*, such as the FIFA World Cup and the Olympics. Those who live in the vicinity of such large-scale projects often have very little say on whether these undertakings, supposedly for the utilitarian public benefit, get implemented or not. Any compensation provided to displaced persons is often insufficient and does not adequately cover costs related to relocation. Furthermore, in the context of mega-events, housing conditions for laborers provided in preparation for the event are grossly inadequate. This statement will address the victims of mega-projects, which may include not only those evicted or displaced, but also the workers constructing the projects. By focusing on examples of past and current human rights abuses arising from mega-projects, as well as appropriate solutions, this report will feature the threats and opportunities presented by large-scale development projects. Human Rights Advocates (HRA) suggests that the mega-project planning model most protective of the right to adequate housing successfully integrates (1) citizen consultation and participation throughout the production process, and (2) the meaningful implementation of subnational and local laws effectuating access to adequate housing.

Various regional and international instruments establish international human rights laws that protect the rights to adequate housing, to be free from forced eviction, to information and consultation, and to adequate compensation. The right to adequate housing is enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1], and is supported

[1] International Covenant on Economic, Social and Cultural Rights, Dec. 16 1996, S. Treaty Doc. No. 95-19, 6 I.L.M 360 (1967), 993 U.N.T.S. 3.

through General Comments No. 4[2] and 7[3] on forced evictions, as well as by various resolutions. For example, in 2010, the Human Rights Council passed resolution 13/10 on the right to housing and mega-events.[4] Resolution 13/10 called upon governments to "… assess the impact on the affected population throughout the process…"[5] and to "… explore alternatives to evictions and to undertake any evictions in accordance with the domestic legal framework…"[6] According to the December 2014 report of the Special Rapporteur on adequate housing, while international human rights obligations "tend to focus more on the role of national level governments," local and subnational governments need to effectuate such obligations for the implementation of access to adequate housing to be more functional.[7] One example of this is the California housing element law.[8] Such a subnational state law is recommended by HRA in locations of mega-projects and events with huge displacement impacts.

During mega-project production, government authorities often must balance the tensions between achieving developmental 'progress' and political fallout. Developing countries currently face a set of challenges experienced in the United States and Europe during the so-called "great mega project era" of the 1950s and 1960s, which produced massive infrastructural undertakings, such as the Interstate Highway System in the U.S., which occurred in the context of heightened

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2 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

3 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22.

4 U.N. Human Rights Council Res. 13/10, U.N. Doc. A/HRC/RES/13/10 (April 14, 2010).

5 *Id.* at ¶ 3(a).

6 *Id.* at ¶ 3(f).

7 U.N. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha*, U.N. H.R.C. Doc. A/HRC/28/62 (December 22, 2014).

8 CA GOV Code Section 65580-65589.8, *available at* http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=65001-66000&file=65580-65589.8 (last visted Feb. 20, 2016).

resistance from affected groups.[9] In countries with a longer tradition of citizen mobilization against mega-projects, planners have learned how to operate under "a politically astute awareness of resistance to planning," which includes pre-emptive consultation processes with affected groups and the proactive offering of compensatory packages.[10] However, as many developing nations were historically centralized (as opposed to democratized and decentralized), such governments traditionally "made most major infrastructure decisions for their cities, relying on top-down 'rational planning models,' where input of local authorities was often highly circumscribed."[11] Hence, vestiges of the vertical approach to mega-project planning in developing nations often remain, and such nations must adjust to the effects of decentralization, including increased subnational political responsibility and citizen participation.

This report will include comparative examples from Latin America, Qatar, and California, which illustrate how the right has been violated as well as how domestic legislation can be effectuated such that compliance with international law is more capably secured. The right to adequate housing must be a prerequisite for the implementation of mega-projects and the hosting of mega-events. Mega-projects, often produced for the preparation of mega-events, impact those who are displaced and evicted as well as those who work on the projects themselves. Furthermore, the effects of displacement may result in homelessness, a "global human rights crisis . . . caused by States' failures to respond both to individual circumstances and to a range of structural causes . . ." as per the December 2015 report of the Special Rapporteur on

[9] Altshuler, A., & Luberoff, D., *Mega-projects: The changing politics of urban investment*, Washington, DC: Brookings Institution Press, p. 26 (2003).
[10] Sanyal, B. *Planning as anticipation of resistance*. Planning Theory, §4(3), p.240 (2005).
[11] Diane E. Davis, Onesimo Flores Dewey, Chapter 12 How to Defeat an Urban Megaproject: Lessons from Mexico City's Airport Controversy, in *Urban Megaprojects: A Worldwide View* (Research in Urban Sociology, Volume 13), Emerald Group Publishing Limited, p. 294 (2013).

adequate housing.[12] Human Rights Advocates (HRA) highlights that citizen participation in the planning process of mega-projects is essential, and subnational and local laws must be tailored such that the right to adequate housing is not compromised.

