

**Human Rights Council****Twenty-second session**

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****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, Raquel Rolnik***Summary*

The present report is submitted by the Special Rapporteur on adequate housing, in accordance with Human Rights Council resolution 15/8. In the report, the Special Rapporteur elaborates upon the concept of security of tenure as a component of the right to adequate housing. The backdrop is one of a global tenure insecurity crisis, manifesting itself in many forms and contexts—forced evictions, displacement resulting from development, natural disasters and conflicts and land grabbing—and evident in the millions of urban dwellers living under insecure tenure arrangements. The Special Rapporteur discusses existing guidance under international human rights law, raising questions regarding the precise State obligations with respect to ensuring security of tenure. She examines the wide range of existing tenure arrangements, and the prevalent focus in policy and practice on one form of tenure: individual freehold. The Special Rapporteur also discusses selected operational and policy challenges pertaining to securing tenure. She concludes by underscoring the need for more specific and comprehensive human rights and operational guidance on security of tenure.

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## I. Introduction: setting the context

### A. A global tenure insecurity crisis

1. We are in the grip of a global tenure insecurity crisis. Access to secure housing and land is a prerequisite for human dignity and an adequate standard of living, yet many millions of people live under the daily threat of eviction, or in an ambiguous situation where their tenure status can be challenged by authorities or private actors at any time.

2. The crisis manifests itself in many forms and contexts. Forced evictions are its most visible and egregious sign. Displacement resulting from development, natural disasters and conflicts, land grabbing, and the growing number of urban dwellers living under insecure tenure arrangements worldwide are further manifestations of the crisis.

3. In the absence of comprehensive global statistics on forced evictions, estimates by organizations of reported cases, as well as communications received by the mandate of the Special Rapporteur, confirm that forced evictions take place everywhere and affect millions of people annually. For instance, the Centre on Housing Rights and Evictions has estimated that between 1998 and 2008 forced evictions affected over 18 million people.<sup>1</sup> The adverse impacts of forced eviction are massive, increasing poverty and destroying communities, leaving millions in extremely vulnerable situations.

4. Many others are displaced due to development projects. According to one estimate, in the 2000s, such development projects affected 15 million people annually.<sup>2</sup> Preparations for mega-events are further sources of insecurity and forced evictions.<sup>3</sup>

5. Conflicts and natural disasters, including those exacerbated by climate change, also trigger displacement and can undermine security of tenure. Over 26 million people were internally displaced at the end of 2011 due to armed conflicts, violence or human rights violations, while nearly 15 million were displaced due to natural hazards.<sup>4</sup>

6. The political economy of land deeply influences processes of development, urbanization and housing. Land speculation, as well as large-scale acquisition of land in rural areas—often non-transparent and managed poorly—undermine tenure rights and local livelihoods.<sup>5</sup> Coupled with drought and other climate-related changes, such activities are major drivers of migration to cities, where adequate land and housing is often not available to newcomers, especially the poor. As a result, people settle in housing and settlements with

<sup>1</sup> Cited in United Nations Human Settlements Programme (UN-Habitat) and the Office of the United Nations High Commissioner for Human Rights, *Losing Your Home: Assessing the Impact of Eviction* (2011), p. 1. For other data and reported cases, see, for example, Habitat International Coalition–Housing and Land Rights Network, *Struggling against Impunity: The Annual Report of Findings from the HIC-HLRN Violation Database* (2012).

<sup>2</sup> M. Cernea, “IRR: an operational risks reduction model for population resettlement”, *Hydro Nepal: Journal of Water, Energy and Environment*, vol. 1, No. 1 (2007), p. 36.

<sup>3</sup> See A/HRC/13/20.

<sup>4</sup> Internal Displacement Monitoring Centre (IDMC), *Global Overview 2011: People Internally Displaced by Conflict and Violence* (Geneva, 2012), p. 8; IDMC, *Global Estimates 2011: People Displaced by Natural Hazard-induced Disasters* (Geneva, 2012), p. 4.

<sup>5</sup> See K. Deininger et al., *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* (World Bank, 2011).

insecure tenure arrangements. Unplanned and exclusionary urbanization has obvious impacts on tenure security.<sup>6</sup>

7. In addition, due to their increasing commodification, rural and urban lands have become highly contested assets, which has had dramatic consequences, particularly but not exclusively in emerging economies. The dynamics that accompany the liberalization of land markets are increasing the pressure of the market on urban low-income settlements, and this in a global context where resources for housing do not reach the lowest income groups. Communities are under threat of dispossession, their right to adequate housing, including tenure security, left unprotected.

## **B. Who is affected by tenure insecurity—measuring and assessing the extent of the problem**

8. Tenure insecurity is a global phenomenon. Yet, assessing the nature and scale of the problem is fraught with difficulties of definition as well as measurement, and precise data is not available.<sup>7</sup> This is because tenure security is partly a matter of perception and experience, highly dependent on political, economic and cultural context, as well as a legal issue.

9. Self-made and unplanned settlements, with precarious housing conditions, epitomize tenure insecurity in a very visible form. In many cities they now represent the largest single channel of land and housing supply for the majority of the population. Attempts to measure the scale of these settlements and their level of tenure insecurity have been problematic for the reasons just highlighted, and also because of the great diversity in settlements and tenure characteristics across countries and regions.

10. The United Nations Settlements Programme (UN-Habitat) provides data on “slums”, the word it has adopted to define such settlements. One UN-Habitat study estimated that 924 million people were living in slums in 2001;<sup>8</sup> an estimate for 2010 placed the number at about 828 million.<sup>9</sup> However, by 2010 tenure security was not taken into account in the UN-Habitat measurements of slums, hence the latter figure offers only a very small insight into the current extent of tenure insecurity in urban areas.<sup>10</sup> Similarly, the revised indicator for the Millennium Development Goal target of improving the lives of 100 million slum dwellers (7 (d)) does not include security of tenure.<sup>11</sup> While this particular target was reached, the question remains as to whether this result reflects the real situation of slums and informal settlements worldwide. Developing effective ways to measure tenure (in)security is an urgent imperative, including for the Millennium Development Goals and the United Nations development agenda beyond 2015.

<sup>6</sup> Expert projections show that by 2050, 67 per cent of the world’s population will be urban. Department of Economic and Social Affairs, *World Urbanization Prospects, the 2011 Revision* (2012).

<sup>7</sup> A few initiatives to measure tenure security are however under way. See, for example, R. Sietchiping et al., “Monitoring tenure security within the continuum of land rights: methods and practices”, paper prepared for the Annual World Bank Conference on Land and Poverty, Washington D.C., 23-26 April 2012.

<sup>8</sup> UN-Habitat, *Slums of the World: The Face of Urban Poverty in the New Millennium?* (2003), p. 24.

<sup>9</sup> UN-Habitat, *State of the World’s Cities 2010-2011: Bridging the Urban Divide* (2011), p. 33.

<sup>10</sup> Ibid.

<sup>11</sup> The revised indicator for the target is the proportion of the urban population living in slums (the original indicator was the proportion of households with access to secure tenure). *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations publication, Sales No. E.08.XIV.6) , p. 40.

