

**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**

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**DRAFT FOR CONSULTATION  
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**Recommendations on Security of Tenure for the Urban Poor**

**Introduction**

1. The Human Rights Council, in resolution 15/8, requested the Special Rapporteur to give emphasis to practical solutions with regard to implementation of the rights relevant to her mandate. In her first report to the Council on this subject,<sup>1</sup> the Special Rapporteur identified the tenure insecurity crisis as a central challenge to the realization of the right to adequate housing. In this second report, the Special Rapporteur offers recommendations to address urban tenure insecurity. In addition to the findings of her previous report, the recommendations are informed by 29 State responses to a questionnaire<sup>2</sup> and nine thematic and regional consultations.<sup>3</sup> The Special Rapporteur wishes to express her appreciation to all for their contributions.
2. In the last decade, States' obligations to respect, protect and fulfil the right to adequate housing have been elaborated. Most pertinently, the previous mandate holder, Miloon Kothari, presented to the Human Rights Council in 2007 the Basic Principles and Guidelines on Development-based Evictions and Displacement<sup>4</sup> and in 2012, member states agreed on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.<sup>5</sup> In the humanitarian context, in 2005 the Principles on Housing and Property Restitution for Refugees and Displaced Persons were developed.<sup>6</sup> The present work is intended to build upon these instruments, focusing in particular on urban tenure security in order to fill an important gap in human rights guidance.

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<sup>1</sup>A/HRC/22/46

<sup>2</sup>See responses at: <http://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx>

<sup>3</sup> See *ibid* for details.

<sup>4</sup>A/HRC/4/18, 2007 [hereinafter the 'Basic Principles on Eviction'].

<sup>5</sup> Endorsed by the Committee on World Food Security at its 38<sup>th</sup> (Special) Session in 2012.

<sup>6</sup>E/CN.4/Sub.2/2005/17, endorsed by the Sub-Commission on the Promotion and Protection of Human Rights in 2005.

## Purpose and Scope

3. The purpose of this work is to assist States and other actors in meeting their obligations to respect, protect and fulfil the right to adequate housing, and eliminate discrimination in this context, with particular emphasis on security of tenure of the urban poor.<sup>78</sup>
4. The executive, legislative and judicial branches of government at the national, regional, municipal and local levels all have an essential role to play in implementing these recommendations. Businesses, private individuals, and multilateral and bilateral development agencies also have roles and responsibilities. The urban poor themselves must play their part: communities should drive the process of strengthening their tenure security and be active agents in exercising the right to adequate housing. Global experience shows that the realization of the right depends as much upon the mobilization and advocacy of social movements as the concerted efforts of States.
5. While the focus of these recommendations is security of tenure, their effective implementation can provide a foundation for the greater enjoyment of other aspects of the right to adequate housing. These aspects include: the availability of services, materials, facilities, infrastructure, and natural and common resources; affordability; habitability; accessibility for disadvantaged groups; a safe location with access to employment options and facilities; and cultural appropriateness.<sup>9</sup> Security of tenure conferring land users a degree of confidence that they will not be deprived of their current arrangements without adequate safeguards enables them to invest in, improve and enjoy their housing and living conditions. Accordingly, secure tenure provides a foundation for the exercise and enjoyment of many other human rights. Conversely, insecure tenure impedes the enjoyment of other aspects of the right to adequate housing. When tenure insecurity manifests in forced eviction, retrogression in the enjoyment of all aspects of the right and many other human rights is experienced.<sup>10</sup>
6. For the purposes of these recommendations security of tenure is understood as an explicit or implicit agreement between persons and groups with respect to rights and interests in housing and land, established through statutory or customary law or informal or hybrid arrangements, that enables one to live in their home in security, peace and dignity.<sup>11</sup>

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<sup>7</sup> Article 2 and 11.1, International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>8</sup> With some adaptation, these recommendations are also applicable to rural areas.

<sup>9</sup> See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4; Basic Principles on Eviction, para. 55.

<sup>10</sup> See, J. du Plessis, *Losing Your Home: Assessing the Impact of Eviction*, UN-Habitat (2011).

<sup>11</sup> For further discussion on security of tenure and the global tenure insecurity crisis, see A/HRC/22/46.

7. These recommendations reflect and are consistent with international human rights law. They apply and give guidance on existing human rights standards as they pertain to housing and land tenure. Nothing in these recommendations should be read as limiting or undermining international human rights obligations of States or other actors.

## **General Principles**

8. States have an immediate obligation to ensure that all persons possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats and that provides a foundation for the progressive realization of all aspects of the right to adequate housing.
9. Security of tenure is not a one-size fits all concept. A variety of tenure forms and systems can ensure secure, efficient and sustainable access to land and housing in different contexts.
10. The social function of land and housing should be recognized and promoted in order to realize the right to adequate housing. The social function of land should not be undermined by its financial value.
11. Urban poor individuals and communities should organize and prepare to actively participate in measures to strengthen their tenure security and advocate for States to respect, protect and fulfil their right to adequate housing.
12. Fundamental human rights principles should be embedded in all measures to strengthen and protect security of tenure, including a) non-discrimination and equality; b) the obligation of progressive realization, making use of maximum available resources and abstaining from adopting deliberate retrogressive measures; c) and international assistance and cooperation; d) prioritizing the most vulnerable and marginalized; e) access to information; f) active, free and meaningful participation; and g) accountability.

## **Operational Guidance**

### **13. OPERATIONAL GUIDANCE ONE**

**Non-discrimination on the basis of tenure status must be guaranteed and protected in law, policy and practice. This guarantee must apply to all forms of tenure. Non-discrimination on the basis of tenure status must be guaranteed in the context of *inter alia*:**

- (a) Access to basic services and facilities;
- (b) Access to social security;

- (c) The collection and presentation of official data;**
- (d) Land administration programmes;**
- (e) Housing policies;**
- (f) Urban planning;**
- (g) Land acquisition and use for public purposes; and**
- (h) Access to shelter and other forms of humanitarian assistance.**

*Commentary*

14. The principle of non-discrimination is a pillar of international human rights law.<sup>12</sup> Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights.<sup>13</sup>
15. Property status and place of residence, including a settlement that is not legally recognized, are prohibited grounds of discrimination.<sup>14</sup> States must adopt deliberate, concrete and targeted measures to ensure that individuals and groups do not face discrimination on the basis of their tenure status in the exercise or enjoyment of their human rights. The prohibition on discrimination applies whether or not the tenure arrangements of an individual or group are recognized under law, and whether or not they possess documentary evidence of their tenure status.
16. *Access to basic services and facilities.* People without an officially recognized tenure status are often denied access to basic services and facilities.<sup>15</sup> In some situations, public and private service providers, including of water, sanitation and electricity, require the presentation of title as a prerequisite for connection or delivery. In other situations, access to social facilities, such as school enrolment, is conditional on a registered street address. The denial of access to basic services and facilities based on tenure status amounts to discrimination in the enjoyment of the right to adequate housing in conjunction with other human rights.
17. States should take measures to ensure that access to basic services and facilities, whether publicly or privately provided, is not dependent on tenure status, official registration of residence, or the presentation of title.
18. *Access to social security.* Social security is critical to guaranteeing human dignity and the enjoyment of human rights when people are faced with circumstances that

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<sup>12</sup>Article 2(2), ICESCR.

<sup>13</sup>See CESCR, General Comment No. 20, para 7.

<sup>14</sup>Ibid, para 34.

<sup>15</sup>S. Patel and C. Baptist, Editorial: Documenting the undocumented, *Environment and Urbanization*, 24:3, 2012. p.3.

- deprive them of their capacity to otherwise realize them.<sup>16</sup> Sometimes homeless persons or individuals without a registered address are unable to access social security either due to eligibility criteria or indirect bureaucratic obstacles.<sup>17</sup> These obstacles amount to discrimination on the basis of tenure status in the enjoyment of the rights to social security and adequate housing, as well as other rights consequentially impaired.
19. States should take all necessary steps to remove barriers faced by persons who are homeless or have an ambiguous tenure status in receiving social security, including by ensuring that a registered address and other residence requirements are not a *de jure* or *de facto* prerequisite to receiving benefits.
  20. *The collection of official data.* Individuals without legally recognized tenure, including people living in urban poor settlements, homeless persons and displaced persons, are often not covered in censuses and other official data collection. When their information is ignored in the collation and presentation of data, their lack of legal tenure status effectively denies them official recognition as members of society.<sup>18</sup> This exclusion exacerbates their invisibility in policy design in all sectors and affects budget allocations essential to the realization of their human rights.
  21. States should ensure that individuals with an ambiguous tenure status are counted and included in all official data collection processes.<sup>19</sup>
  22. *Land administration programmes, housing policies and urban planning.* Discrimination on the basis of tenure status is prevalent in the land, housing and urban policy sectors. Land administration programmes typically only register and secure ownership rights, while ignoring the multiple other existing tenure forms.<sup>20</sup> Housing policies commonly also promote individual freehold through benefits and support made conditional on home ownership.<sup>21</sup> Access to housing finance, for example, is often dependent upon homeownership or made easier for freehold owners.<sup>22</sup> Meanwhile, many urban planning processes are exclusionary and fail to take into account the spatial realities of urban poor communities, and the circumstances of people whose tenure arrangements are not legally recognized or

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<sup>16</sup> CESCR, General Comment No. 19, para. 1.

