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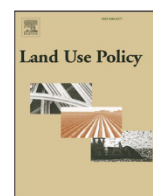
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Land expropriation – The hidden danger of climate change response in Mozambique

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ABSTRACT

This paper sets out why land expropriation is a hidden danger of the response to climate change; a danger that is not adequately captured in legislation and that risks disproportionately affecting the poor. Measures to mitigate the risks and impacts of climate change are often dependent on states' access to land. The legal mechanism through which states can obtain rights over land is expropriation, but a fair expropriation process depends on a number of structural conditions that are (partly or completely) lacking in many countries: effective recognition of people's land rights; a legally detailed expropriation process and adequate administrative capacity to implement it; and respect for the rule of law and access to justice for the affected populations. Climate change exacerbates the problems that many states have with their expropriation processes: it brings new and more complex questions about the limits of expropriation; provokes more urgent expropriations; and disproportionately impacts the poorest people. Based on legal analysis and empirical research, this paper looks into the case of Mozambique in the aftermath of Cyclone Idai to show how issues related with expropriation are a hidden danger for many Mozambicans, but also for citizens of other countries in similar situations.

1. Introduction

Climate change is causing rising sea levels, glacial melting, desertification, and more frequent extreme weather events, such as prolonged droughts, heatwaves, cyclones and floods (IPCC, 2014; Wong, 2016; IFRC, 2020). These changes are making living conditions harsher for many people worldwide, and the number of environmentally displaced persons has been rising rapidly (Falstrom, 2002). According to the Internal Displacement Monitoring Centre, 'around 1900 disasters triggered 24.9 million new in-country displacements across 140 countries and territories in 2019. This is the highest figure recorded since 2012 and three times the number of displacements caused by conflict and violence' (IDMC, 2020: 4). The scale of the issue demands collective action in which state institutions play a leading role, both in the response to climate disasters and in promoting climate adaptation measures. States' measures against the impacts of climate change include, among others, the construction of infrastructure such as drainage, irrigation schemes, and seawalls, and low-cost, low-technology solutions such as voluntary or compulsory resettlement of people from high-risk areas (McDowell, 2013: 677). One element is common to the implementation of many of these state-led measures:

they need land.

Expropriation is the legal mechanism through which – for the implementation of projects with public purpose – states can take land rights from private parties. However, as amply illustrated in the literature, expropriation processes have been far from fair in many countries (Eerd and Banerjee, 2013; Tagliarino, 2016; Kim et al., 2017b; Alden Wily, 2018). Those affected by expropriation, and especially the poorest ones, often lack formal land rights, are exposed to state-led arbitrary decisions, and do not have the means to defend their rights. As a result, they often lose their land with little or no compensation and see their livelihoods and way of life seriously harmed by the process. The growing need for more state access to land in response to climate change and a set of new specific questions created by government-led climate change responses further expose people to the negative effects of land expropriation, as we will show in this paper. In the light of ongoing climate change, the question of expropriation will become ever more pertinent.

The problems relating to structural conditions for fair expropriation as we describe them are not new, but they are likely to get worse in the light of climate change. Climate change is bringing new, or at least more intensified problems regarding expropriation that, if not adequately addressed, will further burden the people on the ground. The examples

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throughout the world are many: In the Pacific Islands people have been forced to move due to natural hazards such as volcanic eruptions and tsunamis, but their voices in this resettlement process have not been adequately heard (Tabé, 2019). In coastal regions of Bangladesh rising sea levels and storm surges are increasingly threatening people's livelihoods in densely populated areas, but also leading to land grabbing by public and private sector actors that benefit from the rising value of available land (Feldman and Geisler, 2012). In the United States, potential government land buyout programmes to prevent the impacts of climate change are criticized for being detrimental to the most vulnerable in society (Simons, 2007; Napolitano, 2016).

This paper aims to highlight and analyse expropriation as a hidden danger of government-led responses to climate change, a topic that remains understudied in the literature on climate change and on land rights. To illustrate this analysis, the paper looks into the government response to Cyclone Idai that, in the beginning of 2019, devastated the central region of Mozambique. This paper does not aim to provide a complete and detailed account of the disaster-response in the country. Rather, our qualitative case study analyses a particular element – expropriation- of the disaster response within its specific socio-political context. Our case study then serves as a steppingstone to provoke debate and reflection on the connection between expropriation and climate change in Mozambique and other countries facing similar problems with expropriation. We first show that, besides the common debates on public purpose and compensation, any fair expropriation – not only in relation to climate change – requires a number of structural conditions to be in place. Then, we argue that climate change brings new issues to expropriation processes and further complicates existing ones, making land expropriation a serious but still hidden threat in government-led climate change responses.

This socio-legal paper is based on a review of academic literature related to climate change, disasters, and expropriation¹; grey literature related to the disaster response after Idai; relevant Mozambican legislation; and empirical data. Reflective of our case study approach, we interviewed a wide range of actors with different backgrounds to gain a rounded picture of expropriation as it was set up, how it unfolded, how it was experienced by some, and avoided by others.² During a two-week field trip to Mozambique in November 2019, we interviewed 15 state and non-state actors in the cities of Maputo and Beira, who had been involved in the disaster response. We also interviewed 39 people affected by the cyclone. Some of them continued to live in high-risk areas in Beira, others had moved to a new resettlement site 60 kilometres from the city. At both locations, our respondents were randomly selected. We validated our findings and obtained further insights during a roundtable in Maputo with 25 local and international experts.³

In the following section, we give an overview of the conceptual and practical debates on fair land expropriation. In section three we assess to what extent structural conditions for fair expropriation are present in Mozambique. Section four looks into the issues that climate change is adding to expropriation. The final section of the paper presents our main

conclusions and recommendations.