11. Informal settlements are by no means the only example of tenure insecurity. In fact, a wide range of individuals and groups may be insecure:<sup>12</sup> refugees and internally displaced persons, affected by or under threat of conflicts, disasters and climate change; people on land set aside or affected by development projects; residents of informal settlements; occupants of valuable land; tenants with or without legal leases/titles, in informal settlements or formal contexts, in rural and urban areas; internal or international migrants; minorities; nomadic communities; groups affected by stigma or caste-based discrimination; the poor, landless, jobless and/or homeless; sharecroppers; bonded labourers; other marginalized groups, such as persons with disabilities or persons living with HIV; children; indigenous peoples; groups with customary land rights; and even individual property owners.

12. Among all these, women, who often have to depend on a man to gain access to housing and secure tenure, are particularly vulnerable. Single and older women, in particular, too often do not have the legal empowerment, education or financial resources to defend their tenure.

13. While no one appears fully protected from tenure insecurity, it is evident that the most marginalized and poorest bear the brunt of the insecurity burden.

### **C. Why security of tenure matters**

14. The Human Rights Council, in its resolution 15/8, requested the Special Rapporteur on adequate housing to identify best practices as well as challenges and obstacles to the full realization of the right to adequate housing, and identify protection gaps in that regard. As the above overview shows, a central challenge to the realization of the right to adequate housing is the lack of security of tenure.

15. Insecure tenure arguably annuls all other aspects of adequate housing—what is the point of having a well-insulated, affordable, culturally appropriate home, to cite only some aspects of adequate housing, if one is under daily threat of eviction? At the same time, any housing initiative, whether in the context of urban renewal, land management or development-related projects, or in dealing with reconstruction needs after conflicts or disasters, will inevitably have tenure security implications. In addition, the denial of access to secure land and housing has been a major cause of conflict throughout history. It is also a source of impoverishment and a hindrance to socioeconomic development.

16. Conversely, when access to secure housing or land is provided, the potential for social and economic progress is immense—a fact recognized globally.<sup>13</sup> Tenure security means a lot to families and individuals. It gives people certainty about what they can do with their land or home; and it offers them protection from encroachments by others. It often protects, increases and enables access to public services and benefits. It increases economic opportunities. It is a basis for women's economic empowerment and protection from violence. The relevance of the issue, not only to human rights but also to development, is evident.

<sup>12</sup> This list was developed at the expert group meeting in Geneva (see para. 18 below) and benefited from submissions from HelpAge ([www.helpageusa.org/older-womens-land-rights](http://www.helpageusa.org/older-womens-land-rights)) and Defend Council Housing.

<sup>13</sup> See the Istanbul Declaration on Human Settlements (1996), known as the Habitat Agenda, and the Global Campaign for Secure Tenure, launched in 1999 by UN-Habitat.

## D. The study on security of tenure

17. The Special Rapporteur has decided to dedicate much of her attention until the end of her mandate to the issue of security of tenure. The present report reflects the areas of research she commissioned in 2012 (some of which can be found in two research papers available from [www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx)). In section I, the Special Rapporteur described the broad context bearing upon tenure security and the crucial importance of the issue. In section II she maps the tenure systems and arrangements existing worldwide, as well as key policies and practices pertaining to tenure security. In section III, the Special Rapporteur assesses existing guidance under international human rights law as well as in national and regional legal frameworks and related case law and other global governance frameworks. In section IV, she highlights some of the key challenges that pertain to securing tenure, flagging areas for further research rather than offering definite answers to what are extremely complex issues.

18. The present report is also based on three consultations convened by the Special Rapporteur in 2012. In September, in Naples, the Special Rapporteur convened a consultation with 26 participants from housing, urban planning and human rights organizations. In October 2012, in Geneva, she convened an expert group meeting with another 26 participants, including experts in the areas of land management, urban planning and human rights law and litigation, and representatives of humanitarian action and community-based organizations. Also that month, the Special Rapporteur convened a public consultation in Geneva. The Special Rapporteur would like to thank the participants in the above consultations,<sup>14</sup> and other contributors, for the high quality of their inputs. The final text of the report remains the Special Rapporteur's sole responsibility.

19. Resources permitting, the Special Rapporteur intends to continue to explore some of the issues that emerged in her first year of research. She aims to submit a final report on security of tenure to the Human Rights Council in 2014.

## II. Mapping and framing tenure

### A. Definitions

20. Any discussion of land and housing tenure needs to recognize the importance of cultural, historical and political contexts, and the specific legal systems in place. The particular combination of these specificities results in subtle differences in the way key terms and relationships are defined.

21. "Tenure" comes from the French verb *tenir*, meaning "to hold". A definition that is commonly cited considers land tenure "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land".<sup>15</sup> This definition does not however reflect the realities of informal tenure systems, common in urban areas. The reasons may be that policy development on land tenure has its roots in rural contexts.

22. For the purpose of the present report, and to account for types of tenure in urban contexts, tenure is understood as the set of relationships with respect to housing and land, established through statutory law or customary, informal or hybrid arrangements.

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<sup>14</sup> The lists of participants for the consultations and the expert group meeting are available from [www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx).

<sup>15</sup> See, for example, Food and Agriculture Organization of the United Nations (FAO), "Land tenure and rural development", Land Tenure Series 3 (2002), para. 3.1.

23. Security of tenure is understood in the present report as tenure of land and/or housing which ensures a secure home and enables one to live in security, peace and dignity. While the report does not address land tenure other than as prerequisite for housing, it must be noted that issues pertaining to land—whether for housing or agriculture—are intimately linked.

## **B. Existing tenure systems and categories**

24. Land tenure systems and forms determine who can use and dispose of what land, housing or natural resources for how long and under what conditions. Attempts have been made to classify forms and systems of tenure in order to clarify existing arrangements.

25. First, it has been suggested that all categories of tenure exist within a number of primary tenure systems, namely: (a) statutory systems, established by law or statutes—they consist of two main types, private and public tenure systems, and can guarantee individual or collective rights; (b) customary systems, referring to the communal possession of rights to use and allocate land by a group sharing the same cultural identity or established by customs; (c) religious systems, whereby all or some land is owned and managed by religious authorities; and (d) informal tenure systems, most common in urban areas—these are often hybrid systems that have emerged in response to the difficulties of existing systems to cater for rapidly expanding cities and their urban land markets.<sup>16</sup>

26. Within each of these primary tenure systems, a number of tenure categories or forms exist. Several tenure categories may also co-exist on the same plot, a situation frequent in urban settlements. Some of the main categories include: individual freehold (ownership in perpetuity); delayed freehold (conditional ownership); registered leasehold (ownership for a specified period, from a few months to 999 years); public rental (rental occupation of publicly owned land or housing); private rental (rental of privately owned property); collective or communal ownership, including cooperative (ownership is vested in the cooperative or group of which residents are co-owners); community land trust (a non-profit organization develops and stewards affordable housing on behalf of a community); and customary ownership or use.<sup>17</sup>

27. These broad distinctions are used to clarify the nature of tenure, yet in most cases they simplify and do not fully reflect the complexity of situations on the ground. In many cases legal plurality exists, such as when statutory tenure categories are superimposed upon customary regimes. It might thus be useful to understand the issue as one of a spectrum of tenure arrangements and forms, with marked variations depending on context.

## **C. Understanding “informal settlements”**

28. The above distinctions have particularly obvious limitations when attempting to capture and reflect the diversity of arrangements in informal tenure systems, or in what is commonly termed “informal settlements”.