<sup>17</sup> CESCR, General Comment No. 20, para.29; No. 19, paras 4, 39 and 64.

<sup>18</sup> Sheela Patel and Carrie Baptist, Editorial: Documenting the undocumented, *Environment and Urbanization*, 24:3, 2012, p. 3

<sup>19</sup> See for example, the Uruguay 2011 census, which included disaggregated data on housing based on all forms of tenure, including owners, cooperatives, renters, occupiers and “without permission from owner”. (Uruguay response to questionnaire.)

<sup>20</sup> See, for example, Natalie Bugalski, A Human Rights Approach to Development of Cambodia’s Land Sector: A discussion Paper, Equitable Cambodia and Heinrich BöllStiftung, 2012, pp. 22-25 and 35-36.

<sup>21</sup> See, A/67/286 and A/68/30827. For a contrary example in Mexico City, where the Housing Improvement Program offers credit without discriminating on the basis of tenure status, see, <http://www.casayciudad.org.mx/publicaciones/PMVUNAEXP.pdf>

<sup>22</sup> See, A/67/286.

- documented.<sup>23</sup> Many exclusionary urban plans are designed only to benefit those with registered tenure arrangements, rendering invisible significant parts of the urban population. In turn, these exclusions impair the enjoyment of human rights by the urban poor on an equal footing with other sectors of the population
23. States should ensure that land administration, housing policies and urban plans protect, promote and secure a variety of tenure arrangements, prioritizing the most vulnerable and marginalized, in order to achieve substantive equality in the land and housing sectors (see operational guidance 2, 3 and 4).
24. *Land acquisition.* Land occupied by urban poor households with an ambiguous tenure status is disproportionately acquired and used by States for ‘public purpose’ projects, such as infrastructure development, requiring the eviction of residents.<sup>24</sup> Wealthier households with title are much less likely to have their land acquired by the State. This situation may amount to discrimination in the enjoyment of the right to adequate housing on the basis of tenure and economic status. In selecting sites for public purpose projects,<sup>25</sup> States should ensure that the urban poor are not disproportionately affected, and that all alternatives have been considered.
25. *Access to humanitarian assistance.* Tenure documentation, such as title, is in some cases a prerequisite to establishing eligibility for humanitarian assistance to ensure, for example, the sustainability of the assistance provided and avoid fraudulent tenure claims and future conflict.<sup>26</sup> However, often those most in need are displaced, landless and tenure insecure, and may not hold title or evidence of occupancy in their names, or may have lost their documentation during the conflict or disaster. Moreover, in many contexts, various forms of customary tenure, which do not rely on documentary evidence, are dominant and can provide a reliable basis for durable shelter assistance.
26. States, including donors, in cooperation with humanitarian actors, should ensure that all disaster and conflict affected persons, irrespective of their tenure status and without discrimination of any kind, have access to emergency shelter. A rapid assessment of the urban land tenure situation should be conducted, recognizing the multiple tenure arrangements that exist or existed prior to the conflict or disaster.<sup>27</sup> Non-documented evidence of tenure, such as testimonies from neighbours, should be collected and recognized during this process. The findings

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<sup>23</sup> Raquel Rolnik, *The City and the Law: Legislation, Policy and Urban Areas in the City of Sao Paulo*, Editora Nobel Studio, 1997.

<sup>24</sup> Richard Ballard, ‘Geographies of development: Without the poor,’ *Progress in Human Geography* 36(5) pp.563-572.

<sup>25</sup> Evictions are only permissible when they are, *inter alia*, undertaken solely for the purpose of promoting the general welfare, reasonable and proportionate, and carried out in accordance with international human rights law. Public purpose projects that result in eviction must meet these criteria. See Basic Principles on Eviction, para 21.

<sup>26</sup> UN Habitat, *Land and Natural Disasters: Guidance for Practitioners* (2010) pp. 64, 67, 75 and 80-81.

<sup>27</sup> See, *Ibid*, Chap 3.

of this assessment should be used to design measures to facilitate, and not inhibit, the delivery of housing recovery and reconstruction assistance to those in need, including through negotiation and mediation-based processes to resolve disputes. Measures should also be taken to provide access to adequate housing to those without evidence of tenure, such as people who were homeless prior to the conflict or disaster.

27. *Multiple discrimination.* Individuals or groups with an ambiguous tenure status often face discrimination on multiple grounds. For example, women commonly face discrimination in the exercise and enjoyment of their human rights both on the basis of gender and tenure status (see operational guidance 6). Migrants, refugees, displaced persons, and ethnic minorities face discrimination in securing tenure rights due to, *inter alia*, their nationality and ethnicity, and experience discriminatory treatment, such as denial of services, on intersecting grounds, including their tenure status. These groups often face marginalization by other members of the urban poor population and are thus particularly vulnerable. People with an ambiguous tenure status are often poor or living in poverty, and face compounded discrimination as a result.<sup>28</sup>
28. States should combat multiple discrimination in this context through concrete, deliberate and targeted measures tailored to the context and in consultation with marginalized groups. For example, legal and other information in relation to tenure and access to social services should be actively disseminated in all relevant languages and accessible formats, and legal and other support services should be made available to marginalized groups. All processes of community awareness raising and participation should ensure the active involvement of marginalized individuals.

## 29. OPERATIONAL GUIDANCE TWO

**States should promote, protect and strengthen a variety of tenure forms, including those deriving from customary, religious, statutory and hybrid tenure systems, through legislation, policies and programmes. All such laws, policies and programmes should be developed on the basis of human rights impact assessments, which identify and prioritize the tenure arrangements of the most vulnerable and marginalized. The following types of tenure, amongst others, should be promoted, strengthened and protected, as appropriate in the given context:**

- (a) Adverse possession;**
- (b) Use rights;**
- (c) Rental;**
- (d) Ownership; and**
- (e) Collective tenure arrangements.**

*Commentary*

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<sup>28</sup> See, CESCR, General Comment No. 20, para. 35.

30. The Committee on Economic, Social and Cultural Rights has affirmed that all persons should possess a degree of security of tenure, notwithstanding the type of tenure held.<sup>29</sup> States should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection.<sup>30</sup> These measures should provide legal protection in relation to a variety of tenure arrangements suitable for all population groups.
31. States should refrain from promoting freehold as the superior tenure form while dismantling support for other tenure arrangements. Policies and programmes that promote the primacy of freehold often exclude and undermine the tenure status of large segments of urban populations, particularly the poorest. They can discourage other tenure arrangements, despite the effectiveness of these alternatives in securing housing for the urban poor. Such policies could lead to retrogression in the enjoyment of the right to adequate housing.<sup>31</sup> Conversely, policies that promote and protect a diversity of tenure forms facilitate the realization of the right.
32. States should undertake human rights impact assessments of existing and proposed laws, policies or reforms that affect tenure, including in the housing, land and financial sectors. Impact assessments should examine the potential and actual effects on all existing tenure forms and the tenure security of groups that may be vulnerable to eviction, including economic eviction, taking into account the interplay of market forces. If risks of exacerbating tenure insecurity are identified, alternatives should be carefully considered or, as a last resort, sustainable mitigation measures should be proposed. Based on these assessments, States should take legislative and programmatic measures that enable and secure a diversity of tenure forms, with a priority on strengthening the arrangements of those facing insecurity and barriers to the full realization of their right to adequate housing.
33. The following types of tenure forms, amongst others, whether deriving from customary, religious,<sup>32</sup> statutory or hybrid<sup>33</sup> tenure systems, should be promoted, strengthened and protected, as appropriate in the given context:

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<sup>29</sup>CESCR, General Comment No. 4 (1991), para.8(a).