2. Conceptual and practical debates on fair land expropriation

Access to land is central for many state-led responses to climate change, such as resettlement or construction of infrastructure. Expropriation is the legal mechanism present in virtually all countries' legislation through which, for reasons of public purpose, a state institution can acquire land rights against the will of the holder of that right (Fonseca, 2011: 10; Kim et al., 2017a: 2).⁴ If states want land that they do not own, they must expropriate it. However, the literature is replete with examples where expropriation rules are ignored or misused, and state expropriation of land has disastrous consequences for the lives and livelihoods of people on the ground (Lund, 2008; Cotula, 2013; Eerd and Banerjee, 2013; Nyantakyi-Frimpong, 2020). This section reflects on the main conceptual and practical debates on land expropriation, and the conditions under which land expropriation can be fair for those affected. This analysis sets the theoretical ground for the analysis of the Mozambican case that follows.

Conceptually, expropriation is based on the idea that the right to private property is not absolute, and in certain circumstances it is justifiable to disturb an individual right to create a larger benefit for the community (Reynolds, 2010: 11; Ronen, 2013: 249). In those justifiable cases, rights can be acquired from private parties against their will.⁵ Importantly, expropriation is a *compulsory acquisition*, not *confiscation* nor *dispossession* (Reeves, 1969: 867; Eerd and Banerjee, 2013: 78); people do not have to simply give away their rights for the common good. In principle an expropriation presupposes the payment of adequate compensation to those forfeiting their rights.⁶ Otherwise the cost of the project that the expropriation serves would be externalized: those being expropriated would be paying with their property for a public benefit (Epstein, 1985, 12, 182; Fonseca, 2011: 21; Verstappen, 2015: 29; Cho, 2017: 210).

While definitions and conceptualizations of expropriation vary among authors, the requisites of *public purpose* and *adequate compensation* are, in one way or the other, present in most countries' legal frameworks on expropriation (Tagliarino, 2016; Alden Wily, 2018; Hoops, 2019). However, these requisites give rise to a number of conceptual and practical debates. The debates about public purpose take place at two levels: first in the abstract, regarding the admissibility of a certain type of project.⁷ For instance, can the state expropriate land for the construction of a hospital? What about a golf course or a shopping mall? Second, this debate also takes place in regard to each specific project, especially when the requisite of public purpose is accompanied by other framing criteria such as necessity and proportionality (Hoops, 2017: 40; Hoops, 2019: 268). For instance, was the expropriation of a certain parcel of land really necessary for the construction of a hospital or were there other, less burdensome alternatives? And is it acceptable to seriously disturb the lives of thousands of people to build a road that is going to serve a few dozen? These conceptual and practical debates raise then a number of other questions, such as: which entities have the power

¹ For the academic literature review, we started with the most widely used academic databases, as well as the library catalogue of our university. We used a number of pre-defined search strings. Further sources were then identified through snowballing. References were kept in an annotated library in Mendeley. We would like to thank Emine Gogus for help with this review.

² We do not pretend formal or statistical generalizability of our findings, but we should stress that qualitative case studies have high internal validity, from which inferences can be drawn (Flyvbjerg, 2006; Small, 2009; Simons, 2014).

³ Both authors speak Portuguese and could draw on pre-existing contacts in Mozambique (in Maputo and in Sofala province) to facilitate the field research. Empirical data were analysed with ATLAS.ti 9 software. We used both deductive coding (roughly based on the main questions of our research) and inductive coding to ensure that we would not overlook unanticipated findings (Saldaña, 2009). Categories such as Expropriation and Land Rights were especially relevant for the writing of this paper.

⁴ Worldwide other expressions are used for expropriation, such as *eminent domain*, *compulsory purchase*, and *compulsory acquisition*. By land rights we mean any set of rights and obligations related to land (Bary, 2015: 5). Therefore, this expression includes ownership but also other sets of rights and obligations, such as use rights.

⁵ Therefore, a key moment of an expropriation process is the 'decision to expropriate', which is the moment where the legally entitled state institution declares that a certain parcel of land will be taken by the state, even against the will of its owner (Jung, 2017).

⁶ A few authors and legal frameworks accept the idea of partial or even no compensation in exceptional circumstances (Dagan, 2015).

⁷ There are doctrinal debates about the expression 'public purpose' and other alternatives such as 'public use' and 'public interest' (e.g., Epstein, 1985: 161; Brown, 2016; Alden Wily, 2018: 11).

to start, conduct, and benefit from an expropriation (Somin, 2017: 41, 61)? How should public purpose be defined, and which principles should guide the assessment of the public relevance of each specific expropriation? The legal solutions adopted for these questions differ throughout the world.

The requisite of adequate compensation also gives rise to a few difficult conceptual and practical debates (Lindsay et al., 2017: 129). For instance: which criteria should be used to calculate the compensation? (e.g., shall the improved value of land caused by state infrastructure be compensated?); what values should be compensated? (e.g., shall a sentimental/ancestral connection to land be compensated, and how can it be valued?); how is compensation paid? (e.g., financial compensation and/or replacement land? A one-off payment or instalments?); and are there alternatives to a one-off, financial compensation? (e.g., payment with land replacement or benefit sharing?).⁸ Also here the solutions adopted in different countries vary significantly.

Importantly, the way in which legal frameworks answer these conceptual and practical debates on public purpose and adequate compensation have major implications in people's lives. They need to strike a difficult balance between the public and private interests at stake. For instance, too-loose criteria for public purpose can lead to abuses from those closely connected to power that can use expropriation to benefit themselves (see, for instance, Feldman and Geisler, 2012 on Bangladesh). On the other hand, too-tight criteria leave state entities powerless to act in the public interest, having to acquire land on the private market and therefore risking speculative prices or simply not being able to acquire land (Kotaka and Callies, 2002: 5). A similar situation happens with the regulations on compensation: too-strict criteria impoverish those expropriated, while too-generous criteria that go beyond a fair value create an unfair burden to taxpayers (Somin, 2017: 55).

