United Nations Special Rapporteur on adequate housing

Regional consultation on the Security of Tenure for the Urban Poor, Johannesburg 27-28 May 2013

This regional consultation brought together 35 participants from across Africa, from government, academia, NGOs and social movements. The African consultation was part of a broader consultative process, with a similar (Latin American) regional consultation having been held in Quito, Ecuador, 11 May.

The main objective of the consultation was to elicit input on challenges, as well as practices, for the Special Rapporteur's Guidelines on the Security of Tenure for the Urban Poor, which will be presented to the UN Human Rights Council in 2014 as part of the Special Rapporteur's mandate.

This report summarizes the discussions at the consultation, focusing on the main issues and recommendations. It does not attribute points to specific participants but rather amalgamates the discussion into themes and commentary around these.

EMERGING ISSUES AND RELEVANT COUNTRY-SPECIFIC EXPERIENCES

Over the two days, various emerging issues and relevant country-specific experiences were identified from the individual presentations, discussions following the presentations, as well as the four thematic working groups (1. Underlying Principles; 2. Multiple Land Tenure Systems; 3. Political Economy of Land; and 4. Financial Role of Markets).

Character of informal settlements

One of the framing issues that emerged starkly was that an informal settlement is not the same thing in every country or context. The character of each informal settlement impacts on the nature of the problems, as well as the likely solutions. For example, an informal settlement in Johannesburg is likely to be poorly-located (on the urban periphery with poor transport links and limited access to schools, clinics and work opportunities), have inadequate housing (shacks made of tin and plastic),

inadequate access to services and suffer from lack of recognition of title. Whereas, in Cairo, fully-fledged houses have been built in well-located areas but suffer from lack of title and planning approval.

Moreover, the issue of who owns the land can raise specific problems. If the state owns the land, this affords the state the opportunity to easily convert title, whereas, if private individuals own the land, this poses questions around compulsory acquisition/ expropriation, which, in turn, raises the issue of fair compensation (in both Uganda and South Africa, compulsory acquisition/expropriation in the public interest is authorized only where fair compensation is paid). In Nairobi, for example, participants explained that approximately 60 percent of houses in informal settlements are owned by government ministers – this begs the question of who would benefit if title was conferred on the owners of these properties.

So, questions of location, structures, services, ownership and planning are critical to unpacking the problems and solutions regarding the tenure security of informal dwellers.

Law and policy as necessary but not sufficient

Many participants noted the presence of progressive laws and policies in their countries. These include Uganda[1] and South Africa[2] with comprehensive constitutional, legislative and policy frameworks for recognizing housing rights, prohibiting arbitrary evictions and recognizing informal settlements. In some countries, e.g. Egypt, the social value of land is recognized in the constitutions. Also in South Africa, there is common law recognition but this only occurs after 20 years of continuous uninterrupted possession).

In Uganda and South Africa, as mentioned above, compulsory acquisition/expropriation in the public interest is allowed after fair and just compensation. And, in Uganda, occupiers have the first option to purchase land they are residing on.

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[1] Some relevant laws in Uganda include: Article 26 and 237(1) of the Constitution of Uganda (1995), as well as the Land Act of 1998 and Land Amendment Act of 2010, which respectively allow compulsory acquisition of land for public purposes after fair and adequate compensation, and vest land with Ugandan citizens recognizing different forms of tenure arrangements. Conducive policies include the National Slum Upgrading Policy of 2008 and the National Land Policy of 2013, which aim to regularize and increase the security of tenure of informal settlers.

[2] Conducive laws in South Africa include: Section 26 of the Constitution of South Africa (1996), which guarantees everyone's access to adequate housing and prohibits arbitrary evictions without an order of court; and the Prevention and Elimination of Unlawful Occupation of Land Act (PIE) (1998), which makes it unlawful to evict an unlawful occupier without an order of court. Conducive policies include the National Upgrade Support Programme (NUSP) of 2004, which is only now being implemented as the state begins to recognize that it cannot sustain the focus on formal houses with individual title and is moving instead to the in situ upgrading of informal settlements.

However, notwithstanding the importance of such legal and policy mechanisms, participants were at pains to point out that legal and policy protection is only a first step towards enhancing tenure security. Much depends on government capacity and willingness to implement laws and policies.

Need for recognition of different forms of tenure arrangements

A common theme that emerged from the individual presentations and discussions thereafter was the need for recognition of multiple and sometimes overlapping tenure arrangements, and for maximum flexibility in this regard. There was a generalized acknowledgment that individual title is often not practical or even desirable and, in South Africa for example, this preoccupation has resulted in the government building relatively expensive individual houses for individual title that are often poorly located with compromised access to other socio-economic rights such as education, health and work; and the government has not been able to keep up with the demand for well-located, low-cost housing.