II. Mega-Project Victims: Displaced Persons & Project Workers

This section will cover two countries as examples of how victims of mega-projects can be effected when citizen participation and a synthesis of national and subnational legislation is absent.

A. Mexico

Displaced and inadequately compensated Mexican urban populations have little specified available recourse when faced with a mega-project in their locale. The only particular domestic avenue for affected populations to consider is *amparo*, a procedural means of injunction designed to protect the fundamental rights preserved in the Constitution, which include the right to property (Art. 27), and in international treaties to which Mexico is a party. As such, if the right to property were to be violated by Mexico through a mega-project or event, it would be presumed that *amparo* could be invoked effectively to halt such activities. However, compliance with judgments of Mexican domestic courts may be an issue in the context of mega-projects.[13] Moreover, plaintiffs wishing to explore alternative solutions after domestic remedies have been exhausted should be cognizant that urban mega-projects are generally difficult to be considered admissible by the Inter-American Commission of Human Rights (IACHR).[14] In regards to the latter, widespread effects of such projects in a metropolis are often difficult to contain, and

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[12] U.N. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, U.N. H.R.C. Doc. A/HRC/31/54 (December 30, 2015).

[13] *Megaprojects and Human Rights in Mexico*, CEMDA, April 25, 2014, *available at* http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MEX/INT_CCPR_ICS_MEX_17205_E.doc. (last visited Feb. 22, 2016).

[14] *Metropolitan Nature Preserve v. Panama,* Case 11.533, Inter-Am. Comm'n H.R., Report No. 88/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 524 (2003).

consequently, identifiable victims may be difficult to ascertain for purposes of standing in international courts.

Furthermore, an example of the consequences of not only the lack of citizen participation, but also of a synthesis between national and subnational governments is illuminated by the cancelled implementation of the proposed airport in Mexico City in 2002. While the historically centralized federal government owned the majority of land at the proposed site, an additional 5,393 hectares of land would have to be expropriated through Presidential decree from 4,375 farmers of thirteen *ejidos* (communally-owned agricultural land) in the area.[15] However, both the *ejidatarios* and the Mexico City government challenged the Presidential decree. The lack of participation in the planning process from both the citizens and subnational and local governments served to politically delegitimize the project. Governor Montiel, of the State of Mexico, asserted "the airport was a project of the Federal Government and *not* of the State of Mexico."[16] Less than ten months after the initial announcement, and after ongoing violent confrontations between *ejidatarios* (owners of the *ejidos*) and government authorities, President Vicente Fox canceled the project.[17] It was particularly shocking as authorities had contended the project would be good for Mexico's position and image in the increasingly globalized economy, generate jobs and investments, and establish Mexico City as an international hub in the hemisphere.[18]

Two of the many lessons learned from the failed airport proposal must be highlighted. First, "the will of citizens" should be treated as "a source of valid claims" as opposed to "an obstacle to

[15] Dávalos, R., *Eijidatarios no cedarán tierras para el nuevo aeropuerto*. La Jornada, October 24, 2001.
[16] Mondragón, A., Lelo, A., Camacho, O., & Saúl, L. *Se dislinda Montiel de la crisis.* El Universal, July 12, 2002.
[17] *Supra* note 11, p. 288.
[18] *Id.*

be overpowered or undermined."[19] Second, there must be a synthesis between national and subnational government in order to guarantee that the rights to property and adequate housing are not discarded in favor of a non-negotiable mega-project. The outcome of the 2002 Mexico City airport proposal demonstrates the importance of both prongs of the mega-project planning model recommended by HRA—increased citizen participation and subnational political responsibility.