29. Informal settlements are self-made, spontaneous, self-managed and unplanned settlement and housing arrangements, initiated by urban poor themselves. They are generally characterized by precarious infrastructure and housing conditions. The term

<sup>16</sup> See Geoffrey Payne and Alain Durand-Lasserve, “Holding on: security of tenure—types, policies, practices and challenges”, available from [www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx).

<sup>17</sup> Ibid.

informal settlement has become common, but many other terms are used, such as “slums”, “bidonvilles” and “favelas”, among others.

30. The category of informal settlements includes diverse categories with varying degrees of formal recognition—in other words, with “ambiguous” or “hybrid” tenure status. They include regularized or unregularized use or occupancy of land and/or housing, on public, private or customary land, unauthorized subdivisions on legally owned land or housing, and various forms of rental arrangements, whether formalized in some manner or not.

31. There is debate about the most appropriate term to use in describing these diverse arrangements. For the purpose of the present report, the term informal settlements is used, recognizing its widespread use, while being sensitive to its shortcomings. Indeed, the term informal settlements is not only a major simplification, it also reflects a false dichotomy between the dominant paradigm of formality and the complexity of urban settlement processes (see section II, subsection E below). Furthermore, informal settlements, like other commonly used terms, has generally negative connotations. In addition, the inherent ambiguity in the status of these settlements has a number of political, operational and human rights implications. It generally results in the settlements not being recognized as belonging to the city. It often leads government authorities and private actors to consider the settlements or their inhabitants fully “illegal”, thereby justifying forced evictions or denial of rights.

#### **D. The primacy of individual freehold**

32. Despite the prevalence of a great variety of tenure systems and arrangements worldwide, in the past few decades, most models of urban planning, land management, development and legal regimes have centred around one particular form: individual freehold. This common fixation on freehold has been supported by the predominant economic doctrine of reliance on private property and market forces.

33. As a result, the financial sector and the private housing market, coupled with support for households to take on credit debt, became primary mechanisms for allocating housing solutions. Foreign assistance from international organizations greatly influenced the development of market-based housing finance and boosted housing market activity in developing countries. Despite some diversity in housing policy experience, most countries opted for promoting housing markets and individual homeownership, privatizing social housing programmes and deregulating housing finance markets. This was evident in most formerly planned economies, which in the 1990s privatized public housing on a large scale, leading to radical changes in tenure structure. In many of those countries, owner-occupied housing now constitutes more than 90 per cent of the housing stock (A/67/286, para. 6).

34. In developing countries, Governments were encouraged to undertake individual land titling programmes as a key means of not only increasing tenure security, but also of facilitating access to formal credit and reducing poverty. The underlying assumption was that secure tenure—understood as having proper titles—increased housing investment.<sup>18</sup> Also influential was the claim of a direct correlation between property ownership and

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<sup>18</sup> See World Bank, *Housing: Enabling Markets to Work* (1993).



affluence in the West and the lack of it in developing countries.<sup>19</sup> Consequently, home ownership rates worldwide have been generally climbing since the 1950s.<sup>20</sup>

35. This process has overshadowed other well-established forms of tenure. Government support of other forms was reduced, for instance for collective ownership or rental housing.<sup>21</sup> Furthermore, the prevalence of individual freehold over any other tenure arrangements has increased the tenure insecurity of all other forms of tenure.<sup>22</sup>

36. More recently, international institutions have become increasingly aware of the limitations of strategies based predominantly on the formalization of urban land markets and have recognized that there is a variety of tenure instruments that can be employed.<sup>23</sup> However this trend has not permeated all spheres of practice and policy. A number of agencies and governments still adhere to a preponderant focus on private property ownership, with debatable results.<sup>24</sup>

## E. The “continuum of land rights”

37. The above sections highlight the existing tensions in development and housing policy between recognizing the complexity and diversity of tenure arrangements worldwide, and promoting one single form—formalized, registered freehold—as the ideal model for secure tenure and socioeconomic development.

38. Such tensions are apparent in a model suggested originally by UN-Habitat and the Global Land Tool Network, and used by other agencies since,<sup>25</sup> called the “continuum of land rights”. While the continuum was intended to express the range and diversity of tenure situations, it is illustrated by a linear diagram, with an arrow going from left (informal land rights) to right (formal land rights).<sup>26</sup>

39. This linear diagram has several limitations. First, by placing individual freehold at the very end of the continuum (the most formal and secure form of tenure), it could be interpreted as reflecting the dominant economic and housing model discussed just above. It appears to suggest that registered individual freehold is an ideal type or ultimate goal, despite the fact that many other categories in other tenure systems offer equally high levels of security and legality. In fact, tenure categories reflect diverse social and economic contexts, and thus there can be no such ideal category—registered individual freehold—as the sole guarantee for secure tenure and route to economic development. Rather, it should be one option, among others.

<sup>19</sup> See Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

<sup>20</sup> See A/HRC/10/7 and A/67/286.

<sup>21</sup> For instance, in 1992 the Government of Mexico reformed article 27 of the Constitution, which had paved the way for the creation of a social property sector consisting of *ejidos* and agrarian communities, to allow for the privatization of social sector land. Willem Assies, “Land tenure and tenure regimes in Mexico: an overview”, *Journal of Agrarian Change*, vol. 8, No. 1, p. 33.

<sup>22</sup> See Geoffrey Payne, “Urban land tenure policy options: titles or rights?”, *Habitat International*, vol. 25, No. 3. See also International Union of Tenants, “Affordable rental housing for the young: facts and news”, available from [www.iut.nu/HabitatDay/2011/FactsNews\\_Daniela.pdf](http://www.iut.nu/HabitatDay/2011/FactsNews_Daniela.pdf).

<sup>23</sup> See, for example, Robert M. Buckley and Jerry Kalarickal, eds., *Thirty Years of World Bank Shelter Lending: What Have We Learned?* (World Bank, 2006), pp. 30-31.

<sup>24</sup> See, for example, A/HRC/22/46/Add.2.

<sup>25</sup> See, for example, German Agency for International Cooperation, “Securing land rights”, briefing note (2011).

<sup>26</sup> UN-Habitat and Global Land Tool Network, *Secure Land Rights for All* (2008), p. 8.

40. In addition, by addressing the issue in terms of informal and formal rights, the continuum diagram is reflective of a binary thinking that has permeated international development policy. It has been common to discuss land tenure and property rights in terms of some form of duality, such as that between statutory and customary tenure arrangements.<sup>27</sup> Another form of duality involved a distinction between legal and illegal, or formal and “informal” tenure categories, in which the former consisted of officially approved and registered property and the latter (all other tenure arrangements) were “extralegal”.

41. As discussed above, tenure categories are often partly formal, recognized or legal, creating shades and combinations of legality, formality and extralegality. The degree of tenure security provided by each of the tenure categories does not always correspond to formalistic or legalistic readings of existing arrangements; rather, it can vary depending on the socioeconomic and political context.