However, while the literature on expropriation has paid considerable attention to these debates on public purpose and compensation, less has been written about the structural conditions under which expropriation is implemented. For a fair expropriation process, a number of structural conditions need to be in place. The conditions that we consider as crucial for a fair expropriation are: (1) land rights are effectively recognized by law; (2) an adequate expropriation process is well detailed in law and there is administrative capacity to implement it; and (3) formal legality and due process are respected and access to justice is adequate. As we show below, we argue that, only if these three structural conditions are verified, is it possible to have consistent fair expropriations. While each of these points have been extensively studied on their own, they have been less explored as a comprehensive set of structural conditions that need to be met for expropriation to work in a fair manner for those affected.

Using the case of Mozambique and the state response to Cyclone Idai, the following section analyses the importance of these structural conditions for a fair expropriation process and exemplifies the consequences of not having these conditions in place. The section after shows how climate change adds further difficulties to expropriation processes, making expropriation one of the hidden dangers of climate change.

3. Structural conditions for fair expropriation in Mozambique

With a long coastline and various rivers, Mozambique is extremely

⁸ On issues of compensation see Cho (2017); Somin (2017): 53; McDermott (2018); Price et al. (2020).

exposed to the effects of climate change and has been frequently affected by tropical storms, cyclones and floods (Christie and Hanlon, 2001; Artur, 2011; Arnall et al., 2013).⁹ In March 2019, and despite early warnings set off by Mozambique's National Disaster Management Institute (INGC in its Portuguese acronym), Cyclone Idai took many people in central Mozambique by surprise. In affected areas many had to flee their houses, either to relatives or friends living in better-protected neighbourhoods, or to temporary accommodation centres that were quickly organized in places such as school buildings, police stations, and hospitals (IOM/INGC, 2019a). It was estimated that more than 1.5 million people were affected by the cyclone, and 240,000 houses were partially or totally destroyed (Government of Mozambique, 2019).

The aftermath of the cyclone highlighted how, besides the concepts of public purpose and adequate compensation, a fair expropriation process is dependent on the above-mentioned structural conditions. As happened in previous extreme weather events, three months after the cyclone the government had already relocated around 88,000 people from high-risk areas to 66 new resettlement sites (IOM/INGC, 2019b).¹⁰ However, the process through which the land for these new sites was obtained, as well as the legal situation of those still residing in dangerous areas, exposed the gaps in the country's structural conditions to make expropriation a fair process, as we explain below. The following sections look into each of these structural conditions: (1) weak legal recognition of some land rights; (2) lack of a well-detailed expropriation process and administrative capacity to implement it; and (3) weak formal legality and due process, as well as impediments to accessing justice. Taken together, the lack of these conditions made it difficult for citizens to receive fair treatment in case of expropriation.

3.1. Recognition of land rights

The first structural condition¹¹ that needs to be in place for a fair expropriation is that the land rights of those using the land are effectively recognized by law (Reynolds, 2010: 5). Without this legal recognition, those using the land are by law considered 'squatters' or 'illegal occupants' (Verstappen, 2015: 18). This kind of qualification might not affect people's day-to-day life but, as amply exemplified in the literature, people's situations tend to change drastically once their land is targeted for a state project (Bennett and McDowell, 2012; Lindsay et al., 2017: 128; Alden Wily, 2018: 6). It is much easier and cheaper for state institutions to conduct an eviction of 'illegal occupants' without any formal rights than a long and expensive expropriation process. Even in those cases in which some compensation is given to those evicted, it is much easier to force 'illegal occupants' to take some compensation, cut their losses and move, than adequately expropriate formalized rights (Eerd and Banerjee, 2013). The issues caused by this lack of recognized land rights was visible in our research in Mozambique.

The 2004 Mozambican Constitution establishes a number of key principles regarding land rights that are regulated in further legislation. While the Constitution recognizes and protects the right to private property (art. 82.1), it also establishes that all land is owned by the state, and that land cannot be sold, mortgaged, or otherwise encumbered or alienated (art. 109.1 and 109.2). Moreover, the Constitution recognizes that the use of land as a means of production and social welfare is a right

⁹ In 2017, the Government of Mozambique reported that 14 % of the population had been affected by either droughts, floods or tropical storms in the last three decades (Government of Mozambique, 2017). The World Meteorological Organization estimates that the number of the most intense tropical cyclones will increase in the future, and that their impacts will be exacerbated due to further sea level rises (WMO, 2019: 2).

¹⁰ An analysis of the resettlement process can be found in Jacobs and Almeida (2020a).

¹¹ An earlier version of this legal analysis and the one in Section 3.2 were published in Jacobs and Almeida (2020b).

of every Mozambican (art. 109.3 and 110), and the occupation of land is, with some exceptions, recognized and protected (art. 111).

The Mozambican Land Law from 1997 (Law 19/1997) is the central piece of legislation regarding land rights in the country.¹² This law builds on the National Land Policy from 1995 (Resolution No 10/95) and is often cited in the literature as a positive result of an inclusive and careful law-making process (Tanner, 2002; Cabral and Norfolk, 2016: 26; Norfolk et al., 2020: 12). Moreover, a number of solutions adopted in this law for the recognition of land rights are pointed out by land specialists as innovative, flexible, and adapted to the needs of the country, which makes this law a model for other states (Norfolk and Tanner, 2007: 2; McAuslan, 2013: 74; LANDac, 2016: 1). In line with the Constitution, the law excludes any ownership rights over the *land itself*, centring its protection on *land use rights*, commonly known as DUATs ('right of land use and benefit' in its Portuguese acronym).¹³ One of the key features of this law is the recognition that it gives to customary-based land rights that de facto govern most land in the country (Norfolk and Tanner, 2007: 1).