<sup>30</sup>Ibid.

<sup>31</sup> Any deliberative retrogressive measures must be fully justified by reference to the totality of human rights and in the context of the full use of the maximum available resources. (CESCR, General Comment No. 3 (1990), para. 9.)

<sup>32</sup> In many societies, customary and religious tenure systems play an important role in allocating land for housing and conferring tenure security with a high degree of social legitimacy. Since a diverse range of tenure forms exist under customary and religious systems that govern land allocation, use and management in different societies, some of which are akin to the forms of tenure described in this commentary, they are not discussed separately here, notwithstanding their special character.

<sup>33</sup> Hybrid tenure systems refer to a combination or intermingling of two or more tenure systems, including what is often referred to as “informal” or “extra-legal” tenure.

34. *Adverse possession.* The right of adverse possession or usucapio of land and housing that has been unused and unclaimed by its owner over a specified duration should be recognized in law. The legal recognition and protection of the rights of those occupying public or private land and housing for a prescribed period, above the rights of absentee owners or the State, is an important measure to ensure that land and housing is being used in the most socially productive manner and to fulfil the right to adequate housing for all. For example, the constitution of Brazil recognizes *usucapio* of urban land used for a family home as a right after five years of possession without interruption or opposition, provided that the possessor does not own any other urban or rural property.<sup>34</sup>
35. Administrative and judicial procedures for the conversion of adverse possession into ownership should be simple, prompt and affordable. Both individual and collective adverse possession should be recognized. Where owners have been forcibly displaced or forced to flee their homes, caution should be exercised to ensure that the right of adverse possession does not result in a violation of their right to return.
36. *Use rights.* The right of people to use public property, or property owned by a third party, for their housing needs under certain conditions should be recognized and protected in law and policy. Various instruments can be used to this effect; for example, in Trinidad and Tobago, Certificates of Comfort give the holders a personal right not to be removed from the plot unless resettlement is deemed necessary and an alternative plot is identified and made available. The certificate is therefore an assurance of somewhere to live, either on the spot occupied or on an identified alternative.<sup>35</sup>In Mozambique, a right to use and improve State land can be granted to individuals or collectives, which allows persons to mortgage or sell their buildings and other improvements on that land.<sup>36</sup>
37. *Rental.* Renting a plot, dwelling or room from a private owner or the State provides an accessible and flexible means of securing housing for many urban poor households.<sup>37</sup>Rental involves the right to use land and/or housing for a period of time at a given price, without transfer of ownership, on the basis of a written or verbal contract.
38. States should promote rental, including through policy measures to increase rental-housing stock.<sup>38</sup> Such measures include tax incentives to owners to rent out low-income units, guarantees or insurance schemes for non-payment of rent, and the provision of grants or low-interest loans to landlords to improve dilapidated

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<sup>34</sup>Article 183, Constitution of Brazil.

<sup>35</sup>G. Payne and A Durand-Lasserve, 'Holding On. Security of Tenure: Types, Policies, Practices and Challenges,' prepared for the Special Rapporteur on the Right to Adequate Housing, p. 62.

<sup>36</sup>Article 10-18, Land Law, 1997, Mozambique.

<sup>37</sup> See A/68/30827, 2012, paras 23-26.

<sup>38</sup> See A/68/30827 paras 29-31.

housing units on the condition that they rent to low-income tenants. An incentive program in New Jersey, United States, for example, provides grants to landlords to provide safe, suitable and affordable housing for low and moderate-income residents.<sup>39</sup> In Slovakia, subsidies are provided for the construction of rental apartments for low-income groups, including for socially excluded Roma communities.<sup>40</sup> Housing allowances for low-income tenants and flexible rent controls should also be considered as a means of promoting rental.<sup>41</sup> Non-market allocation of rental housing to low-income households, through public housing agencies or non-profit housing associations, is also an important means of increasing rental housing stock and promoting rental for the urban poor.<sup>42</sup>

39. States should adopt regulatory tenancy protections, including flexible restraints on rent increases and limits on eviction consistent with their international human rights obligation to protect against abuses by third parties.<sup>43</sup> These measures should balance the rights of tenants and landlords and encourage, rather than stifle, the provision of rental housing. For example, in Germany, where a majority of households rent, regulations place a cap on rent increases for sitting tenants and provide a high degree of tenure security, while maintaining the profitability of private investments in rental housing.<sup>44</sup> States should also encourage and support the use of standardized human rights-compliant rental contracts, which should be freely available and should not require notary approval.

40. *Freehold ownership.* Individual ownership confers full control over housing and land, subject to law and local regulations, as well as adverse possession rights and the State's expropriation powers. It is a suitable form of tenure for many households. Since ownership rights are generally expensive to acquire, housing finance is often necessary. The tenure security of owner-occupiers is jeopardized when they are unable to cope with loan repayments and default on their mortgages. Foreclosures by banks and other credit institutions in these circumstances pose a serious threat to the enjoyment of the right to adequate housing, with the poorest disproportionately affected. States should take regulatory and programmatic measures to prevent the loss of homes and homelessness as a result of foreclosures (see operational guidance 4) and to

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<sup>39</sup> The Landlord Incentives Program, introduced in June 2013. See, <http://www.nj.gov/governor/news/news/552013/approved/20130621b.html>

<sup>40</sup> Governed by Act No. 443/2010 Coll. Slovakia response to questionnaire.

<sup>41</sup> See discussion in A/68/30827 paras 32–33.

<sup>42</sup> See, for example social rental options in Austria (dwellings rented from regional and local governments, limited profit associations and cooperatives) and in the Netherlands (primarily housing associations) Kath Hulse, et al.(2011) *Secure occupancy in rental housing: conceptual foundations and comparative perspectives*, AHURI Final Report No. 170. Melbourne: Australian Housing and Urban Research Institute, p. 85.

<sup>43</sup> CESCR, General Comment No. 4, para 8(c) and 17; and General Comment No. 7, paras 9 and 11.

<sup>44</sup> Kath Hulse, op citp. 89, 122 and 213 - 215; and Dalia Fahmy, German Cities Plan Tighter Rent Controls to Curb Housing Boom, Bloomberg, 19 April 2013, <http://www.bloomberg.com/news/2013-04-19/german-cities-plan-tighter-rent-controls-to-curb-housing-boom.html>. See also A/68/30827 paras 34-38.

promote alternative forms of tenure that do not rely on household debt and housing finance systems.<sup>45</sup>

41. *Collective tenure*. Several types of collective tenure arrangements exist in which ownership, rental or use rights over land and housing are shared by members organized under various governance structures. Within these arrangements, the allocation of rights to individuals is dealt with according to rules established by the group or local custom. Collective arrangements can reduce the costs of securing housing by creating a single legal entity and diminishing the number of units to be surveyed and registered.<sup>46</sup> For example, in South Africa, the cost of tenure registration is reduced through group ownership by the creation of a single juristic person that takes transfer of the property.<sup>47</sup> Collective organization also promotes affordability by leveraging group resources to compete in the housing market and by enabling group loans and savings.<sup>48</sup> Collective tenure can also provide a high degree of security and safeguard against the threat of predatory purchasing by higher-income groups and speculators by vesting decision-making powers, including the right to sell, in the collective.

42. Collective tenure forms include:

- *Housing cooperatives*, which are established by a group of persons who form a legal entity to develop and maintain a housing project for the collective benefit of its members.<sup>49</sup> In countries including the Philippines, Uruguay and Sweden, innovative programmes support communities to acquire, develop and manage land for cooperative housing. In Uruguay, where there has been legislative recognition and regulation of cooperatives since 1968,<sup>50</sup> approximately 600 have been established, housing some 20,000 families.<sup>51</sup> The success of cooperatives as a provider of low-income housing has been largely due to active social organization through the Federation of Mutual Aid Housing Cooperatives, based on democratic participation, self-management and the joint effort of every family in the construction of all homes.<sup>52</sup> Municipal support is also crucial. The Buenos Aires Municipality, for example, has established a program that provides access to credit to housing cooperatives.<sup>53</sup>
- *Community land trusts (CLTs)*, which are non-profit organizations that acquire and hold a parcel of land in trust for the purpose of providing affordable housing through long-term lease of land plots or housing units to community

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<sup>45</sup>See A/67/286 and A/68/30827.

<sup>46</sup>Payne, op. cit, para 181.

<sup>47</sup>Ibid, para 180.

<sup>48</sup> See A/68/30827 paras 15 and 64.