The experiences of attempting to regularize informal tenure arrangements in Madagascar, Kenya and Mozambique[3] were particularly interesting. In Madagascar, the post-2005 land reform has included a decentralization of land titling competencies to municipalities (and the creation of Local Land Offices within municipalities), in terms of which mayors now have the authority to manage the process of converting non-titled, but occupied, land. This has involved creating a new Land Certificate, which is issued at the end of an 'on-request process' overseen by a Local Recognition Committee comprising village chiefs, elders and neighbors. There are attempts to ensure Local Recognition Committees are democratically elected and opposition to the process of issuing any Land Certificate is possible. The Land Certificate has the same legal value as other forms of land title. However, it has the benefit of costing 10 to 20 times less and being issued 6 times faster. One of the problems of the Land Certificate process, however, is that it has been overwhelmingly rural and it has not yet begun to tackle urban land.

In Kenya, the Kenyan Informal Settlement Improvement Program (KISIP) is a recent attempt to move away from individual titling, and focuses on recognition of communal titling. Here, informal settlements are to be issued with a community title in the name of a legally constituted community body corporate, which will then hold title in perpetual trust of the members of the community. The rights and powers of the holder of the community title would include the right to issue land-use rights to individuals and the right to manage and plan for common areas together with the government. In this scheme, individual rights would be secured through leasehold. Again, however, this scheme has

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[3] There were no participants from Mozambique, but this example was provided by a participant who has been researching land tenure arrangements across southern Africa.

focused mainly on rural areas. And it is too recent to properly assess its ability to successfully ensure tenure security.

In Uganda, the government's National Slum Upgrading Policy (TSUPU) has, since 2008, focused on issuing Customary Tenure Certificates to regularize informal settlement arrangements, even though the government acknowledges that these certificates are still considered to be a lesser form of title than individual freehold titles. Key to this process has been the incorporation of stakeholder participation in the design, planning and implementation of informal settlement upgrading programs. This has involved organizing and mobilizing the poor into organized groups around savings schemes. It was unclear from the discussions how successful such schemes are and whether organizing communities around savings schemes is an appropriate or ideal focal point.

Finally, in Mozambique, since 2011, the government has begun to recognize a practice called 'Duat', which is a system to recognize informal title, whether collective or individual, through enumeration, local records and construction of a community register.

Arising from these discussions, unanswered questions were posed about:

1. The potential for undemocratic forms of community leadership e.g. tribal/chiefly authorities, non-gender parity;
2. Powers of a community member to divest him/ herself from the communal tenure arrangements;
3. How to secure investment in communal upgrading? Some suggested that all forms of tenure must be afforded access to financial markets, while others opposed this, arguing it would render the poor more vulnerable to market-related forces, shocks and collapses.
4. How to ensure that recognition is not a long and complex, as well as expensive, process?
5. What forms of tenure arrangements and what land use schemes are available/exist to protect tenure security in urban areas?

Exclusion of the urban poor from affordable housing, as well as participation in decisions about housing

One of the recurring issues raised by participants was the non-affordability of housing for the urban poor. Several questions came up:

*   How to ring-fence land and housing as off limits for the market and/or protect rental housing at affordable levels? One way to do so is by regulating tenant-landlord relations e.g. South

Africa[4] and/or the possibility of rent control (not raised as a lived reality in any of the countries of our participants). In Uganda, tenants may only be evicted if they default paying rent for two consecutive years.

- Another set of unanswered questions centered on how to create low-cost housing stock – social housing with public ownership and management; how practical/affordable is this in most countries; how successful are public-private partnership arrangements in this regard?

And then two other sets of issues that were raised were:

- The exclusion of the poor from participating in decisions about their tenure, land use, etc, and the importance of involving poor people in all processes.

RECOMMENDATIONS FROM WORKING GROUPS AND GENERAL DISCUSSIONS

At the end of day-one, the emerging themes were divided into four topics, which were addressed by four working groups on day-two:

➢ Underlying Principles
➢ Multiple Land Tenure Systems
➢ Political Economy of Land
➢ Financial Role of Markets

The comments and recommendations related to each topic are outlined below.