Especially innovative is the way in which the law recognizes the DUATs; these rights can be requested by private parties, but are automatically recognized to national individuals and communities in case of customary-based occupation or more than ten years of good-faith occupation (art. 12; Serra, 2014: 568).¹⁴ In these two last cases the land use right is not limited in time, it is inheritable, and exists by itself, the law expressly says that 'the absence of title shall not prejudice the right of land use and benefit' (art. 13.2, 14.2, 15). This automatic acquisition of a DUAT, independent of any administrative process, is especially important because it automatically gives legal protection to those poor land occupants that tend to have limited legal awareness and resources to legally protect their land rights (Deininger, 2003: 171; Norfolk and Tanner, 2007: 2; Serra, 2014: 571; Cabral and Norfolk, 2016: 13; Norfolk et al., 2020: 10).

However, the Mozambican law has limitations and a number of pieces of legislation have been progressively undermining the innovative aspects of the Land Law (Norfolk and Tanner, 2007: 3; Knight, 2010: 136; McAuslan, 2013: 81). For instance, Decree 60/2006 on spatial planning establishes that 'the acquisition of the right of land use and benefit through occupancy in good faith is based on the rules established in articles 10–16, and as long as it is in line with the urban plan (.)' (art. 29, our emphasis).¹⁵ In practice it means that, for instance, urban slum dwellers cannot ever see their land use recognized by law, because informal settlements are not part of urban plans (see Shannon, 2019: 8).¹⁶ Without formal rights those affected are significantly more exposed to an eviction instead of an expropriation process where their rights are accounted for and properly compensated.

¹² This law is further regulated by, among others, Decree 66/98 that regulates the Land Law; and Ministerial Diploma 29-A/2000 that established the Technical Annex to the Land Law Regulation.

¹³ For national citizens this right is in practice very similar to an ownership right (Serra, 2014: 568).

¹⁴ Apart from public domain areas (art. 6, 7 and 8). Although the land use cannot be sold directly, investments made on land can be sold, bought, or mortgaged (art. 16).

¹⁵ Regarding other examples of the weakening of the Land Law provisions see for instance the change introduced to article 35 of Decree 66/98 that regulates the Land Law, debated in detail by Serra : 637 (2014).

¹⁶ A few provisions of this law mitigate the effects of this article (e.g., art. 24.4), but the initial provisions of the Land Law are nevertheless weakened. The constitutionality of these provisions could be challenged considering that the Mozambican constitution expressly recognizes and protects the occupation of land, but to our knowledge such a challenge has never been made (art. 111; see Serra, 2014: 637; Cabral and Norfolk, 2016: 17). However, article 36 of Decree 60/2006 was declared unconstitutional by Decision No. 4/CC/2016 for a few reasons, including the fact that it does not respect the lower hierarchical level of this norm regarding the Land Law.

We found a few examples of the limited recognition of land rights, and its impact on expropriation processes in Praia Nova, one of the many makeshift neighbourhoods of Beira heavily affected by cyclone Idai. The neighbourhood is located in the coastal area of the city, close to the city centre. Throughout the years the extensive sandy shore became covered with makeshift houses, both by fisherman that make use of quick access to the sea, but also other urban dwellers who depend on petty jobs available in the city centre. In the last years the sea came closer and closer to the houses due to coastal erosion and sea level rise. Some of the houses are now flooded daily during the high tide. When Cyclone Idai hit the city of Beira, the neighbourhood was completely flooded by the sea, and several houses were fully or partially destroyed by the force of the water and wind. In the aftermath of the cyclone, the recurrent problems of tidal flooding got even worse, and both residents and state authorities are acutely aware that the neighbourhood is one of the most exposed areas of the city to future disasters.

Building physical barriers to protect the neighbourhood would be extremely expensive and complex, so relocating the entire community from the area might be the only feasible way of protecting its inhabitants against future natural disasters. Expropriating land from private owners living in high-risk areas is one of the measures that more and more states are using to mitigate the impacts of climate change, as this approach removes people from the risky area and provides them with the financial means to find an adequate alternative.¹⁷ But such a solution will not work for those living in Praia Nova. Although residents have lived in this area for many years, by law they do not have any land rights, especially if the law is narrowly interpreted: those whose houses are now flooded daily by the sea are technically in a public domain area, and no urban plan foresees any of the houses there, so by law residents do not have a DUAT.¹⁸ This lack of legal rights was also visible in the widespread feeling we found – among both state officials and aid workers – that people in Praia Nova did not have formal land rights and should not be living in this dangerous area.

Some of the remaining residents in the neighbourhood told us a different side of the story. One couple that we met lived in a relatively solid and well-equipped house. They had been living in Praia Nova for twelve years (hence longer than the 10-year term for occupation in good faith) and they informally bought the plot of land on which they then constructed their own house, as their (informal) document from the neighbourhood secretary attested. At that time, the neighbourhood was not yet flooded daily and there were no impediments to settle. However, in the past four years they felt that the living conditions in the neighbourhood had deteriorated considerably, and since the cyclone they are keen to leave the area. With the government discouraging settlement in the neighbourhood, they are not able to find a buyer of their plot, nor would they receive any compensation from the government for their land and for their loss of livelihoods if they would leave. The lack of compensation for the land to be abandoned, coupled with the loss of livelihoods and the lack of alternative means of subsistence also prevented other dwellers in Praia Nova from leaving the area. When asked why they returned after the cyclone, several respondents would simply shrug their shoulders with a 'não temos como' ('we don't have another alternative').