<sup>49</sup> See A/68/30827 paras 48–55.

<sup>50</sup> The Housing Act (Law 13.728 of 1968, regulated by decree 633/69).

<sup>51</sup> See A/68/30827 para 50.

<sup>52</sup> World Habitat Awards, Uruguay, Winner 2012, <http://www.worldhabitatawards.org/winners-and-finalists/project-details.cfm?lang=00&TheProjectID=9DC73800-15C5-F4C0-99F350F027EC172E> See also, Uruguay response to questionnaire sent by the Special Rapporteur to Member States.

<sup>53</sup>*Programa de Auto gestión para el Desarrollo del Hábitat Popular*, created by Law 341 of Buenos Aires City.

members.<sup>54</sup> CLTs aim to remove land from the speculative real estate market, and thereby provide access to land and housing to low-income households, establish community control over resources and preserve affordability over the long term.<sup>55</sup> CLTs have increased in popularity since the 1980s, especially in the United States.<sup>56</sup> For example, the Cooper Square Community Land Trust in the Lower East Side neighbourhood of New York City encompasses 303 low-income housing units in multifamily buildings, owned and managed by a mutual housing association. Community and political organizing as well as support from local government, which drastically reduced land and financing costs, have been key to the CLT's success.<sup>57</sup>

43. States should adopt measures to promote collective forms of tenure, including by establishing supportive legislative and institutional frameworks<sup>58</sup> and ensuring that suitable financing instruments are available to associations. States should consider supporting and promoting collective tenure strategies for low-income housing through the allocation of public funds and well-located urban land, land tax exemptions and other tax benefits.<sup>59</sup>

#### **44. OPERATIONAL GUIDANCE THREE**

**States must recognize and secure existing tenure arrangements of those using land and housing to realize their right to adequate housing, without discrimination of any kind and with priority given to the most vulnerable and marginalized. States should take the following measures:**

- (a) Conduct citywide assessments of tenure arrangements and mapping of insecure settlements and population groups;**
- (b) Develop citywide strategies for securing tenure and upgrading settlements on different categories of land;**
- (c) Review and reform urban plans and regulations in order to integrate settlements;**
- (d) Adopt and implement a human rights-compliant resettlement policy to be applied where *in situ* solutions are not possible;**
- (e) Facilitate participatory settlement mapping, enumerations and tenure registration;**
- (f) Establish a fair and effective land dispute resolution mechanism;**

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<sup>54</sup>See A/68/30827 paras 56-62.

<sup>55</sup>D. Diakon, et al., *Redefining the Commons*. Coalville, UK, Building and Social Housing Foundation, 2005, p.55.

<sup>56</sup> According to the National Community Land Trust Network in the US, as at 2013, approximately 200 communities operate or are in the process of forming CLTs. <http://www.cltnetwork.org/About-CLTs/What-Are-Community-Land-Trusts>

<sup>57</sup> Tom Angotti (2007), *Community Land Trusts and Low-Income Multifamily Rental Housing: The Case of Cooper Square, New York City*, Lincoln Institute of Land Policy Working Paper, p. 3 and 5-7.

<sup>58</sup> See, for example, the Housing (Scotland) Act 2001, Part 6 on Establishment of Tenant Management Cooperative.

<sup>59</sup> See A/68/30827 paras 48-55.

**States should allocate funds to relevant ministries, municipalities and local governments for the implementation of these measures.**

*Commentary*

45. In the absence of formal affordable housing options, the urban poor increasingly find self-help tenure solutions to meet their needs. States should acknowledge these housing solutions and take steps to recognize and secure existing tenure arrangements for those households and communities currently lacking protection.
46. Citywide mapping of tenure typologies, including an assessment of the tenure categories that exist in practice and the degree of security they provide, should be conducted. Patterns of *de jure* and *de facto* discrimination, including against women, ethnic minorities, displaced persons and other groups with respect to secure tenure should be identified. The assessment should ascertain the underlying causes of tenure insecurity, such as inadequate or exclusionary urban planning, including zoning and building regulations; market forces; the political economy; or cultural and social factors. The mapping process should identify the settlements and groups throughout the urban and peri-urban area that lack tenure security and other aspects of adequate housing.
47. The assessments should be made public and presented in an accessible format to settlement residents for discussion and verification. They should inform the preparation of citywide strategies for securing tenure and upgrading settlements, with strong participation of residents themselves.<sup>60</sup> Strategies should address the distinct factors that arise in securing the tenure arrangements of people living on public or private land with a presumption in favour of *in situ* tenure solutions, unless residents prefer another settlement option.
48. States are obliged to make use of the maximum available resources in order to realize human rights. Public land is an essential resource available to the State to fulfil its obligation to realize the right to adequate housing. As such, unless exceptional circumstances exist, the tenure arrangements of households and communities residing on State land, with no other adequate housing option, should be legally secured *in situ*.
49. States should also facilitate *in situ* tenure solutions, wherever possible, for those people residing on property privately owned by a third party, where the inhabitants have no other adequate housing option. While the strategy employed will depend on the particular circumstances, options include:
- The recognition of adverse possession rights of the inhabitants on an individual or collective basis.
  - Rental of the property by the owner to the inhabitants, on an individual or collective basis, at affordable rates and with legal tenancy protections.

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<sup>60</sup> See for example, the Thai *Baan Mankong* (Secure Housing) National Collective Housing Program in Thailand Response to questionnaire.

- Sale of the property to the inhabitants, on an individual or collective basis, with State support where necessary.
  - Sale of the property to the State for the purposes of granting use, rental or other secure tenure rights to the inhabitants, on an individual or collective basis.
  - Land sharing that allocates sufficient land to the original owner and to the inhabitants.
  - State acquisition of the property without payment of compensation through, for example, absentee property laws, and reallocation to the inhabitants. Subject to national laws, this may be appropriate for land that has been neglected by the owner for a prolonged period, including by failure to pay property taxes. These laws must not be used to prevent the right of return for displaced persons.<sup>61</sup>
  - Expropriation of the property with payment of compensation and reallocation to the inhabitants. This option should be considered only as a last resort, given the high fiscal cost to the State, when voluntary measures have been unsuccessful and absentee property laws do not apply in the circumstances. There should also be a compelling justification for expropriation, such as when the landholding size is excessive and inequitable in the given urban setting.
50. States should review existing planning regulations in light of the information gathered through the citywide mapping process. Municipal authorities should reform urban plans to integrate settlements into city systems, facilities and infrastructure. The plan may, for example, designate low-income settlements as “special zones” within which building regulations are adapted to allow for incremental upgrading of settlements. For example, the City Statute of Brazil introduced the concept of Social Interest Special Zones, in which special regulations reflecting the reality of settlement configurations apply. The Special Zones allow settlements to be included in the official planning system and formally recognized as part of the city.<sup>62</sup>
51. The urban plan should incorporate a citywide strategy for any necessary resettlement, including through the identification of available, suitable and safe locations for resettlement sites to ensure access to livelihood opportunities, services and facilities. Resettlement is only permissible under international human rights law where it is assessed, in consultation with the community and subject to administrative and judicial review, that *in situ* upgrading is not viable due to exceptional circumstances and the absence of feasible alternatives to eviction.<sup>63</sup> In these cases, States satisfy their obligation to respect, protect and fulfil the right to adequate housing through a participatory and human rights compliant resettlement

<sup>61</sup>Principles on Housing and Property Restitution for Refugees and Displaced Persons, op. cit., principle 2.

<sup>62</sup>R. Rolnik, et al. Zonas Especiales de Interés Social (ZEIS) en ciudades brasileñas: Trayectoria reciente de implementación de un instrumento de política de suelo, presented at “Foro Latinoamericano sobre Instrumentos Notables de Intervención Urbana”, Quito, Ecuador, 2013

<sup>63</sup> See, Basic Principles on Eviction, paras.21 and 38-40.