B. Qatar

Qatar, the host nation selected for FIFA World Cup 2022, has proposed to build nine new stadiums and renovate three in time for the mega-event. Foreign migrant workers, primarily from South Asia, are constructing each of these stadium projects. According to Qatar's Law 14 of 2004, private sector workers are required to have limited hours, receive paid annual leave, receive timely payment of monthly wages, and enjoy protection from health and safety standards.[20] However, authorities generally fail to enforce these provisions. Additionally, through the *kafala* (sponsorship) system, which ties a migrant worker's legal residence and passport possession to his employer, workers are virtually barred from leaving the country without their sponsor's permission. Due to unsanitary labor camp conditions and the lack of implementation of safety requirements on the field of work, it has been reported that Nepalese workers in Qatar have been dying at a rate of one per day.[21] Hence, it appears the foreign migrant workers constructing such large-scale stadium and infrastructure projects in time for the mega-event are effectively marooned in a nation which has not enforced its own laws in regards to the health and safety standards required for access to housing to be *adequate*.

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[19] Applebaum, A.I. *Ethics for adversaries: The morality of roles in public and professional life*. Princeton, NJ: Princeton University Press, p. 250 (2000).
[20] Human Rights Watch, *World Report 2014: Qatar*, *available at* https://www.hrw.org/world-report/2014/country-chapters/qatar (last visited Feb. 8, 2016).
[21] Pattison, *Revealed: Qatar's World Cup Slaves*, The Guardian, Sep. 25, 2013, *available at* http://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves (last visited Feb. 8, 2016).

The case of Qatar exemplifies: the intersection of mega-projects and mega-events, workers who are denied adequate housing, and the consequences of when a national government fails to comply with its own legislation requiring adequate health standards for laborers, which includes housing camp conditions. A suggested method of ensuring adherence with national legislation is a bottom-up approach, requiring subnational and local governments to effectuate national law through compliance mechanisms. This will be discussed in further detail below.

III. National & Subnational Legislative Solutions

This section will use two legislative mechanisms, one guaranteeing citizen access to government information and the other increasing the responsibility of local governments to provide access to housing, to demonstrate how the right to adequate housing may be successfully protected.

A. Chile

In the watershed Inter-American Court case *Claude Reyes v. Chile*, the Chilean State was found internationally responsible for its refusal to provide information related to a forest industrialization project to Marcel Claude Reyes, as well as the lack of an adequate and effective resource to challenge such a decision. The logging contract, between the U.S. corporation Trillium and the Chilean State, was feared to have immense adverse environmental impacts on the ecosystem of southern Chile inhabited by the indigenous Mapuche peoples.[22] The Court ultimately determined that the facts of the case constituted a violation of Article 13 (freedom of thought and expression), thus the petitioners were eligible for reparations.[23] The Court also held that within six months of the judgment, the Chilean State was obligated to provide necessary

[22] TED Case Studies, *Chile Forest Preservation and the Project River Condor*, American University, *available at* http://www1.american.edu/TED/chilewd.htm (last visted Feb. 28, 2016).
[23] *Claude Reyes et al v. Chile,* Case 12.108, Inter-Am. Ct. H.R. (ser. C) No. 151, (Merits, Reparations and Costs) at ¶ 174.1 (Sep. 19, 2006).

legislative measures to guarantee the right of access to state-held information, and that it must provide training for public authorities and state agents on this right.[24]

In response, Chile successfully promulgated and published in the Official Gazette the Law No. 20,285 *Ley de Transperencia y Acceso a la Información del Estado*, by which "the Administration is obliged to provide information in the widest practicable matter, excluding only constitutional or legal exceptions."[25] The State also created the Council of Transparency, which punishes violations of this law, and implemented training activities concerning the new law of hundreds of state officials and lawyers. Since the Chilean State fully complied with the judgments, the Court officially closed the case in 2006. In 2008, the Inter-American Commission " . . . applaud[ed] the progress made by the State in the instant case and the spirit of cooperation between the representative of the victims and the State in relation to the reparations ordered by the Court."[26] Hence, Chile's progress is a paradigm of how national governments may take affirmative legislative steps to guarantee citizen participation in the mega-project planning process, by which consultation may ultimately enable citizens to preemptively protect their access to adequate housing on their own terms.