To the best of our knowledge there is no plan to soon relocate those who chose to stay in Praia Nova, but if or when such a solution is put forward, the current legal framework puts them in the position of illegal occupants instead of people with legal rights to live in that area. This legal situation leaves them in a very weak position to be entitled to and

¹⁷ See, for instance, <https://www.nytimes.com/2020/08/26/climate/flooding-relocation-managed-retreat.html?action=click&module=Top%20Stories&pgtype=Homepage>

¹⁸ As argued above, the norms that limit the possibility of obtaining land use rights raise doubts regarding their constitutionality, but to our knowledge no court decision has ever ruled on such a matter.

negotiate compensations that can help them to re-establish their lives. As this case shows, expropriation only works if people's land rights are effectively recognized by law.

3.2. Expropriation process and administrative capacity

The second structural condition regarding expropriations relates to the substance of the law and the regulatory administrative capacity: Are the administrative processes well defined in law, and is there enough administrative capacity to execute these processes? Expropriation is by its own nature a complex administrative and/or judicial process that consists of various steps and involves multiple actors. Although the expropriation process varies from country to country, it normally includes steps such as the decision of a state entity to expropriate a right, the declaration of public interest of that expropriation, and the negotiation and calculation of compensation (Kotaka and Callies, 2002; Jung, 2017). Expropriation is also often preceded by steps such as public consultations, impact assessments, and a negotiation where the parties attempt to reach an agreement regarding the acquisition and its price, without the need to declare the public interest of compulsorily acquiring the right (Jung, 2017).

The need to have this complex process well detailed in law is not just a bureaucratic formality, but an important tool to guide administrative and judicial officers and to protect those being affected by an expropriation (see Fonseca, 2011: 12; Galani et al., 2016: 11; Lindsay et al., 2017: 143; Salomão, 2020: 257; Almeida, 2018: 110). First, the formalities of a clearly laid out expropriation can deter abuses of power of politicians and state officials (Somin, 2017: 58; Alden Wily, 2018: 27). For instance, the obligation of having a well-detailed declaration of public interest limits the uses that can be given to expropriated land and helps prevent abusive expropriations in favour of private parties. Second, the formalities of an expropriation process are also important to give people the opportunity to make their voices heard in the process and to challenge the value of compensation offered as well as the decision to expropriate. Finally, an adequate expropriation process also contributes to preventing rushed and centralized decisions about the project to be implemented and land to be expropriated, by demanding steps such as viability studies and the consideration of various alternatives to the project. Complex and expensive expropriation processes force politicians and state officials to consider alternatives to it. Yet, when designing their expropriation processes, states also must consider that, the more complex the process is, the more administrative and judicial capacity will be necessary to adequately implement it.

However, too often the expropriation process is only poorly detailed in national legal frameworks, and state institutions lack the administrative capacity to implement those processes, opening the door to arbitrary approaches to expropriation, to the detriment of those on the ground (Kim et al., 2017b: 301). While our research did not directly look at the capacity of Mozambican state institutions to implement expropriation processes, it assessed the legal framework and detected that the process for an adequate expropriation is not clearly described in the law.

The 2004 Constitution establishes that expropriation can only happen 'for reasons of public necessity, utility, or interest, as defined in the terms of the law, and subject to payment of fair compensation' (art. 82.2). A similar, but less detailed norm is also established by the Land Law (art. 18.1.a) and the Land Law Regulation, which establishes that the termination of a DUAT for a public purpose is equivalent to an expropriation (art. 19.3 of Decree 66/98). However, none of these pieces of legislation establish the process through which expropriation must be conducted, such as which state entities can start an expropriation process, how interested parties are involved in the process, or how compensation is negotiated.

There are a few specific cases in which the Mozambican legislation regulates the expropriation process further, but even in these cases important details are missing. For instance, Law 19/2007, together with Decree 23/2008 and Ministerial Decree 181/2010, regulate some

aspects of the expropriation process in the specific case of spatial planning. These pieces of legislation provide some details regarding the payment of compensation (art. 20.3 of Law 19/2007 and art. 70 of Decree 23/2008); establish the need for a declaration of public interest by the Government (art. 69); establish a few parameters for its definition (art. 68); and list a few steps for the expropriation process (art. 71). However, such provisions miss important steps of the process such as which preventive measures should be taken to minimize the impacts of expropriation, how and when holders of land rights are identified, and how they are consulted. Moreover, these rules are only applicable to spatial planning and do not take into consideration interventions such as the disaster response after cyclone Idoi.¹⁹

Law 15/2014 on Disaster Management, further regulated by Decree 7/2016, allows for the urgent acquisition of assets in case of disasters. Such acquisition is supposed to follow a process to be established by the Council of Ministers but, to the best of our knowledge, this process has not yet been approved (art. 18.1.e).²⁰ The law also explicitly states that any right affected by these measures must be compensated (art. 18.3), and establishes a general rule determining that rights affected by the provisions of this law, including rights with a customary basis, can be addressed by the courts and the courts should give them priority (art. 41). However, the details of the expropriation process are missing.

Some authors argue that, without general legislation on expropriation, the Portuguese colonial law remains applicable, specifically Law 2030 of 1948 (Trindade et al., 2015: 19).²¹ The application of the Portuguese law seems to be one legal path for expropriation of land, for instance in the case of resettlement of people affected by a natural disaster, if such resettlement is not part of any spatial plan, but it remains unclear which legislation is applicable in these cases. Nevertheless, even in the above-mentioned cases where some rules about the expropriation process exist, they are systematically ignored by state authorities (Centro Terra Viva, 2016: 11; Salomão, 2017: 165; Salomão, 2020: 258).