- process. States should not resettle or authorize the resettlement of any household until it has adopted a resettlement policy that is fully consistent with their international human rights law obligations.<sup>64</sup>
52. States should work in partnership with settlement communities to recognize and secure their tenure arrangements (both *in situ* or in preparation for resettlement). States should facilitate people-driven settlement mapping and enumerations to gather settlement and household data, using both oral and written evidence.<sup>65</sup> Participation of residents is key to understanding local contexts and the design and successful implementation of tenure security projects. Residents and communities should organize themselves and, with independent technical support, actively participate in the planning and implementation of tenure security projects. States should encourage and enable community organization and mobilization, and ensure that no legal or political impediments exist to freedom of assembly and association.<sup>66</sup> Any community-level negotiation with the State on tenure options should only occur through representatives with a legitimate mandate from community members. All relevant actors should ensure that marginalized groups within the community meaningfully participate in these processes, as well as in decision-making on tenure options. The participation of such groups, including tenants, whose rights and interests are often ignored during such processes, should be actively supported.
53. Registering tenure rights in a land information system is usually an important step towards tenure security. However, consideration must be given to the impact of registration and full legal recognition of particular tenure forms on land and housing prices. States should support communities in choosing tenure options, such as cooperatives and CLTs, that safeguard against sudden increases in prices and counteract the risk that poor households will not be able to afford to continue residing in the settlement. Rental arrangements should be secured through recorded contracts that protect tenants from unmanageable rent hikes. Consideration should also be given to suitable secure tenure options that reflect the needs of households and communities with mobile livelihoods or lifestyles.
54. Settlement land information systems should be simple, affordable, accessible and transparent. People should have a reasonable opportunity to contest, clarify or query recorded tenure rights and arrangements through an appropriate process including public display of tenure maps. Unlike conventional cadastres, settlement land information systems should reflect varied and overlapping tenure rights - not only ownership - and the spatial realities that exist in urban settlements. For example, the Social Tenure Domain Model, developed by the Global Land Tenure Network (GLTN), enables the recording of multiple forms of

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<sup>64</sup>States' obligations with respect to evictions and resettlement are set out in CESCR, General Comment No. 7 (1997) and the Basic Principles on Eviction.

<sup>65</sup> See UN-Habitat and GLTN, Count me in: Surveying for tenure security and urban land management, 2010, [www.unhabitat.org/pmss/getElectronicVersion.aspx?nr=2975&alt=1](http://www.unhabitat.org/pmss/getElectronicVersion.aspx?nr=2975&alt=1)

<sup>66</sup>Articles 21 and 22 of the International Covenant on Civil and Political Rights.

individual and collective tenure, overlapping rights, and irregular spatial units in urban settlements.<sup>67</sup>

55. States, public utilities and private service providers, businesses and other actors should recognize and respect the tenure rights recorded in settlement land information systems. These information systems should be recognized as socially and legally legitimate, on an equal footing to established land cadastres and registries.
56. Professional technicians, including surveyors, planners and notaries, and the use of technology, such as satellite imagery and global positioning systems, should serve to facilitate and bolster the community mapping and tenure recording process, and not pose an obstacle to the establishment of accessible and affordable land administration systems.
57. States should establish or identify, in consultation with communities, a local dispute resolution mechanism, which is socially legitimate and culturally appropriate, to address any disputes that arise during these processes. The dispute resolution mechanism should be impartial, fair, competent, transparent and human rights-compatible, and States should ensure that it is affordable and accessible to all. Negotiation and mediation between parties to a dispute should be facilitated and encouraged wherever possible in order to promote mutually beneficial outcomes that secure the tenure rights of all parties. States should also ensure access to effective remedy for any human rights violations that occur during the implementation of these measures (see operational guidance 9).

**58. OPERATIONAL GUIDANCE FOUR:**

**States should promote the social function of land and housing in order to progressively realize the right to adequate housing and, in particular, to ensure access to well-located housing for the urban poor. States should take, *inter alia*, the following measures:**

- (a) Conduct citywide audits of vacant and underutilized land, housing and buildings and, in parallel;**
- (b) Conduct assessments of the spatial needs to house the urban poor, taking into account current and anticipated trends;**
- (c) Allocate available public land for the provision of low-income housing;**
- (d) Adopt measures to combat speculation and underutilization of private land, housing and buildings;**
- (e) Adopt inclusive urban planning processes and regulations;**
- (f) Adopt measures to regulate and stimulate the low-income rental market and collective forms of tenure; and**
- (g) Adopt measures to regulate the housing finance market and financial institutions.**

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<sup>67</sup>The Model has been used in two settlements in the municipality of Mbale under a joint project of GLTN, UN-Habitat, Slum Dwellers International and Uganda's Ministry of Land, Housing and Urban Development. See, <http://www.gltm.net/index.php/land-tools/social-tenure-domain-model-stdm>.

*Commentary*

59. The inability of the poor to access secure and well-located urban housing is often a direct result of policies that promote the commodification of land and housing to the detriment of its social function. Urban housing located near employment opportunities and good quality schools, health care services and other essential facilities is regarded primarily as a financial asset, and only secondarily as a social asset. The commodification of housing has had the effect of denying many urban poor households the enjoyment of the right to adequate housing and other human rights.
60. Policies that promote the social function of land aim to ensure that it is allocated, used and regulated in a manner that serves both individual and collective needs.<sup>68</sup> Limitations are placed on private property rights for the purpose of promoting social interests and the general welfare.<sup>69</sup> States inherently recognize the social function of land through, *inter alia*, the collection of property taxes, the exercise of their expropriation powers for the public good, adverse possession laws, and urban planning that designates spaces for public use and environmental protection. States should take further measures to ensure land is used optimally to give effect to its social function, including adequate housing of the urban poor.
61. *Audits of unused land and housing and assessments of housing needs.* An audit of unused and underutilized land, housing and buildings, both public and private, should be conducted concurrently with an assessment of the housing needs of the urban poor, including homeless persons, with the objective of matching availability with spatial needs. The assessment of current and anticipated housing needs should take into account trends in demographics, including patterns of urbanization, labour and other migration, population growth, and population age. In South Africa, for example, a court has ordered an audit of vacant and unused land plots in Cape Town that could be made available to accommodate people facing eviction.<sup>70</sup>
62. *Allocation of public land for the provision of housing.* States should utilize available serviced public land to meet current and anticipated housing needs of the urban poor, using suitable secure tenure arrangements (see operational

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<sup>68</sup>See, Leticia Osorio, "The Social Function of Property and the Human Right to Security of Tenure in Latin America," University of Essex, doctoral thesis, Mimeo: January 2013.

<sup>69</sup> See, for example article 10 of Law 14.449 of Buenos Aires Province (Argentina), which establishes the social function of property as one of the fundamental principles of all housing policies. According to article 11, property fulfills its social function when it is used according to laws, plans, projects and regulations pertaining to the production of housing and when used with the purpose of securing quality of life, maintaining a sustainable environment and achieving social justice.

<sup>70</sup>*Lyton Props and Robert Ross v Occupiers of isiQalo and City of Cape Town*, High Court of South Africa (Western cape High Court, Cape Town) 3 June 2013. See also, <http://www.seri-sa.org/index.php/19-litigation/case-entries/166-lyton-props-and-robert-ross-v-occupiers-of-isiqalo-and-city-of-cape-town-isiqalo>

- guidance 2). States may choose to provide adequate housing or ensure that the conditions exist to enable recipients to construct, rehabilitate or improve housing themselves.
63. *Measures to combat speculation and underutilization of private land and housing.* States should adopt a range of measures to curb property speculation and the underutilization of privately held land and housing. Tax liabilities on underutilized property can be progressively increased to discourage speculation and neglect.<sup>71</sup> Public authorities can be empowered to acquire rights in unused parcels for use for low-income housing. In Colombia, the Urban Reform Law establishes the Priority Development Declaration, under which owners of vacant land unwilling to put it back into use are compelled to sell. If the land is not sold at auction, the State can expropriate the land at 70 per cent of its tax-base value for social housing purposes.<sup>72</sup> The Netherlands has used an alternative scheme allowing local authorities to temporarily take over management of an empty property for social rental housing. Renovation of the property, paid for by the local authority, can be reimbursed through rental income, with both the tenant and owner benefiting from the rehabilitation.<sup>73</sup>
64. *Inclusive urban planning.* Inclusive urban planning is instrumental in promoting integrated communities and ensuring that well-located housing is available to the poor. Inclusionary zoning, for instance, requires that a proportion of neighbourhood property be allocated to low-income dwellings. Inclusive parcelling and development regulations require that a proportion of new housing developments is reserved for low-income housing. For example, in France, 25 per cent of all new housing developments in an urban area with a population of more than 50,000 must be allocated to social housing.<sup>74</sup> Inclusionary zoning programs exist in many other cities in Europe, as well as the US, Canada, Ireland, England, Scotland, Colombia, Chile, and the Maldives among other countries.<sup>75</sup> A ceiling on plot sizes in residential zones can also be an important tool to ensure inner-city land is available for low and moderate income housing.
65. Inclusive urban renewal can be facilitated by participatory land readjustment processes, through which communities jointly plan and redevelop their pooled land plots, for the purpose of improving infrastructure and services, and in some

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<sup>71</sup> Any such tax liability should not apply to property that is vacant because its owner has been forcibly displaced and is unable to return.