42. The importance of recognizing the diversity and multidimensional nature of existing practices is increasingly being acknowledged. In a recent publication, UN-Habitat and the Global Land Tool Network indicated that the continuum diagram illustrates a wide range of tenure rights “in a highly simplified way: in reality, tenure rights do not lie on a single line, and they may overlap with one another. Tenure can take a variety of forms, and ‘registered freehold’ (at the formal end of the continuum) should not be seen as the preferred or ultimate form of land rights, but as one of a number of appropriate and legitimate forms.”<sup>28</sup>

43. It is thus evident that forms of tenure should more accurately be placed in a multidimensional relationship to one another. And if there is a continuum, it should be seen as going from insecurity to security of tenure, not from informality to formality.

### **III. Security of tenure in international human rights law**

#### **A. Overview of relevant frameworks**

44. Security of tenure is recognized as a key component of the right to adequate housing under international human rights law. The Special Rapporteur conducted comprehensive research into the various sources of international human rights law, and especially the authoritative guidance and commentary of United Nations human rights mechanisms, in order to identify States’ obligations relating to security of tenure.

45. Regional and national case law, global governance frameworks relating to land tenure and human settlements, and selected national constitutional and legislative frameworks were examined in order to supplement an understanding of international human rights law and to assist in identifying potential gaps and challenges.

46. The most explicit and comprehensive discussion on security of tenure can be found in commentary and observations adopted by the Committee on Economic, Social and Cultural Rights. Other United Nations human rights mechanisms, like their regional and national counterparts, have focused overwhelmingly on preventing and providing redress for forced evictions, while giving only limited attention to other elements of security of tenure.

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<sup>27</sup> See, for example, World Resources Institute, in collaboration with the United Nations Development Programme et al., *World Resources Report: The Wealth of the Poor—Managing Ecosystems to Fight Poverty* (2005), pp. 60-61.

<sup>28</sup> UN-Habitat and Global Land Tool Network, *Handling Land: Innovative Tools for Land Governance and Secure Tenure* (2012), p. 12.

## B. Obligation to confer legal security of tenure

47. In its general comment No. 4 (1991) on the right to adequate housing, the Committee on Economic, Social and Cultural Rights identified “legal security of tenure” as one of seven elements of the right to adequate housing (para. 8 (a)). The Committee stressed that “notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups” (ibid.).

48. From this observation and the authoritative guidance of the Committee on Economic, Social and Cultural Rights and other United Nations human rights mechanisms, it appears that security of tenure must be “legal” or protected by law. Systematic reference can be found as to the provision of “adequate housing with legal security of tenure”, and to the importance of adopting adequate laws and regulations in this respect.<sup>29</sup>

49. The obligation to confer legal tenure security is due to everyone, irrespective of the type of tenure held. The question then arises as to what precisely the State obligations are under that general injunction. The Committee on Economic, Social and Cultural Rights notes that States should take immediate measures aimed at conferring security of tenure (see para. 49 above). This language, on its face, articulates an immediate obligation to ensure a minimum degree of tenure security to all (to prevent forced evictions).

50. States are also called upon to confer security of tenure to all those who lack it. This seems to imply that one focus of State action should be on the most disadvantaged and insecure. An examination of the authoritative guidance of United Nations mechanisms confirms that States must secure tenure particularly for the most disadvantaged and marginalized, such as low-income groups, informal settlers, and minorities.<sup>30</sup>

51. National and regional case law offers similar guidance. For instance, the Supreme Court of India has called upon the State to provide some security of tenure to marginalized groups, such as pavement dwellers, and the South African Constitutional Court and the European Court of Human Rights have addressed security of tenure and protection against eviction for the urban poor and inhabitants of informal settlements.<sup>31</sup>

52. The above questions, as well as others discussed in subsections C and D of the present section, could be discussed with respect to a number of situations, individuals and groups. One such group is inhabitants of informal settlements. Guidance so far has focused on protection against forced evictions. More broadly, what should States do to ensure that all inhabitants of informal settlements enjoy security of tenure, irrespective of their legal status under national law? What types of minimum measures, as well as measures of

<sup>29</sup> See, for example, the concluding observations of the Committee on Economic, Social and Cultural Rights on Trinidad and Tobago (E/C.12/1/ADD.80), para. 51; Ukraine (E/C.12/UKR/CO/5), para. 47; and Serbia and Montenegro (E/C.12/1/ADD.108), para. 57.

<sup>30</sup> See, for example, the concluding observations of the Committee on Economic, Social and Cultural Rights on Nicaragua (E/C.12/NIC/CO/4), para. 25; Dominican Republic (E/C.12/DOM/CO/3), para. 27; Philippines (E/C.12/PHL/CO/4), para. 29; Ukraine (E/C.12/UKR/CO/5), paras. 47-48; the former Yugoslav Republic of Macedonia (E/C.12/MKD/CO/1), paras. 41-44; and Serbia and Montenegro (E/C.12/1/ADD.108), para. 57.

<sup>31</sup> See Kate Tissington, *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (Socio-economic Rights Institute of South Africa, 2011); and European Court of Human Rights (ECHR), *Jordanova and others v. Bulgaria*, application No. 25446/06, judgment adopted on 3 April 2012.

progressive realization, should States take? Is there an obligation to give legal recognition to such settlements, and if so what are the implications for rights of tenure? Should any distinction be made under international human rights law as to whether these settlers are on public or private land (a distinction that is often accorded central importance in national law<sup>32</sup>)? And should the threshold of protection be higher in situations of long-established communities and historic acquiescence of the authorities to their presence?<sup>33</sup>

### C. Protection against forced eviction

53. As noted above, the Committee on Economic, Social and Cultural Rights has stressed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. The Commission on Human Rights, in its resolution 1993/77 (para. 3), similarly urged Governments to confer legal security of tenure on all persons currently threatened with forced eviction.

54. There is no doubt that forced eviction constitutes a gross violation of a wide range of internationally recognized human rights.<sup>34</sup> Providing protection against such practices is thus a core function of security of tenure. Forced evictions have been addressed by human rights mechanisms and courts at all levels in considerable detail. Extensive guidance is available as to the prohibition of forced eviction and the strict procedural safeguards that must be followed in situations in which evictions are carried out, including meaningful consultation with affected communities.<sup>35</sup>

55. Legislation against forced evictions is considered essential to a system of effective protection. According to the Committee on Economic, Social and Cultural Rights, such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out.<sup>36</sup> A number of countries have adopted legislation aimed at preventing forced evictions.<sup>37</sup>

56. Questions remain as to what types of measures should be taken to “provide the greatest possible security of tenure” to occupiers of houses and land. No explanation is given as to what could qualify as greatest possible security of tenure, or how this should be determined bearing in mind the diversity of national contexts. For instance, should principles of reasonableness<sup>38</sup> and proportionality be used to ascertain what level of security of tenure is appropriate in a given context? This question of a threshold of security of tenure has also attracted little attention from regional and national mechanisms and courts.

<sup>32</sup> This question should be explored against the complexity of intervening on private land in a context where national law guarantees the protection of private property.

<sup>33</sup> ECHR found that States have higher obligations of protection in such cases (*Yordanova and others v. Bulgaria*, para. 121). See similar reasoning in Human Rights Committee, communication No. 2073/2011, *Naidenova et al. v. Bulgaria*, Views adopted on 30 October 2012, paras. 14.6-14.7.

<sup>34</sup> Resolutions 1993/77 and 2004/28 of the Commission on Human Rights.

<sup>35</sup> See, for example, Committee on the Economic, Social and Cultural Rights general comment No. 7 (1997); and the basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I). See also jurisprudence by South Africa Constitutional Court, in Tissington, *A Resource Guide*.