Surprisingly, the lack of a clear and consistent regulation of the expropriation process is almost not addressed in the literature on Mozambique. Several authors raise issues with forced displacement in the country (Milgroom and Spierenburg, 2008; Lillywhite et al., 2015; Shannon et al., 2018; Wiegink, 2020), and as highlighted by many, the topic of expropriation is convoluted with the common assumption that, because by law land is owned by the state, those using it are powerless against the state in case of dispossession (Norfolk and Tanner, 2007: 31; Osório and Silva, 2017; Salomão, 2020: 247). But there is almost no focus in the literature on the (lack of a) detailed formal process of expropriation.

As argued above, the problem is that, without a clear expropriation process to follow, state officials have enormous discretion in setting their own approach to expropriation, most often to the detriment of those on the ground. It was exactly informality and discretion that we found in our research in the new resettlement site of Mutua, created soon after Cyclone Idoi. Without a clear legal process for expropriating the land necessary for a disaster response, the process followed was mostly improvised, with negative impacts on the resettlement project and on those both served and affected by it. For instance, although safe areas for relocation had been identified by INGC prior to the relocation, no

¹⁹ Other pieces of legislation such as Decree 31/2012 on the Regulation for the Resettlement Process Resulting from Economic Activities (further regulated by Ministerial Decree 155/2014 and 156/2014), and Decree 34/2015 on the Regulation of Petroleum Activities are linked to expropriation but make almost no explicit reference to it.

²⁰ According to article 18.4 these measures can also be taken by decision of the Provincial Governor, but the article does not make any reference to the process to be adopted.

²¹ Which became partially applicable in Mozambique through Ordinance (Portaria) 14507 of 1953 and Decree 37758 of 1950. See also Law 2063 of 1953.

detailed studies about the viability of and alternatives to that solution were conducted prior to the decision to expropriate the land for the new resettlement. Moreover, although there were conversations from state officials with the long-term occupants of the resettlement sites, the consultation with them was far from satisfactory. Also, the conditions offered to those losing their land were highly unfavourable, but they nevertheless felt they had to accept them (see more detail below).

State officials we spoke with justified the approach taken for expropriation with the need to take quick action during the chaotic period after the cyclone. We were also told by a few interviewees that political pressure to address the problem of temporary settlements before the national elections was another factor rushing the (informal) process. While the argument of urgency is to a certain extent understandable, it ignores the fact that a good expropriation process also includes provisions for expropriation in case of emergency. In those situations – and only in those established in law – some steps of the expropriation process can be skipped or postponed to a later stage (e.g., a final calculation of the value of compensation). The difference is that, if conducted with a legal basis, the process can be fast without being arbitrary and the rights of those affected can still be protected. As time will tell, the rushed approach to expropriate land in Mutua to prevent a disaster might be the source of a new disaster in the future.

Having a well-structured expropriation process regulated by law is not, by itself, a guarantee of a fair expropriation for those on the ground. Besides needing also administrative capacity to implement the process, politicians and state officials often ignore the law or use it selectively. However, even when systematically disrespected, the law provides those affected by wrongdoings with a tool that can be used to fight for their rights (Almeida, 2020: 281).

3.3. Expropriation, formal legality, and due process

The third structural condition for fair expropriation is that there is formal legality and due process: that the state not only has a proper legal framework in place, but that this framework is also respected in practice (Bedner, 2010: 56; Lindsay et al., 2017: 129). This also entails that those affected by an expropriation have adequate access to legal mechanisms to challenge the wrongdoings committed during an expropriation. Our research in Mutua also showed us the problems with this structural condition.

Based on Mozambique's Constitution and Land Law described above, those using rural land customarily or for more than 10 years automatically have a land use right, without any need for a formal recognition, and that right can only be taken from them through an expropriation process, and upon the payment of adequate compensation. But this is not what happened in practice; the acquisition of their land rights was done through the informal approach described above.²² Even those who were against the process eventually agreed to give away the land to make space for more than 600 new households. A number of them were able to negotiate keeping parts of their land (as residential instead of agricultural plots), but no compensation was paid for the parts they lost. As we were told by a state official, in direct contradiction with the law, 'they don't have the paperwork, so they don't really have a land right'. In other words, the land right that people had by law and the obligation to conduct a formal expropriation were simply ignored by the state authorities.

Moreover, those affected by the expropriation had little chance of using the justice system to defend their rights. They were not provided with (independent) legal assistance, so they had very limited knowledge about their rights and obligations. Furthermore, when we asked one of the dispossessed rural farmers about the possibility of resorting to the courts to obtain compensation, he looked puzzled; the possibility of

²² According to a local leader, 60 families were using this land before the acquisition, mostly for agriculture.

using the courts against the state was for him a completely unknown reality. This is not surprising: weak legal knowledge and poor physical and financial access to courts are a common mark of the Mozambican justice system. In practice, the majority of Mozambicans resort to informal or semi-formal authorities with their justice concerns, as a wide range of authors show,²³ but they are much more powerless when their dispute is against the state. Therefore, without a viable way to challenge the wrongdoings of the administration in the process to obtain land, the rights of those affected by these wrongdoings cannot be enforced.

Finally, the example of Mutua exemplifies the point raised above regarding the intrinsic logic behind an expropriation process. If the land is acquired for the common good, the state must pay adequate compensation on the behalf of everyone. Otherwise, as it happened in Mutua, those whose land is expropriated without compensation are the main contributors to the common good, the cost of this common good is not shared by all. This logic is especially perverse when the poorest are the ones who, due to their weak tenure security, limited legal knowledge, lack of access to justice, and fragile economic situation, are more easily pushed by state authorities to accept these draconian deals. Moreover, as the following sections show, such a situation is likely to get worse in light of climate change.

4. Land expropriation and climate change

Why is climate change further complicating expropriations, beyond the structural conditions analysed above? This section again uses the case of Cyclone Idai to reflect on the following aspects: (1) The new debates about the limits of expropriation, (2) the increase in urgent expropriations, and (3) the growing exposure of the poorest people to expropriation processes.