<sup>72</sup> 9<sup>th</sup> Law of 1989, modified by Law 388 of 1997. Colombia response to questionnaire.

<sup>73</sup> Empty Homes; Temporary Management, Lasting Solutions: A Consultation Paper, UK Office of the Deputy Prime Minister, London, May 2003, paras. 52 and 57 and Annex 5.

<sup>74</sup> Law No. 2013-61. France's response to questionnaire.

<sup>75</sup> See, NicoCalavita, et al. (eds), *Inclusionary Housing in International Perspective: Affordable Housing, Social Inclusion, and Land Value Recapture*, Lincoln Institute of Land Policy, Cambridge, 2010; and Questionnaire responses from Chile, the United Kingdom, France, Columbia, Maldives and Thailand.

cases densification of the area.<sup>76</sup> Fragmented land plots are assembled and then re-parcelled to achieve a better use of urban space.

66. *Measures to regulate financial markets and institutions.* The deregulation of financial markets, along with policies that have promoted homeownership and discouraged other forms of tenure, have had adverse impacts on many urban poor households.<sup>77</sup> Sub-prime loans and attendant payment defaults and foreclosures have led to increased tenure insecurity and evictions of the urban poor.<sup>78</sup> Financial institutions, including microcredit institutions, charge higher interest rates to the poor to mitigate the heightened risk of default. In some cases lenders have aggressively targeted low-income households or minorities for loans with exploitative terms, without clearly explaining the terms and conditions, and ignoring their ability to repay.<sup>79</sup> States should adopt legislative prohibitions on predatory lending practices and regulations to ensure that mortgage payments are commensurate with income levels and do not compromise the satisfaction of other basic needs. In the United States, for instance, financial reforms require that lenders determine and document whether the homeowner can afford the loan.<sup>80</sup> Regulations should also mandate the full disclosure and communication of loan terms to applicants in accessible formats and languages.
67. Regulatory safeguards should be put in place to protect households facing default and foreclosure, including prohibiting eviction until the household has access to alternative adequate housing. Some U.S. jurisdictions have passed regulations banning a servicer from proceeding to foreclosure without first establishing live contact with the homeowner and assisting them with loss mitigation options, or while a loss mitigation option is pending.<sup>81</sup> Even after foreclosure, a servicer cannot proceed to sale if the homeowner submits a loss mitigation application within a certain period.<sup>82</sup> In England and Wales there is a pre-action protocol for possession claims, which obliges lenders and borrowers to follow procedures aimed at ensuring that repossession is a last resort after all reasonable attempts to resolve the situation have failed.<sup>83</sup> In some jurisdictions, including the City of Richmond, California, U.S., municipalities have been empowered to purchase, at or below the market rate, mortgages of households that have defaulted or are at risk of default, and then rent the house to its residents or offer affordable

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<sup>76</sup> For example, see the Participatory and Inclusive Land Readjustment Approach (PiLaR) of UN-Habitat (<http://www.unhabitat.org/content.asp?cid=12137&catid=5&typeid=6&AllContent=1>)

<sup>77</sup> See A/67/286 and A/68/30827.

<sup>78</sup> See, for example, A/HRC/13/20Add.4 paras. 47-48.

<sup>79</sup> Elvin K. Wyly, et al. (2006), *American Home: Predatory Mortgage capital and Neighborhood Spaces of Race and Class Exploitation in the United States*, *Swedish Society for Anthropology and Geography*, 88B, pp. 105–132.

<sup>80</sup> Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) § 1411, to be codified at 15 U.S.C. § 1639C.

<sup>81</sup> Conf. California Foreclosure Reduction Act, commonly referred to as the Homeowner Bill of Rights (HBOR), passed in 2012..

<sup>82</sup> *Ibid.*

<sup>83</sup> UK Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property. [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_mha](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha)

refinancing options.<sup>84</sup> Under schemes that allow for the expropriation of mortgages when the bank does not agree to sell the loan for less than its current value, financial institutions are made to bear a proportion of the risk of their lending. A decree-law in Andalucía, Spain allows the government to expropriate empty residences that have been repossessed by banks and developers in order to house families who have lost their homes.<sup>85</sup>

## 68. OPERATIONAL GUIDANCE FIVE

**States must not undermine security of tenure through regulations aimed at protecting public health and safety or the environment. *In situ* solutions should be found whenever it is possible to: (a) mitigate and manage risks of disaster and threats to public health and safety; or (b) balance environmental protection and security of tenure; except when inhabitants choose to exercise their right to resettlement.**

### *Commentary*

69. There are legitimate circumstances in which resettlement in a manner consistent with international human rights law may be appropriate to protect the health and safety of inhabitants at risk of exposure to natural disasters or environmental hazards, or to preserve critical urban environmental resources.<sup>86</sup> However, the misuse of regulations aimed at protecting public health and safety or the environment to unduly justify eviction of poor households in the absence of genuine risk, or when other options are available, is contrary to international human rights law.<sup>87</sup>
70. Where a genuine risk to health and safety or the environment exists, prior to any decision to evict being made, States must explore all feasible alternatives to eviction in consultation with affected persons.<sup>88</sup> Specifically, States should use the technical resources at their disposal, including through international assistance, to explore all feasible *in situ* alternatives to mitigate and manage risks to health and safety or the environment, regardless of the tenure status and housing standards of inhabitants. Feasible *in situ* solutions should be adopted unless the inhabitants prefer to be resettled to alternative housing that satisfies all criteria of adequacy.<sup>89</sup>

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<sup>84</sup> See, [http://www.nytimes.com/2013/07/30/business/in-a-shift- eminent-domain-saves-homes.html?hp&\\_r=1&](http://www.nytimes.com/2013/07/30/business/in-a-shift- eminent-domain-saves-homes.html?hp&_r=1&) and <https://www.coc.org/rbw/why-everybody-should-be-talking-about-san-bernardino-july-2012>

<sup>85</sup> Decree-Law 6/2013 of 09 of April of 2013 of the Comunidad Autónoma de Andalucía and Ley Foral 24/2013 of 02 of July of Navarra. Under the decree, lenders receive two percent of the value of the property each year and can recover legal possession after three years.

<sup>86</sup> See, Basic Principles on Eviction, para 21.

<sup>87</sup> Ibid, paras 21 and 38-40; and CESCR, General Comments No. 4 (1991), para 18; No. 7 (1997), para 13.

<sup>88</sup> Ibid.

<sup>89</sup> See, Basic Principles on Eviction, para 16; CESCR, General Comment No. 4 (1991), para. 8.

71. Precarious housing structures in hazard prone areas, such as along fault lines, steep slopes or river banks should be prioritized for incremental upgrading that benefits the current inhabitants, whenever feasible. States should explore technical options, such as the construction of embankments and retaining walls, to transform the area into a safe location for housing. For example, a participatory project in the Lower Lempa River Valley in El Salvador led to a range of proposals to address the flooding hazards to inhabitants, including construction of safer houses with relocation of people living in particularly hazardous areas, improved woodland management as a natural buffer to floods, and a risk management and early-warning system.<sup>90</sup> States should raise awareness amongst inhabitants of hazardous areas and support them to improve their own living environment and build safer houses.<sup>91</sup>
72. Where habitations pose risks to environmental resources, such as parks, coastlines, rivers, lakes and wetlands, States should explore options that both protect the environment and the tenure security of inhabitants. For example, participatory land readjustment allocating sufficient areas to parks and to low-income housing can balance two legitimate demands on limited urban space. Incremental upgrading of settlements along water bodies, including improved sanitation and waste disposal services, can address both environmental and housing concerns. The local government of Surabaya in Indonesia has taken successive measures over several decades to balance security of tenure with environmental interests.<sup>92</sup> Under the *Prokasih* (Clean River) Programme, established in 1989, the government provided sanitation facilities to people living along the Kali Mas River, planted trees along the riverbank, and successfully encouraged community-based systems for regular river cleaning.<sup>93</sup>
73. All potentially affected persons have the right to information about possible *in situ* solutions to risks to health and safety or the environment, and should be afforded opportunities for active participation in the process of exploring alternatives and decision-making. Any decision to resettle households should be subject to judicial review.
74. States should review all disaster, public health and safety, and environmental protection legislation and regulations to ensure they do not undermine security of tenure and are consistent with international human rights law.