<sup>36</sup> General comment No. 7, para. 9.

<sup>37</sup> See, for example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 (South Africa), and the Urban Development and Housing Act of 1992 (Philippines).

<sup>38</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 8, para. 4.

57. Further questions remain as to the exact circumstances under which evictions may be carried out, with a view to restricting their occurrence. According to the Committee on Economic, Social and Cultural Rights and as reiterated in the basic principles and guidelines on development-based evictions and displacement, evictions can take place only in the “most exceptional circumstances”.<sup>39</sup> Jurisprudence from national and regional bodies that has developed since this language was adopted could be used to more clearly define what the phrase “most exceptional circumstances” entails. For example, the “just and equitable” jurisprudence from South Africa as well as European Court of Human Rights jurisprudence regarding proportionality are highly pertinent in seeking to better understand this phrase and in identifying what constitutes a public purpose of the type that is often cited as reason to evict.<sup>40</sup>

#### **D. Recognizing and protecting a variety of tenure forms**

58. The Committee on Economic, Social and Cultural Rights has noted that tenure “takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property”.<sup>41</sup> Thus the Committee reflects the diversity of tenure arrangements worldwide.

59. In the same vein, the Governing Council of UN-Habitat, in its resolution 23/17, encouraged Governments and Habitat Agenda partners to promote security of tenure for all segments of society by recognizing and respecting a plurality of tenure systems (para. 7 (b)).<sup>42</sup> Similarly, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security<sup>43</sup> advise that States “should recognize and respect all legitimate tenure right holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not” (p. 3). The Special Rapporteur observes that the determinations of who may constitute “legitimate” right holders should be made in accordance with international human rights law.

60. Given that tenure can take a variety of forms and that States must ensure security of tenure to all, irrespective of tenure type, what are States’ obligations with respect to ensuring that all forms of tenure that are legitimate under international human rights law are protected equally? Guidance is incomplete in this regard. United Nations and regional human rights bodies have focused only on a limited range of forms of tenure—mostly private property, indigenous communal ownership or use, women’s access to land, property or inheritance, informal tenure (mostly in cases involving Roma), and occupancy tenancy rights (in countries that were previously part of the Socialist Federal Republic of Yugoslavia).

61. Other forms of tenure are barely discussed. For instance, collective tenure—other than that held by indigenous peoples—warrants further examination. It is also unclear what State obligations are with respect to tenancy. Should States adopt a framework of tenant

<sup>39</sup> General comment No. 4, para. 18. See also general comment No. 7, and A/HRC/4/18, annex I, para. 7.

<sup>40</sup> Prevention of Illegal Evictions Act (South Africa). ECHR, *Yordanova and others v. Bulgaria*, paras. 120-134.

<sup>41</sup> General comment No. 4, para. 8 (a).

<sup>42</sup> See A/66/8.

<sup>43</sup> Endorsed by the Committee on World Food Security at its 38th (Special) Session on 11 May 2012.

protection? How should tenants' rights be balanced with the rights of property owners?<sup>44</sup> What are the limits within which tenants' rights or the rights of holders of other forms of tenure can be ensured?

## E. Non-discrimination and security of tenure

62. International human rights mechanisms have discussed the particular tenure situation of some groups and individuals, such as Roma or women, but have offered little guidance with respect to other groups.<sup>45</sup> For instance, commentary in relation to the situation of internally displaced persons (IDPs) focuses only on a few issues (primarily housing or property restitution) and countries,<sup>46</sup> and would thus warrant further elaboration. Other groups whose tenure needs require clarification are asylum seekers and migrants.

63. While non-discrimination is relevant to all groups and individuals, and all grounds of non-discrimination are potentially relevant to tenure security, the Special Rapporteur focuses here on issues of non-discrimination on account of property status, location and socioeconomic status, which are less often discussed in the human rights framework.

64. The Committee on Economic, Social and Cultural Rights has stressed that discrimination on the grounds of property status or place of residence is prohibited under the International Covenant on Economic, Social and Cultural Rights. Property status includes those holding real property (for example land ownership or tenure) and those who lack it. The Committee further clarified that the exercise of Covenant rights, such as access to water or protection from forced eviction, should not be conditional on, or determined by, a person's current or former place of residence, or land tenure status, such as living in an informal settlement.<sup>47</sup> Furthermore, the Committee has noted that States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration.<sup>48</sup>

65. An examination of national legislation and case law reveals that different forms of security of tenure provide varying degrees of security, and that the variation is often a function of the property interests associated with each type of tenure as well as of socioeconomic status. For instance, those in informal settlements have minimal protections against eviction, while those with freehold tenure secured by title deeds are able to avail themselves of a far higher degree of protection. Furthermore, as United States expropriation case law demonstrates, even within an overall regime providing security of tenure, those with less economic status tend to enjoy a lesser degree of security of tenure in practice.<sup>49</sup>

<sup>44</sup> See, for example, Constitutional Court of South Africa, *Maphango and others v. Aengus Lifestyle Properties*, case CCT 57/11, [2012] ZACC 2, decision adopted on 13 March 2012.

<sup>45</sup> On Roma, see concluding observations cited in note 30. On women, see for example concluding observations of the Committee on the Elimination of Discrimination against Women on Côte d'Ivoire (CEDAW/C/CIV/CO/1-3), para. 42; Nepal (CEDAW/C/NPL/CO/4-5), paras. 11, 15-16, 43-44; Zimbabwe (CEDAW/C/ZMB/CO/5-6), paras. 35-38; and Ethiopia (CEDAW/C/ETH/CO/6-7), paras. 36-37, 40-41.

<sup>46</sup> See, for example, concluding observations of United Nations treaty bodies on Bosnia and Herzegovina (E/C.12/BIH/CO/1) and Croatia (CERD/C/HRV/CO/8 and CCPR/C/HRV/CO/2); as well as A/HRC/16/43/Add.1. See also the principles on housing and property restitution for refugees and displaced persons (E/CN.4/Sub.2/2005/17, annex).

<sup>47</sup> General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, paras. 25 and 34. See also general comment No. 15 (2003) on the right to water and general comment No. 4.

<sup>48</sup> General comment No. 4, para. 11.

<sup>49</sup> The Supreme Court of the United States found that expropriating low-cost owner-occupied housing to make way for private redevelopment was in the public interest as that development would create jobs

66. The issue of non-discrimination on account of property or socioeconomic status is evidently complex. While the Committee on Economic, Social and Cultural Rights has explicitly prohibited such discrimination, the precise modalities of addressing these aspects of non-discrimination are unclear. How can States ensure that all members of society, regardless of economic status or type of tenure arrangement, enjoy security of tenure on the basis of non-discrimination and equal protection of the law? This has massive implications for inhabitants of informal settlements.

## F. General remarks

67. The foregoing analysis demonstrates that a number of issues require further clarification under international human rights law. Treaty bodies, starting with the Committee on Economic, Social and Cultural Rights, have a particularly important role to play in efforts to provide more precise and comprehensive guidance with respect to security of tenure. National courts, aided by the use of strategic litigation, could provide another avenue to clarify aspects of security of tenure beyond preventing or seeking redress for forced evictions.