4.1. New and more complex debates about the limits of expropriation

Climate change is making the debates about the limits of expropriation more complex. As mentioned above, one of the main debates about expropriation is how to determine in abstract which projects fulfil the concept of public purpose and, regarding each specific case, how to determine which cases fulfil this requisite in combination with principles such as necessity and proportionality. The debates about the limits of expropriation were already difficult, but the pace, and scale of climate change, in addition to the new challenges it causes raise new questions and tensions about this issue. For instance, can taking land from one community to relocate another group that lives in a dangerous area be considered a public purpose?²⁴ And what if, in a specific case, the relocated community is much wealthier than the host one?

In our fieldwork our respondents were mainly concerned with issues such as compensation, information about the resettlement process, and resettlement conditions. The limits of expropriation did not come across as an immediate point of contention. The fact that state-led displacement for various reasons has been a common practice in Mozambique might contribute to this less critical view on the limits of expropriation (Newitt, 1995; Milgroom and Spierenburg, 2008; Artur, 2011; Wiegink, 2020; Salomão, 2020). Nevertheless, this issue is relevant and will probably surface at some point. For instance, to which extent is it

²³ See, for instance, Open Society Foundation (2006), the contributions in the rich edited volume by Santos and Trindade (2003) and the edited volume by Kyed, Borges Coelho, Neves de Souto and Araujo (2012). Helpful overview articles on the Mozambican legal landscape are Santos (2006) and Meneses (2007).

²⁴ See, for instance, the debate about expropriation of land for nomadic groups in Nigeria (Ele, 2020).

acceptable to take farmland from rural farmers to relocate urban populations from other areas, as partially happened with the new settlement in Mutua?²⁵ And can the state use expropriation to remove the residents in Praia Nova, evoking their exposure to future natural disasters as a public purpose? And if so, which uses could the state give to that land in Praia Nova?

The answers to these questions are not straightforward and are ultimately dependent on the political debates around the topic, as well as on how those debates are converted into criteria that are set in law. As the examples above show, when the law does not clarify the limits of expropriation, or if the law is not applied in practice, the issue is left to the discretion of state officials, to the detriment of transparency and ultimately to the rights of those on the ground. If the new questions about the limits of expropriation caused by climate change are not adequately addressed, those on the ground will be further exposed to the arbitrary practices of state administrations.

4.2. More frequent cases of urgent expropriation

One of the consequences of climate change is the increased frequency and intensity of extreme weather events such as cyclones and floods (IPCC, 2014). Ideally the response to climate change should be timely and well-prepared, but, in the case of an imminent disaster and in the aftermath of sudden extreme weather events, access to land to resettle displaced people or to implement other relevant responses becomes a critical matter. In these situations, urgent expropriations – expropriations where the time for planning, consulting and negotiating the acquisition of land is reduced, and therefore parts of the process are simplified – are needed.

The case of Cyclone Idai showed once again how issues such as crowded temporary accommodation centres result in political and social pressure for the government to adopt quick solutions, and therefore urge state officials to rush through the expropriation process, with serious consequences in practice. These rushed expropriations are more likely to cause problems both to those affected by them and those who the expropriation intends to serve, for instance, by overlooking existing land rights; failing to adequately consult both those affected by and benefiting from the expropriation; forcing affected people to accept the values of compensation offered; and disregarding studies about viability and alternatives to the expropriation.

The pressure to rush expropriation and the effects of it were visible in the aftermath of Cyclone Idai. Although INGC had previously identified some possible relocation sites, they were not ready for the scale of the disaster. As we were told by state officials and humanitarian workers, the social and political pressure to quickly close the temporary emergency shelters pressed them to implement one-size-fits-all solutions like Mutua. As described above, preparatory studies were skipped, consultations with the beneficiaries of that expropriation were very limited, and humanitarian reasons were used to pressure people to give away their land without any compensation (Jacobs and Almeida, 2020a). While there is no guarantee that with more time the expropriation process would have been smoother, our fieldwork showed that this pressure to quickly obtain land played a role in the way the process was conducted.

Finally, the case of Cyclone Idai exemplifies how these rushed expropriation processes risk becoming more frequent. Only one month after Idai, Cyclone Kenneth fustigated the northern part of Mozambique, and in December 2019 and January 2020, less than one year after Idai,

²⁵ Furthermore, as identified by Nyantakyi-Frimpong, poor expropriation processes can hinder farmers' ability of self-adapting to climate change (Nyantakyi-Frimpong, 2020).

strong rains again flooded Beira. In each of these cases state officials had to again deal with the issues of creating temporary accommodation centres and of closing them to find more durable solutions.²⁶ Moreover, in the new resettlement areas the floods destroyed thousands of upgraded and emergency shelters, tents, and support structures such as latrines and water points (IOM DTM & CCCM, 2020), again highlighting the fragilities of the response to Cyclone Idai. In conclusion, climate change will result in more frequent rushed expropriation processes, and these rushed processes will have a stronger impact on the population affected and served by the expropriation.

4.3. Increased exposure of the poorest ones to expropriation

Climate change will further increase the exposure of the poorest people to the issues of expropriation.²⁷ It is already well established in the literature that the poorest people are disproportionately affected by climate change, as they live in areas more prone to disaster, and have less resources to take adaptive measures or simply move to other areas (Hellmuth et al., 2007; IPCC, 2014: 13; Hallegatte et al., 2016: 7, 93; Borderon et al., 2019).²⁸ Living in the areas more prone to be affected by climate change makes the poorest people more exposed to state interventions which, as demonstrated above, are often less than ideally conducted. For instance, as described above, the poor residents of Praia Nova are on the frontline of exposure to extreme weather events, and any intervention in the area would most probably involve expropriation, exposing them to the problems described above.