B. California, United States of America

California law requires each city and county to adopt a general plan containing seven mandatory elements, one of which is housing. The housing element, required to be updated every eight years, is subject to detailed statutory requirements and mandatory review by the California Department of Housing and Community Development (HCD).[27] The law, first enacted in 1969, is a tool used by the state in anticipation of future housing needs resulting from a projected

[24] *Id.* at ¶ 165.
[25] *Claude Reyes et al v. Chile,* Case 12.108, Inter-Am. Ct. H.R. (ser. C) No. 151, (Monitoring Compliance with Judgment) at ¶ 8 (Nov. 24, 2008).
[26] *Id.* at ¶12.
[27] *Supra* note 8.

significant increase in population. Each local government is obligated to demonstrate how it plans to meet existing and projected housing needs of people at all income levels. Each city must show it can accommodate a certain number of very low, low, moderate, and market-rate housing units.[28] If its housing element complies with state law, a city may qualify for various state funds; however, failure to do so opens up a city to potential litigation from housing advocates.[29] Thus, noncompliance is effectively addressed.

In the State of California, real estate has become increasingly unaffordable for many renters and potential homeowners. In 2010, the city of San Jose required that all new residential developments of 20 units or more set aside 15 percent of those units for sale below the market rate, a process known as "inclusionary zoning".[30] Developers may opt out of building the required 15 percent of the more affordable units by paying a fee to the city. Timothy Iglesias, a professor of the University of San Francisco School of Law, has argued that "the next step for cities and affordable housing advocates is to head to the state Legislature to allow for more expansive inclusionary zoning measures to be applied to rental housing as well as new units for sale."[31] Inclusionary zoning tactics are a method of facilitating local compliance with the California Housing Element Law and have been upheld to be constitutional under state law as per *California Building Industry Association v. City of San Jose* (2015).[32]

In accordance with the 2014 report of the Special Rapporteur on adequate housing, California's law is an example of how subnational governments can direct local governments to guarantee adequate housing for its populations. HRA urges state parties to encourage the

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[28] *Id.* at 65583 (C)(2).
[29] Paul G. Lewis, *California Housing Element Law: The Issue of Local Noncompliance*, Public Policy Institute of California, p. 7 (2003).
[30] Rachael Myrow, *California Supreme Court Upholds San Jose's Affordable Housing Rules*, KQED News (June 15, 2015), *available at* http://ww2.kqed.org/news/2015/06/15/california-supreme-court-upholds-san-joses-affordable-housing-rules (last visited on Feb. 28, 2016).
[31] *Id.*
[32] *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015).

application of effective bottom-up approaches via subnational governments to guarantee the right to adequate housing, particularly vis-à-vis persons likely to be displaced or insufficiently compensated due to potential mega-project production.

IV. Conclusion

As it has been illustrated by the case studies of Mexico City and Qatar, the implementation and compliance of national and subnational decision-making is required in order for the right to adequate housing to be effectively protected. Top-down mega-project planning models do not always address the issues inherent in mega-projects at a local level, thus bottom-up mechanisms which incorporate citizen consultation and participation better protect the right to adequate housing. For example, by enacting legislation to guarantee and enforce the right of access to state-held information, such as in the case study of Chile, a national government may first take affirmative steps to enable citizens to preemptively protect access to adequate housing on their own terms. This preemptive protection of the right to adequate housing may be supplemented by subnational legislative mechanisms, such as the California Housing Element law, which compel local governments to make sufficient provision for adequate housing for people at all income levels. Therefore, the mega-project planning model most protective of the right to adequate housing synthesizes (1) citizen consultation and participation throughout the production process, and (2) the meaningful implementation of subnational and local laws effectuating access to adequate housing.

V. Recommendations

HRA requests that the HRC:

(1) Recognize the need for (a) citizen participation and (b) national and subnational legislation to ensure the right to adequate housing in context of mega projects and events, including those of evicted or displaced persons and workers;

(2) Urge the Special Rapporteur on the Right to Housing to monitor the topic of mega-projects, including in the context of mega-event preparations, as they relate to the right to adequate housing; and

(3) Urge state party governments to affirmatively protect this right through appropriate domestic legislation.

HRA urges all state parties undergoing preparations for mega-events and mega-projects to take affirmative steps to implement and enforce effective national and subnational legislation to ensure citizen participation in planning processes and to guarantee the right to adequate housing.