68. At a more fundamental level, the above issues may require a paradigm shift away from correlating security of tenure with a property rights regime and towards the grounding of security of tenure solidly in the human rights framework. Related to this is the need to protect the right to adequate housing when it comes into conflict with the right to property. For instance, in the case of *Modder East Squatters and Another v. Modderklip Boerdery (Pty) Ltd*, involving an informal settlement located on private land, the Supreme Court of South Africa reconciled this conflict of law by ordering the State authorities to compensate the owner of the land for the costs associated with its occupation by the informal settlement until such time as the State authorities could provide alternative land for the residents of that settlement, thereby recognizing the rights of the community to adequate housing and to protection against illegal eviction.<sup>50</sup> *Modderklip* demonstrates how individual property rights can interfere with, rather than enhance, tenure rights of others. It also demonstrates how such a conflict of rights can be reconciled. Such conflicts also take place between the rights of landlords and those of tenants.<sup>51</sup>

69. Finally, while the full elaboration of the scope of “security of tenure” as recognized in the framework of international human rights law presents a range of challenges that have yet to be adequately met, the Special Rapporteur nonetheless underscores that security of tenure should be understood as encompassing, at a minimum: (a) legal protection from forced eviction, harassment or other threats; (b) recognition—legally, by authorities, but also by private actors—of the right to live in a secure place in peace and dignity; this recognition includes receiving support from authorities and equal access to and availability of all public services; (c) justiciability—in other words, security of tenure must be enforceable; to make this criterion truly effective may require the provision of legal aid to facilitate access to effective remedies; and (d) any other aspect required as a step towards

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and pay higher real estate taxes. *Kelo et al. v. City of New London et al.*, opinion delivered on 23 June 2005.

<sup>50</sup> See Supreme Court of Appeals of South Africa, *Modder East Squatters and Another v. Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v. Modderklip Boerdery (Pty) Ltd*, case Nos. 187/03 and 213/03, judgement of 27 May 2004; upheld in Constitutional Court of South Africa, *The President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd*, case No. CCT20/04, judgement of 13 May 2005.

<sup>51</sup> See, for example, *Maphango and others v. Aengus Lifestyle Properties*.

the enjoyment of other components of the right to adequate housing, on an equal basis with others.

## IV. Selected challenges and entry points

70. In addition to gaps in existing human rights guidance, the Special Rapporteur notes a number of challenges at the operational and policy level in a number of sectors bearing upon security of tenure. In this section, she reviews a few existing challenges requiring further examination.

### A. Land governance and the political economy of land

71. Fundamentally, tenure insecurity is a political economy issue—the laws, institutions and decision-making processes relating to the access and use of housing and land are highly influenced by existing power structures within society. Thus it is increasingly recognized that land administration and urban planning cannot be considered purely technical matters. They can be manipulated to serve private interests, with major risks of exclusion and discrimination.<sup>52</sup> This is especially problematic when the rule of law is absent or out of reach of the poorest and most vulnerable.

72. A land governance and political economy perspective raises some important questions. Who benefits from the status quo and who is excluded? Who sets the agenda for land governance and land management reform? How are the benefits of reform distributed?<sup>53</sup> These questions cannot be ignored, especially not in a context of rising interest in land and conflicted legal pluralism.<sup>54</sup>

73. Increased global demand for land implies an increased need for land policies that ensure tenure rights and equal access to land. Efforts to promote secure tenure must go hand in hand with improving the overall governance of land and protecting human rights. This is precisely the rationale behind the voluntary guidelines on land tenure mentioned above.<sup>55</sup> Other guidance exists with regard to the governance of agricultural investments.<sup>56</sup> Yet no such safeguards are in place for urban and housing investments.

74. And while central and local authorities are primarily responsible to ensure that land and housing policies are respectful of the right to adequate housing, development and humanitarian agencies also have a significant role to play. Agencies must show due diligence to avoid being unwittingly complicit in human rights violations. In addition, urban developers, investors and national and international finance institutions may contribute to a more inclusive urban growth, but can also have an adverse impact on the rights of urban poor and other groups, and be complicit in forced evictions and land

<sup>52</sup> See The Inspection Panel, “Investigation Report—Cambodia: Land Management and Administration Project (Credit No. 3650 – KH)” (2010); A/HRC/22/46/Add.2.

<sup>53</sup> David Palmer, Szilard Fricska and Babette Wehrmann, “Towards improved land governance”, Land Tenure Working Paper 11 (FAO and UN-Habitat, 2009), p. 2.

<sup>54</sup> See Deininger et al., *Interest in Farmland* (note 5 above) and D. Adler and S. So, “Toward equity in development when the law is not the law: reflections on legal pluralism in practice”, in Brian Tamanaha, Caroline Sage and Michael Woolcock, eds., *Legal Pluralism and Development* (2012).

<sup>55</sup> See also Klaus Deininger, Harris Selod and Anthony Burns, *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector* (World Bank, 2012).

<sup>56</sup> See, for example, FAO, International Fund for Agricultural Development, United Nations Conference on Trade and Development and World Bank Group, “Principles for responsible agricultural investments that respect rights, livelihood and resources” (2010).



grabbing. Their particular impact on security of tenure should be assessed against the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex).

## B. Land management and administration

75. Land management and administration can have enormous positive impacts on solving land disputes and strengthening tenure security. However, prevalent land management and administration projects, by focusing on the granting of individual freehold titles to users or owners of non-contested plots, have often proven ill-suited to recognize all forms of tenure and in particular to protect the most vulnerable. This is particularly the case in urban contexts, where such programmes have on occasion unwittingly discriminated against or excluded urban poor.<sup>57</sup> Land management programmes might also unwittingly exclude IDPs.<sup>58</sup>

76. Titling is not just a matter of formalizing informal arrangements that already exist. Very often, contradictory claims of ownership arise following the announcements of titling programmes.<sup>59</sup> A related difficulty has been that titling of contested plots involves politically contentious decisions about the allocation of rights and thus is difficult to advance—this is often the case in informal settlements.<sup>60</sup>

77. At a more basic level, land titling is unlikely to address the global needs for increased tenure security within an adequate time frame. In many countries adjudication and registration of freehold land parcels at current rates could take well over a century.

## C. The role of public land

78. Public land remains one of the most important potential sources of land for housing the poor, yet there remain obstacles to using public land for such purposes. For instance, poor land governance, corruption in land administration and the tight relationship that exists between tenure status and land values encourages nepotism, corruption, clientelism and market-driven interests in public land allocation.

79. Legal dualism and ambiguity between the concepts of “public domain” and “State domain”, common in francophone Africa for instance, is blurring the boundary between alienable and unalienable land, to the benefit of government actors involved in land allocation. The lack of public land demarcation also allows for misuse.<sup>61</sup>

80. Legal regimes regulating the use of public land differ greatly in their flexibility or ability to make land secure or not. In many countries, the State can grant temporary and conditional permits to settle on public land, such as “temporary licenses” in Nigeria or “permits to occupy” in francophone Africa.<sup>62</sup> There is great diversity in the rights and level of security such permits offer. Such temporary allocations of public land offer needed housing with some security to those who occupy that land, in a context of scarcity of

<sup>57</sup> See, for example, Bridges Across Borders Southeast Asia et al., *Untitled: Tenure Insecurity and Inequality in the Cambodian Land Sector* (2009).