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<sup>90</sup>See, A. Lavell, 'The Lower Lempa River Valley, El Salvador: From Risk to Sustainability. Experience with a Risk Reduction and Development Project', in G. Bankoff, et al. (eds), *Mapping Vulnerability: Disasters, Development and People* (Earthscan, 2003).

<sup>91</sup> See, IFRC (2011), Participatory Approach for Safer Shelter Awareness.

<http://www.ifrc.org/PageFiles/95526/publications/305400-PASSA%20manual-EN-LR.pdf>

<sup>92</sup> World Habitat Awards, Winners and Finalists, the Kampung Improvement Programme, Surabaya, 1992, (<http://worldhabitatawards.org/winners-and-finalists/project-details.cfm?lang=00&theProjectID=117>)

<sup>93</sup> Happy Santosa, 'Environmental management in Surabaya with reference to National Agenda 21 and the social safety net programme', *Environment & Urbanization*, Vol. 12, No. 2, 2000, p. 181.

## 75. OPERATIONAL GUIDANCE SIX

**States must promote, strengthen and protect women’s security of tenure, regardless of their age, marital, civil or social status, and independent of their relationships with male household or community members, with the aim of achieving *de jure* and *de facto* gender equality in the enjoyment of the right to adequate housing.**

### *Commentary*

76. Gender discrimination remains prevalent under all types of land tenure systems. Patriarchal laws, attitudes and customs dominate the governance of land in many societies. The privatization and financialization of land and housing has, in some cases, further marginalized women and reduced their tenure security.<sup>94</sup>
77. States should legally guarantee the right of women to security of tenure, independent of their relationships with males or community members. States should adopt legislative and administrative measures to prohibit and eliminate discrimination against women in this respect by, *inter alia*, landlords, public housing providers and credit institutions. States should identify and remove barriers to formal and substantive gender equality whether in laws, policies or programmes affecting tenure. The legal recognition and promotion of diverse tenure arrangements is crucial to removing barriers to tenure security for women, since, presently, they are much less likely than men to own land.<sup>95</sup>
78. States should adopt measures to strengthen women’s security of tenure during the registration of tenure rights. Legislative provisions and administrative practices authorizing only heads of household to sign tenure documentation should be repealed and abolished. The registration of tenure rights in joint or multiple names should be promoted as standard procedure. For example, in Tajikistan, law reform in 2004 made it mandatory to list all family members on land use certificates when families receive plots of land from former collective farms.<sup>96</sup> Practical measures should also be adopted such as requiring men and women to be present throughout the registration process, during which all documentation should be read aloud and explained in accessible language, and by providing space on documentation for recording multiple household or community members. Under Ethiopia’s land certification program, for example, certificates are issued jointly with photos of both husband and wife.<sup>97</sup> Training local authorities involved in tenure registration is critical, given the cultural barriers women face in exercising their rights. Incentives can also be used to promote registration of tenure rights in

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<sup>94</sup>See A/HRC/19/53.

<sup>95</sup>According to the International Center for Research on Women, just one percent of the world’s women actually own land. <http://www.icrw.org/what-we-do/property-rights>.

<sup>96</sup>Article 15(a), Law on Amending the Land Code, Republic of Tajikistan, 2004.

<sup>97</sup><http://go.worldbank.org/NGH3VV93Y0>

the name of women. For example, in 2006, Nepal introduced a partial tax exemption for plots of land registered to women.<sup>98</sup> The cost of registration of tenure rights should not be prohibitive to female-headed households.

79. In relation to customary tenure systems, States should adopt measures, in consultation with communities, and with due respect for the rights of indigenous peoples, to eliminate discriminatory practices that deny women security of tenure. Efforts should be made to engage and cooperate with community leaders in designing and implementing such measures. Support should be given to reform initiatives by women. In Vanuatu's Erromango Island, women have challenged custom and successfully claimed land rights in the absence of male heirs.<sup>99</sup>
80. Similarly, measures should be taken, in consultation with communities, and with due respect for religious freedoms, to eliminate discrimination against women in the enjoyment of the right to adequate housing where such discrimination exists in religious tenure systems.
81. States should take measures to protect the tenure security of women and girls in the case of the death of a spouse, father, brother, son or other male household member so that they are able to continue residing in the family home. States should also take measures to address the vulnerability of women and children to tenure insecurity due to a breakdown of spousal relations, including as a result of domestic violence. Women and children's security of tenure should be prioritized in these circumstances. For example, in Serbia, the Family Law authorizes the courts to issue an order for the removal of the perpetrator of domestic violence from the family home, and to allow the victim to remain in the home, regardless of ownership.<sup>100</sup> When remaining in the family home is not feasible, the States should ensure women and children have access to alternative adequate housing with secure tenure.
82. In humanitarian settings, women and children are particularly vulnerable to tenure insecurity, homelessness and other human rights violations. States should ensure as a priority the provision of safe emergency shelter to women and children until durable housing solutions are in place. States should ensure that women are able to access humanitarian assistance and exercise their right to return, restitution and resettlement regardless of their family status or whether their name is recorded on tenure documentation.

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<sup>98</sup>UNWomen (2011), *In Pursuit of Justice: 2011-2012 Progress of the World's Women*, p.22, <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>

<sup>99</sup>OHCHR, *Handbook on Effective Strategies to Realize Women's Rights to Land and Other Productive resources*, Geneva, 2013, p.? to be published.

<sup>100</sup>Article 198(2) of the Family Law of the Republic of Serbia, 2005.

### 83. OPERATIONAL GUIDANCE SEVEN

**Business enterprises should take all possible steps to ensure there are no adverse impacts on security of tenure as a result of or in connection with their activities, investments or business dealings. Businesses should act promptly to address any adverse impacts on security of tenure that occur, including by taking all possible steps to ensure that affected persons receive an effective remedy.**

#### *Commentary*

84. While States bear the principal obligation under international human rights law, including the obligation to protect against abuses by third parties, other actors including business enterprises also have human rights responsibilities.<sup>101</sup>
85. The responsibility to respect the right to adequate housing requires that businesses avoid causing or contributing to infringements of the right, including security of tenure, and address adverse impacts when they occur.<sup>102</sup> It also requires that businesses seek to prevent adverse impacts on, *inter alia*, security of tenure, that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>103</sup>
86. As part of their responsibility to carry out human rights due diligence,<sup>104</sup> businesses should assess on a regular basis their impact, and the impact of their business relationships, on tenure security, paying special attention to those people who may be at heightened risk of vulnerability.<sup>105</sup> Businesses should engage independent experts on security of tenure in relevant countries or contexts, and meaningfully consult any potentially affected groups and other stakeholders. Businesses should respond to any information made available to it alleging potential or actual adverse impacts on tenure security by investigating the validity of the allegations.
87. If potential adverse impacts are identified, businesses should take all possible steps to avoid and prevent these impacts. Avoidance measures may include abandoning or ceasing a proposed or active operation, investment or business relationship. For example, a proposed business venture, including an investment in another entity, that would foreseeably result in forced eviction should be abandoned or adapted so that human rights violations will not occur. Prevention

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<sup>101</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, endorsed by the Human Rights Council in resolution 17/4, 16 June 2011.

<sup>102</sup> Ibid, 13(a).

<sup>103</sup> Ibid, 13(b).

<sup>104</sup> Ibid, 17(b).

<sup>105</sup> See, Ibid, 17 and 21.

measures include applying appropriate safeguards to ensure that security of tenure is not undermined. Such safeguards include, *inter alia*, full disclosure of information, in accessible forms, about how planned activities will affect the area and people's housing and land tenure; and transparent, free and fair negotiations regarding any interference with or transfers of tenure rights, whether or not they are recognized under law, with full respect for the right of affected people to accept or reject any offer made by the business. Businesses should communicate through an appropriate channel with potentially affected groups and other relevant stakeholders in order to explain the risks and to consult on proposed prevention strategies.