Underlying Principles

1. <u>Context</u> of tenure insecurity:
   a. Historical dispossession and unequal land distribution
   b. Urban poverty/absence of human dignity
   c. Inequitable urbanization and poorly planned urban growth
   d. No place for the poor in cities
   e. Exclusion from participation
   f. Unequal rights to the city
   g. Discrimination (racial, gender, ethnic and economic…)

2. <u>Rationale</u> for securing tenure for the urban poor:

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[4] In South Africa there is a Rental Housing Act (1999) with a set of regulations specifying unfair practices and establishing provincial Rental Housing Tribunals as quasi-judicial bodies to adjudicate housing disputes between landlords and tenants.

a. Security of tenure is a critical factor that contributes to human well-being, which is a constituent of human dignity, itself the philosophical and juridical basis of all human rights.

b. Security of tenure for the many rather than the few is an issue of distributive justice and public interest.

c. Security of tenure is inter-dependent with the other elements of the right to housing, like location, affordability, habitability etc., and all other rights.

d. Deprivation of security of tenure for the urban poor aggravates urban poverty and deepens social exclusion. It also undermines the ability of people to reach their full potential.

3. <u>Principles</u> for securing tenure for the urban poor:
   a. Process-oriented:
      i. Participation, empowerment and inclusion, including principles of Free, Prior and Informed Consent (FPIC)
      ii. Open, transparent, accountable and democratic
      iii. Effective access to information
   b. Substantive:
      i. Protection against forced and arbitrary eviction (General Comment 7)
      ii. Recognize that sometimes prevention of eviction is not possible, but need to put in place processes and clarify state's obligations regarding evictions (along the lines of the Guidelines on evictions and displacement)
      iii. Transit camps and temporary/ emergency shelter cannot become permanent
      iv. Issues of location and affordability of low-cost housing are key – densification and public/social housing a possibility
      v. Prioritizing the vulnerable; paying particular attention to women's tenure rights
      vi. Non-discrimination and culturally acceptable
      vii. Non-retrogressive
      viii. Safeguarding of social value of land and regulation of market to ensure affordable housing stock
      ix. Provision of minimum infrastructure and services e.g. water, sanitation; and progressive realization of access to housing and basic services
      x. Tenure security must be recognized as a component of the right to housing and as linked with other human rights

Multiple Land Tenure Systems

1. Multiple tenure systems and arrangements must be recognized and protected, including establishment of appropriate regulatory systems

2. Land use, as well as occupation, and ownership need to be recognized and protected. Where adverse possession is recognized, due protection should be given to all interests, including owners

3. Decision-making power within these arrangements must be given to those who are directly affected

4. Measures must be developed to ensure flexibility to move from one tenure system to another

Political Economy of Land

Recognizing that urban land is typically highly contested because of its commercial value, there is a need to:

1. Map/audit the players in the political economy of land – the owners, users and occupiers

2. Develop laws, policies and mechanisms to protect the social value of land and to regulate the private market so that it does impinge on this land or crowd out low-cost housing options

3. Encourage the state to facilitate access to and protection of low-cost rental housing, and to upgrade informal settlements

4. Prioritize inclusionary planning and provision of affordable serviced land

5. Implement user-friendly, affordable and accessible registration processes

6. Establish effective and accessible land/property dispute resolution mechanisms including legal aid

Financial Role of Markets[5]

1. The effective regulation of land markets should provide for:
   a. Value capture
   b. Guarantee a specific percentage of new developments to low-income housing
   c. Provision of ceiling on plot sizes (e.g. Egypt, South Korea, Taiwan and Constitution of Kenya)
   d. Separating development rights from ownership rights (e.g. Brazil)
   e. An effective mechanism to regulate speculation:
      i. Creation of special zones

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[5] It is possible that this topic could be collapsed with the Political Economy of Land. In addition, regarding references to banking and financial linkages, see the point on areas of disagreement/non-resolution below.

  ii. Taxation based on value of land; and high taxes on vacant land

  iii. Communal or cooperative ownership

 f. Policy instruments and recommendations:

  i. Land banking to enable housing for the poor

  ii. Prioritize public investment expenditure on the needs of the poor

  iii. Protection in the face of bank foreclosure

AREAS OF DISAGREEMENT AND NON-RESOLUTION

In the course of the two days, there were three main areas of disagreement among participants:

1. Whether to push for the bankability of informal settlements/ access to financial institutions. On the one hand, some participants argued that without such, there would be limited investment in improving houses and services in informal settlements. On the other hand, other participants pointed out that such exposure is likely to render residents more vulnerable, as had been shown with the international financial crisis and its knock-on effects in most African countries.

2. The issue of whether, especially in the context of informal settlements far from urban centers, it made sense to push for recognition and upgrading and whether this might not simply entrench inequality and disadvantage (and whether, after all, eradication and alternative social housing in urban centers should not be preferred). While recognizing the ideal of well-located low-cost social housing, many participants pointed to the reality that most governments would either not be able to or not want to provide such housing options, and so recognition of informal settlements was a more pragmatic solution.

3. Should the goal be to 'harmonize' the various tenure systems or will this result in a problematic destruction of diversity and flexibility?