<sup>58</sup> In Côte d’Ivoire, land titling legislation makes it difficult for displaced persons to apply for recognition of their rights. See Internal Displacement Monitoring Centre, *Whose Land is This? Land Disputes and Forced Displacement in the Western Forest Area of Côte d’Ivoire* (2009).

<sup>59</sup> See Buckley and Kalarickal, *Thirty Years* (note 23 above), p. 29.

<sup>60</sup> See Adler and So, “Land governance”.

<sup>61</sup> See, for example, Inspection Panel Cambodia, “Investigation report”, p. xx.

<sup>62</sup> See A/HRC/22/67, case NGA 2/2012, Government response No. 397/2012.

urbanized land and housing. However, in cases of complete lack of alternative secure housing elsewhere, they can have detrimental effects, given the real threat of evictions with no or inadequate compensation and within an extremely short time frame.<sup>63</sup> The issue is how to manage land in ways in which these temporary rights-holders are not left vulnerable to forced eviction and abuse, and are able to gain increased tenure security in the long term.

81. Conversely, such temporary permits could be a first step towards increased tenure security.<sup>64</sup> For instance in Brazil, authorities can recognize, by way of leasehold rights to use and stay for an indefinite period, those individuals or communities who have settled on public land for at least five years—however these do not offer complete protection, as seen in the recent evictions of communities benefiting from such permits.<sup>65</sup>

## D. Urban planning

82. Urban planning policies, laws and regulations can have a direct impact on strengthening tenure security, or, conversely, on increasing insecurity. Planning rules that often disregard cultural specificities and are based solely on the housing products offered to the upper classes or dominant groups, coupled with rigid and costly regulatory frameworks for how land and housing should be developed, often fail to meet the needs of the poor or of marginalized groups, putting formalization out of their reach and rendering them or their homes de facto illegal.

83. Non-compliance with planning laws thus becomes a common justification for the evictions of long-established communities, often minorities or informal settlers. This has been the case in Israel, whereby non-issuance of construction permits often leads to irregular construction and, in some cases, to eviction and demolition orders to the detriment of minorities.<sup>66</sup> In Turkey, an urban rehabilitation project within the framework of a law regulating the protection and renovation of historical and cultural buildings led to the demolition of the historic Romani neighbourhood and the eviction of its inhabitants.<sup>67</sup>

84. Another issue is the lack of coherence and harmonization among the multiplicity of laws and regulations bearing upon urban security of tenure, leading to legal uncertainty, lack of implementation of key provisions, even unwanted impacts such as evictions.<sup>68</sup> Rights of adverse possession provided for by law might also be limited or denied by subsequent regulations, or in implementation.<sup>69</sup> In addition, even when planning laws provide for the regularization of informal settlements, questions of sustainability relating to the increase of land prices and full availability of services remain.<sup>70</sup>

<sup>63</sup> Ibid.

<sup>64</sup> Such as the Certificate of Comfort in Trinidad and Tobago.

<sup>65</sup> See the City Statute (Federal Law No. 10.257/2001); Provisional Measure No. 2220 (2001); A/HRC/22/67, case BRA 14/2012.

<sup>66</sup> A/HRC/22/46/Add.1, para. 24.

<sup>67</sup> A/HRC/10/7/Add.1, paras. 86-87. See also A/HRC/22/46/Add.2, paras. 39-40.

<sup>68</sup> See NALAS, *Challenges of Regularization of Informal Settlements in South East Europe: Overview of the Relevant Urban Planning and Legalization Laws and Practice* (2011).

<sup>69</sup> For example, in Bulgaria, the moratorium on adverse possession of public land preventing Roma from legalizing their homes (A/HRC/19/56/Add.2 and Corr.1, para. 88); in Cambodia, the eviction of urban poor with possession rights under the Land Law (see Bridges Across Borders Southeast Asia, *Untitled*); in Brazil, expropriation with inadequate compensation of regularized communities (A/HRC/22/67, case BRA 14/2012).

<sup>70</sup> Edesio Fernandes, "Informal settlements: What can South Africa learn from the Brazilian experience?", *Transformer*, vol. 18, No. 2, p. 30.

85. Some innovative planning regulations exist to secure tenure for the most marginalized.<sup>71</sup> A significant example is the Brazilian “Special Zones of Social Interest” (ZEIS).<sup>72</sup> ZEIS is a planning instrument, based on the constitutional recognition of the social function of property,<sup>73</sup> regulating the use and occupation, for social housing purposes, of public or private properties. It is used to recognize existing informal settlements as well as to define unoccupied areas of the city as areas for social housing.

86. Regulations on “inclusionary zoning”, which provide that any new city development must include “mixed types of housing”, including a minimum percentage for social housing, are another positive example. Several cities in Canada and the United States have adopted such measures, while they are also envisaged in planning legislations in Colombia, France and the United Kingdom of Great Britain and Northern Ireland.<sup>74</sup>

87. Finally, an issue relevant to any planning is the role of planning policies and related institutions in supporting initiatives by communities of the urban poor and community-driven upgrading.<sup>75</sup> In many countries, urban poor associations have been very successful in gaining access to secure housing and land. However, community initiatives without clear government support can be limited to areas that are not contested (for example, of low land value) while communities supported can be vulnerable to evictions.

## E. Recognizing and recording the diversity of tenure forms and rights

88. As mentioned in section II, development actors and Governments are increasingly moving towards more flexible and expansive ways of recording and recognizing tenure forms and tenure rights.<sup>76</sup> Tools and approaches are being developed and implemented to that end. They often build upon existing practices or rights,<sup>77</sup> and involve communities (such as participatory mapping).<sup>78</sup> There are also legal instruments to recognize or regularize tenure rights, such as “adverse possession” in common law systems or the similar concept of “*usucapiao*” in Brazil.<sup>79</sup>

89. Questions remain as to the minimum conditions that these approaches should fulfil to ensure security of tenure, what type of institutional arrangements are required for implementation, and whether such approaches can be replicated in diverse contexts and at scale. This is particularly relevant to those forms of tenure that have received less attention

<sup>71</sup> See, for example, UN-Habitat, *Global Report on Human Settlements 2009: Planning Sustainable Cities*. However, such initiatives are scarce.

<sup>72</sup> Federal Law No. 10.257/2001 (City Statute).

<sup>73</sup> Constitution of Brazil, art. 5 (23).

<sup>74</sup> See N. Calavita and A. Mallach, *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion, and Land Value Recapture* (Lincoln Institute of Land Policy, 2010); Maldonado Copello and María Mercedes, “Revisitar las tensiones en el proceso de aplicación de la Ley 388 de 1997”, *Fórum de direito urbano e ambiental*, vol. 9, No. 54.

<sup>75</sup> See, for example, the Déclaration d’engagement solidaire de Casablanca (Morocco, 2004).

<sup>76</sup> See para. 59 above.

<sup>77</sup> See Global Land Tool Network ([www.glttn.net/index.php/home](http://www.glttn.net/index.php/home)); Payne, “Urban land” (note 22 above); and Urban LandMark, *Incrementally Securing Tenure: An Approach for Informal Settlement Upgrading in South Africa* (2010).

<sup>78</sup> See UN-Habitat, *Count me in: Surveying for Tenure Security and Urban Land Management* (2010).