In connection with the previous point is also the fact that the poorest people tend to have less formalized rights over their properties and are more reluctant to - temporarily or seasonally- move as they are less certain that they will be able to reclaim their land upon return, or to find new livelihoods in the place of displacement (Bennett and McDowell, 2012; Hilton Prize Coalition, 2017). Moreover, in many countries the access of the poorest people to effective justice mechanisms is very limited, and their power to protest wrongdoings of the state regarding their land is more limited. These factors make the land of the poorest the easiest go-to option when the state needs land: such land is often easier to claim as state land because there are no formal rights to it; it is also easier to acquire cheaply, without due process and with less political, judicial, and social backlash. Therefore, the poorest people are more exposed to the problems of unregulated or illegal displacement by the state (Ocheje, 2007: 180; McDowell, 2013: 688; Alden Wily, 2018: 3).

The new resettlement area in Mutua is an illustrative example of this increased exposure of the poorest people. The low population density in the area, the weaker legal position of those using the land, the lack of capacity to demand a due expropriation process and adequate compensation, and the lack of capacity to create a political case out of the expropriation were factors that implicitly or explicitly influenced the government's decision to take that land.

In short, climate change is increasing the need for land. The poorest are being disproportionately affected by this need for land, both because they live in areas more prone to disasters and possible interventions, and because their land is often easier to obtain to implement measures such as the creation of new settlements.

5. Conclusions and recommendations

States across the world are looking for the best ways to reduce

²⁶ See <https://www.dw.com/pt-002/mo%C3%A7ambique-inunda%C3%A7%C3%B5es-amea%C3%A7am-mais-de-500-mil-pessoas-entre-outubro-%C3%A0-mar%C3%A7o/a-50423458>

²⁷ This is also valid for countries in the Global North. On the US see for instance Brown (2016): 273.

²⁸ They are also more exposed to other consequences such as diseases and health issues (Hellmuth et al., 2007; Hallegatte et al., 2016: 9).

disaster risks and to mitigate the impact of ongoing climate change. Most of their measures need land to be implemented and, if land is not under the control of the state, expropriation is the legal mechanism through which they can obtain it. But expropriations are often problematic for those on the ground and climate change brings new challenges to it. Considering that more access to land by states is needed due to climate change, and that the specificities of climate change are making expropriation even more difficult, this article argues that expropriation is one of the hidden dangers of the response to climate change.

Although much has been written about two key concepts of the expropriation process – public purpose and adequate expropriation – less has been said about the structural conditions that need to be in place to allow fair expropriations. Through the study of the response to Cyclone Idai in Mozambique, this article shows how a fair expropriation is dependent on a number of key structural factors, more specifically (1) effective legal recognition of land rights; (2) the importance of a well-detailed legal process for expropriation and the administrative capacity to implement it; and (3) formal legality and due process, including access to justice. Our research shows that, only when these three structural conditions are met is it possible to have consistently fair expropriations. Certainly, it is possible to find in the literature occasional exceptions where expropriation resulted in fair outcomes despite not meeting all these conditions. But without the constraints that these three structural conditions impose on politicians and state officials, it is only normal that they, more often than not, will follow the easier path of an arbitrary approach to expropriation.

Moreover, this article also shows how climate change is bringing new or at least more intensified problems regarding expropriation. Climate change response raises new questions about the limits of expropriation; sudden disasters make rushed processes of urgent expropriations more common; and adaptation measures disproportionately expose the poorest people to the risks of expropriation. The case of Mozambique works here as an example of our claims, but we believe that the same conclusions can be extrapolated to other cases. With such claims we do not want to advocate for one-size-fits-all approaches; we are acutely aware of the importance of understanding the local context and studying land issues through a multi-disciplinary approach (Almeida, 2020; Canfield, 2020: 4). But we believe that these general conclusions are relevant as a starting point for policy design and further research into the issues of expropriation.

In the specific case of Mozambique much can be done to improve the situation. The various pieces of legislation that have been progressively undermining the innovative and fairly protective rules of the Mozambican Land Law regarding the recognition of land rights can be repealed, so those residing in places like Praia Nova can be protected by law. The expropriation process can be unified into one single piece of legislation that clearly defines public purpose, regulates compensation, and details the various steps of the expropriation process and the powers of each relevant state entity. A new expropriation law should also include detailed regulation for urgent expropriations, establishing in which cases this exceptional process would be admissible and which steps of the process could be delayed or suppressed, while still guaranteeing the rights of those being expropriated. This would eliminate the excuses for informal and arbitrary land acquisitions such as the one experienced by the farmers of Mutua.²⁹ Finally, improving the compliance of state entities' procedures with the law and providing people with adequate legal aid in case of expropriation can avoid situations such as the ones described above, where the formal land rights of poor rural dwellers can be simply disregarded by state officials.

Improving expropriation processes, especially considering the new

²⁹ See here point 16 of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

challenges of climate change, is not an easy task. Comprehensive and protective expropriation processes need human and financial resources, and the trade-offs between the protection of people's rights, the costs of expropriation, and the collective interests at stake during an expropriation pose difficult dilemmas to politicians and state officials (Somini, 2017: 58). But, as highlighted by McDowell : 678) (2013), there is little evidence that states are aware of the implications that climate change will have on land expropriation. As we show in this paper, if the problems and dilemmas regarding expropriation are not acknowledged, studied, debated, and addressed it is likely that expropriation for climate change response will further weaken the living conditions of the poor. This is of relevance not only in Mozambique, but also in other countries across the globe where climate change – whether through sea level rise, or extreme weather events, such as excessive droughts or rains – may threaten people's lives and livelihoods, and where human acts contribute to the detrimental impacts of natural disasters.

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Data availability

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