88. When, despite due diligence, adverse impacts on security of tenure or other violations of the right to adequate housing occur, the business should immediately take all possible steps, by itself or in cooperation with other actors, to ensure effective remedy. The business should immediately communicate with persons or groups affected with the aim of achieving remediation. The steps to be taken will depend upon the nature of the violation; the nature and degree of the involvement of the business in the activity that caused or contributed to the violation; and the extent of its leverage. When people have been forcibly evicted or displaced, remedy should include return of the land, housing and resources to the victims and compensation for any losses. When return of the land and housing is impossible, for instance because it has been destroyed, or when the business is not in a position to ensure its return, all possible steps should be taken to ensure the victims obtain other forms of just reparations, such as secure alternative land and housing of the same or better quality and location.<sup>106</sup>
89. Property investments of a predominantly speculative nature can have the effect of undermining security of tenure of low-income groups by contributing to the unaffordability of land and housing. The result is a regression in the enjoyment of the right to adequate housing for the urban poor, including increased homelessness. Businesses should thus refrain from entering into speculative property investments to avoid contributing to these adverse human rights impacts.
90. The responsibility of banks and other credit institutions to respect the right to adequate housing, requires that they undertake human rights due diligence, including assessments on the impact on security of tenure of their private lending and asset-based securitization operations. During such assessments, banks should pay special attention to individuals or groups who are at heightened risk of losing their home as a result of the loan. Lending programmes that have the effect of undermining tenure security should be abandoned or safeguards put in place. Safeguards may include special measures to ensure applicants fully understand the terms of the loan and how they will be affected, including implications of default; flexible repayment options in cases of financial hardship; and policy and contractual commitments not to apply for an eviction from a foreclosed home until alternative adequate housing has been arranged. Predatory lending practices

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<sup>106</sup> See, Basic Principles on Eviction, paras 59-68.

are incompatible with the responsibility of business to respect human rights and should be banned by all banks and credit institutions.

## **91. OPERATIONAL GUIDANCE EIGHT**

**Multilateral and bilateral development agencies should support States lacking sufficient resources to take all necessary measures to strengthen the security of tenure of the urban poor and promote equitable access to urban housing and land, in order to realize the right to adequate housing. Development agencies should ensure that their financing operations, programmes and projects do not undermine security of tenure.**

### *Commentary*

92. Under article 2 of the International Covenant on Economic Social and Cultural Rights, States parties undertake to take steps, including through international assistance and cooperation, to achieve the full realization of Covenant rights. Under article 11, States parties recognize the importance of international cooperation for realizing the right to adequate housing and undertake to take appropriate steps accordingly. States that are in a position to do so should provide financial and technical assistance, through their aid agencies and as members of multilateral development agencies, to countries lacking sufficient resources to adopt the measures set out in the present recommendations.
93. Development agencies regularly provide financial and technical assistance to operations that affect tenure security, including infrastructure development; land management, administration and reform; spatial planning; urban development and renewal; and settlement upgrading. Support to policy reforms in, *inter alia*, the housing and financial sectors also affect tenure security. Development agencies should ensure that all such operations serve to strengthen and prioritize, and not weaken, the tenure security of vulnerable and marginalized persons and groups. Impact assessments should be conducted in relation to all operations that could foreseeably have such effects before assistance is provided. The present recommendations should guide development agencies in ensuring that operations that they support promote and strengthen a variety of tenure forms and increase security of tenure and access to well-located housing for the urban poor.
94. Multilateral and bilateral development agencies should adopt internal policies to ensure that their projects and operations do not adversely affect security of tenure or other aspects of the right to adequate housing. Development agencies should establish accountability and remediation mechanisms with the mandate and resources to address human rights concerns resulting from their operations.

## 95. OPERATIONAL GUIDANCE NINE

**States must ensure access to effective remedy for violations of the right to adequate housing, due to, *inter alia*:**

- (a) Discrimination on the basis of tenure status, including multiple discrimination;**
- (b) Discrimination on the basis of any prohibited ground in the enjoyment of security of tenure;**
- (c) An ongoing failure of the State to take appropriate steps to the maximum of its available resources to secure the tenure of the urban poor; and**
- (d) The undermining of security of tenure including through forced eviction.**

**Tenure status should not pose a barrier to people in accessing an effective remedy for the violation of human rights.**

### *Commentary*

96. The urban poor face significant barriers in accessing effective remedy.<sup>107</sup> Political influence and corruption in courts and administrative bodies prevent access to justice for the urban poor. The costs of accessing courts and tribunals and obtaining legal representation are often prohibitive. Legal information is often not available. The lack of legal recognition faced by persons without official identity documentation, including a registered address, poses a further obstacle. States should take all necessary measures to remove these barriers to justice and ensure that the urban poor are able to avail themselves of a range of judicial and administrative mechanisms to access effective remedy. States should ensure that legal information relevant to tenure status is disseminated in accessible forms and languages to the urban poor. States should establish, support and enable legal aid for urban poor communities, ensuring in particular that marginalized groups can access these services.

97. Remedy for violations of the right to adequate housing may include restitution, reparation,<sup>108</sup> the provision of alternative adequate housing, rehabilitation of housing or livelihoods, financial or non-financial compensation for loss and damage, and punitive sanctions against the perpetrator of the violation. It may also include repeal or amendment of law or policy and quashing of an administrative decision. In this regard, States should ensure that land and housing sector policies and administrative decisions affecting tenure security are subject to administrative and judicial review. Effective remedy for the on-going failure of

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<sup>107</sup> See, Report on the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/67/278, August 2012.

<sup>108</sup> Forced evictions are a gross violation of human rights and victims are entitled to reparations in compliance with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, March 2006.

the State to take appropriate steps to the maximum of its available resources to secure the tenure of the urban poor would require that the necessary steps be immediately initiated for aggrieved groups.

## 98. OPERATIONAL GUIDANCE TEN

**States and other relevant actors must be accountable to the urban poor in taking measures, in accordance with the present recommendations, to strengthen and protect their security of tenure and promote equitable and secure access to urban housing and land. In order to ensure accountability in the fulfilment of human rights obligations, States should:**

- (a) Undertake all necessary measures in a timely and progressive manner making use of the maximum available resources;**
- (b) Ensure public access to information and transparency with regard to all decision-making, including reasons for decisions;**
- (c) Ensure active, free, informed and meaningful consultation and participation of all people affected by laws, policies, programs and other measures adopted;**
- (d) Be answerable to the public for all decisions, laws, policies, programs and use of public funds and resources;**
- (e) Develop contextually appropriate indicators and benchmarks against which to regularly measure progress, including both improvements and regressions, and publically disclose all periodic evaluations;**
- (f) Take timely remedial action if any decisions, laws, policies or programs undermine security of tenure; and**
- (g) Hold to account any actor, including government officials, responsible for or complicit in human rights abuses that occur in the process of carrying out these measures.**

### *Commentary*

99. States must be accountable to the people whose human rights are affected by the implementation of the present recommendations. Accountability means that relevant actors are responsible for their decisions and actions and are able to demonstrate that they have fulfilled their responsibilities effectively, fairly, expeditiously, in accordance with national laws and policies and in full compliance with their international human rights obligations. Accountability also means that responsible actors accept responsibility for problems and act to rectify them in a timely manner and to remedy any harm caused (see operational guidance 9).

100. Public access to information and transparency in decision-making are central to accountability because they allow for external scrutiny and critical debate. Active, free and meaningful consultation and participation of people who

are affected by various measures ensures that their ideas, views and concerns are taken into account and influence decision-making at all stages.

101. While some of the present recommendations elaborate on immediate human rights obligations, the implementation of many of the measures is, by nature, an ongoing process. States must demonstrate that they are taking deliberate, concrete and targeted steps towards full realization of the right to adequate housing as expeditiously and effectively as possible.<sup>109</sup> Periodic measurement and evaluation of progress is essential to demonstrating the effective discharge of human rights obligations. States should conduct baseline surveys, develop quantitative and qualitative indicators and set benchmarks against which to regularly measure performance, monitor progress, evaluate outcomes and inform decision-making. States should actively disseminate the evaluations in a form and language accessible to the urban poor.
102. Indicators and benchmarks should be designed to measure, *inter alia*, progress in the promotion and use of a variety of tenure forms and the degree of security they confer; the progress made in securing the tenure arrangements of vulnerable and marginalized groups; the progress made in achieving more equitable access to urban housing, including reductions in the number of vacant plots and buildings and the proportion of these that are being used to house low-income households; and progress made in reducing discrimination vis-à-vis the right to adequate housing.<sup>110</sup>

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<sup>109</sup>CESCR, General Comment No. 3 (1990), paras 2 and 9.

<sup>110</sup>See, OHCHR (2012), Human Rights Indicators: A Guide to Measurement and Implementation, HR/PUB/12/5 available at <http://www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx>; UN-Habitat (2011), Monitoring tenure security in cities: People, Land and Policy, GLTN, Nairobi available at <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=3261>; and Osorio, op. cit., Chap 2.