<sup>79</sup> Article 183, Constitution of Brazil. See also the State Lands (Regularisation of Tenure) Act No. 25 of 1998 (Trinidad and Tobago) and *Urban Poverty and Habitat Precariousness in the Caribbean* (United Nations publication, Sales No. S.04.II.G.43).

and support in research, policy and practice, such as community land trusts, collective tenure models and cooperative ownership.<sup>80</sup>

90. Other forms that had a demonstrated ability to ensure secure tenure in the past, such as tenancy, should also be given renewed attention. Tenancy rates have decreased in many countries, and so has the security associated with them, as seen in some European countries for instance.<sup>81</sup> In other countries, tenancy remains well-established,<sup>82</sup> and in some the role of rental housing is attracting renewed attention,<sup>83</sup> or being used in innovative ways to prevent homelessness.<sup>84</sup>

91. At a more fundamental level, there remains a tension between the obligation under international human rights law to confer security of tenure in law and approaches of de facto or administrative recognition.<sup>85</sup> A related question is whether a form of tenure can be secured if not recorded at all.

## F. Security of tenure in the aftermath of conflicts and disasters

92. Conflicts and natural disasters tend to exacerbate tenure insecurity for affected populations, in particular displaced persons, and heighten the risks of forced evictions.<sup>86</sup> Displacement resulting from conflict or disaster creates risks for forced evictions, confiscation, land grabs, abusive or fraudulent sale or occupation of land and housing.

93. In the aftermath of conflict or disaster, there is a real risk that existing discrimination on the basis of tenure status, gender or other grounds will be reinforced, thus preventing individuals from accessing aid, including temporary shelter and permanent housing with tenure security. The Special Rapporteur has highlighted the overemphasis placed on individual property owners and the associated difficulty to protect and support those with other forms of tenure, such as renters or those without formal documents over their land or housing. Women's equal access to security of tenure is another concern, in a context of discriminatory access to land or housing (see A/66/270).

94. In addition, disaster risk reduction and climate change adaptation legislation, and measures such as planned relocation,<sup>87</sup> natural hazard risk mapping and land zoning for residential housing, have been used to bypass eviction protections or may be phrased in a manner that could be misused to forcibly evict people.<sup>88</sup>

95. Progress has been made in recent years, with some humanitarian actors explicitly addressing issues of tenure for the most disadvantaged. For instance, several agencies have worked to record rights to housing and land at an early stage of displacement; to upgrade

<sup>80</sup> In Uruguay, the cooperative model has produced over 15,000 housing units. It has been replicated in other countries of Central and South America. See Arévalo et al., *El camino posible. Producción social del hábitat en América Latina* (2012).

<sup>81</sup> In the United Kingdom, life tenancy of "Council tenants" is now being reduced to five years (submission by Defend Council Housing UK, 12 November 2012).

<sup>82</sup> See Dan Andrews, Aida Caldera Sánchez and Asa Johansson, "Housing markets and structural policies in OECD countries", Organization for Economic Co-operation and Development Economics Department Working Papers No. 836 (2011).

<sup>83</sup> See <http://habitarargentina.blogspot.mx/2012/11/grupo-de-alquileres-segunda-reunion.html>.

<sup>84</sup> See the Homelessness etc. (Scotland) Act 2003.

<sup>85</sup> See, for example, Urban LandMark, *Incrementally Securing Tenure*.

<sup>86</sup> For more on these issues, see A/HRC/16/42 and A/66/270.

<sup>87</sup> See the Cancun Adaptation Framework (FCCC/CP/2010/7/Add.1, para. 14 (f)).

<sup>88</sup> See A/HRC/21/49, p. 51; South Africa Constitutional Court, *Pheko and 777 Others v. Ekurhuleni Metropolitan Municipality*, case CCT 19/11, [2011] ZACC 34, judgement of 6 December 2011.

and regularize IDP settlements;<sup>89</sup> and to support the most vulnerable through legal aid on housing, land and property issues, both in statutory and customary law contexts.<sup>90</sup>

96. Humanitarian actors and Governments addressing conflicts and natural disasters play an important role with respect to ensuring (or not) security of tenure. Temporary arrangements initiated or supported by humanitarian actors often have long-term impacts; the challenge is to ensure that these reinforce, rather than undermine, tenure security. Coordination between humanitarian and development actors is also essential to guarantee a coherent approach. The Special Rapporteur made recommendations in this regard in a previous report to the General Assembly (A/66/270). She believes those recommendations, together with work done by individual agencies,<sup>91</sup> could serve as basis for further operational and strategic guidance.

## V. Conclusion and recommendations

97. **Recognition and protection of security of tenure is one of the most compelling challenges of today's world and is fundamental to preventing the most egregious forms of eviction, displacement and homelessness. Furthermore, security of tenure, as the cornerstone of the right to adequate housing, is essential for human dignity and to sustain an adequate standard of living.**

98. **The Special Rapporteur has highlighted the complexity and multifaceted nature of security of tenure, both in practice and in law. While human rights mechanisms and courts at national, regional and international levels have primarily focused on forced evictions, policies and practices pertaining to land tenure have taken a fully different approach, with an emphasis at the start on securing tenure through land titling programmes, based on the granting of property rights. The past decade has seen some developments towards more flexible and encompassing approaches to recognize and protect various forms of tenure.**

99. **This evolution, from a narrow focus on property rights towards a more expansive recognition of diverse forms of tenure and rights—while still uneven and incomplete—is significant. There is a risk in relying on property rights as the means by which to best secure tenure. Rather, security of tenure should be clearly articulated and grounded in the international human rights framework and expressed in a variety of tenure forms.**

100. **An obvious need, confirmed by consultations with a wide range of stakeholders, is for more specific and comprehensive human rights guidance on security of tenure. As shown in section III above, existing legal and policy guidance is incomplete and sparse. Many questions remain as to the precise State obligations with respect to conferring legal security of tenure, and the scope and content of security of tenure under international human rights law. In this regard it must be emphasized, however, that people already have a right to security of tenure, as part of their human right to**

<sup>89</sup> See Filiep Decorte and Ombretta Tempra, “Improving living conditions in Bossaso, Somalia”, *Forced Migration Review*, No. 34 (2010).

<sup>90</sup> See, for example, Norwegian Refugee Council, *Housing, Land and Property Training Manual* (2011) and *Housing, Land and Property Handbook on Design and Implementation of Collaborative Dispute Resolution* (2011).

<sup>91</sup> For example, resolution 31IC/11/R7 on strengthening normative frameworks and addressing regulatory barriers concerning disaster mitigation, response and recover, adopted at the 31st International Conference of the Red Cross and Red Crescent.

adequate housing—what needs clarification is how this right can be recognized, protected and realized.

101. Much work remains to be done to harmonize law with practice—both fields have much to learn from each other. The ultimate objective is to ensure that legislation and a wide range of practices and policies are available and effective to recognize, record and protect all forms of tenure that are legitimate under international human rights law, on par with one another, and protect holders of those tenure rights equally.

102. The Special Rapporteur has addressed only some of the areas that present challenges, as well as opportunities, to truly and comprehensively ensure security of tenure, irrespective of tenure arrangements and without any discrimination. There are others. The Special Rapporteur looks forward to continuing discussions with a wide range of stakeholders on the priority areas that States, with the international community, should address, to make security of tenure a reality for all.

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