

WORKING PAPER: Security of tenure in humanitarian shelter operations

Prepared by the Norwegian Refugee Council (NRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC) to inform discussion at the Roundtable: Security of Tenure in Humanitarian Shelter, Programming for the Most Vulnerable - Geneva, 28 June 2013

INTRODUCTION

In recent years, increasing attention has been devoted to the different bases on which beneficiaries of humanitarian shelter assistance¹ occupy their homes (otherwise known as “tenure”). Although the humanitarian community has made progress in orientating emergency shelter toward addressing the needs of the most vulnerable conflict and disaster-affected populations, the equity of assistance is challenged by the increasing requirement for tenure documentation (often freehold title) to establish beneficiary eligibility. While the rationale for this approach is understandable, this paper will argue that such a restrictive notion of security of tenure is often a poor fit in the humanitarian context and can unnecessarily lead to discrimination against the most vulnerable, the very persons generally considered to be the target of humanitarian work.

Why would humanitarian actors insist on documented title? Verifying each beneficiary’s documented property right provides a degree of assurance against later property disputes, forced eviction, or other issues that could result in the beneficiary being moved off the land where the assistance was provided. Arguably, therefore, this reduces the possibility of inadvertently misappropriating the property of others and also ensures that intended beneficiaries are not disturbed after shelter is provided. Such “official” documentation can also provide a means of accountability (internally, to donors, the general public or others). It may be a way of mitigating against the possibility that humanitarian funds will be spent on solutions that do not last. Thus, when landowners are not already registered, regularisation (whereby land holders need to formally register their land) can become a necessary pre-requisite for a household to access humanitarian assistance.²

Yet, in many contexts, title documents are not the only or even the most common means by which a beneficiary may demonstrate security in their tenure (assuring protection from eviction). Depending on local law, custom and practice, documented title may represent only one among several commonly-accepted land tenure arrangements. In many contexts in which humanitarian shelter is provided, various forms of customary land rights are dominant. For example, in Africa, statutory tenure covers only between two and ten per cent of the land. While possible in some areas, formal registration can be costly and time-consuming, and therefore not pursued by many who instead rely on the strength of the customary system for their tenure security.³ Likewise, in several states in Myanmar more than half of all

¹ For the purposes of this document, humanitarian shelter is considered to be emergency and transitional. However it is recognised that decisions taken during the early response phase can influence longer-term considerations, including implications for permanent reconstruction.

² UN Habitat, *Land and Natural Disasters: Guidance for Practitioners* (2010) p. 82, includes a case study on the response to the 2001 earthquake in Bhuj, India, where the World Bank, Asian Development Bank and other donors insisted on regularisation.

³ Deininger, K., *Land Policies for Growth and Poverty Reduction: Key Issues and Challenges Ahead*, World Bank (2003). http://www.fig.net/pub/mexico/papers_eng/ts2_deininger_eng.pdf

households are legally classified as landless,⁴ and under such criteria would be ineligible for shelter assistance if displaced by conflict or disaster. In these and many similar contexts, there is a risk that overemphasis on individual property ownership may prevent individuals from accessing shelter assistance, in particular those without registered title or other documentation to evidence their landholdings (including customary landholders, renters, women and other vulnerable groups).

The challenges of providing humanitarian shelter assistance can be extreme when evidence of occupancy is physically destroyed and lost forever (Aceh 2004, Darfur 2004), land registries ruined (Haiti 2010) or when rule of law is absent (Liberia 2003). But even in less extreme situations, humanitarian actors cannot assume that fully-functional and comprehensive land registries were operating prior to the conflict or disaster. Formal land registration and governance systems are often lacking or ineffective in many countries, and large segments of the world's population find security in their rights to use and occupy land from sources other than title registration (a situation perhaps more common among otherwise vulnerable groups).⁵

This paper will explore the challenges of providing humanitarian shelter assistance related to three key issues (legal pluralism and customary rights, urban contexts and disadvantaged groups). At the end of the paper a number of discussion questions are set out as a means of advancing towards a proposed operational definition of security of tenure well-suited to the humanitarian context.

SECURITY OF TENURE: UNPACKING THE CONCEPT

The Special Rapporteur for adequate housing, who has dedicated the remainder of her mandate to the issue of security of tenure, has defined security of tenure as follows:

“Security of tenure is understood ... as tenure of land and/or housing which ensures a secure home and enables one to live in security, peace and dignity.”⁶

This definition builds upon General Comment Number 4 by the Committee on Economic, Social and Cultural Rights:

“Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”⁷

⁴ In this context, we refer to those without legally documented title to land as well as those without claims to land as “landless.” Displacement and Dispossession: Forced Migration and Land Rights – Burma, COHRE Country Report, November 2007. http://www.cohre.org/sites/default/files/burma_-_displacement_and_dispossession_-_forced_migration_and_land_rights_nov_2007.pdf

⁵ IFRC, *Addressing Regulatory Barriers to Providing Emergency and Transitional Shelter in a Rapid and Equitable Manner after Natural Disasters*, Background report for the 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011. http://www.rcrcconference.org/docs_upl/en/IC31_5_5_3_barriers_shelter_20Oct_EN.pdf

⁶ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 24 December 2012, A/HRC/22/46, para. 23.

⁷ Committee on Economic, Social and Cultural Rights, General Comment Number 4 on the right to adequate housing (1991), para. 8. <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

The Human Rights Council in a resolution adopted at its 19th Session in March 2012 urged states in the context of post-disaster settings to:

*“...ensure that all affected persons, irrespective of their pre-disaster tenure status and without discrimination of any kind, have equal access to housing...”*⁸

It is important to note that the responsibility to protect against forced eviction and to ensure equal access to housing is held by states. This differentiates the role of humanitarian organisations in responding to crises from the governments of the countries in which they operate. These aspirational definitions are thus difficult to apply in operational settings by humanitarian actors who are not in a position to protect, respect or fulfil the right to adequate housing. The challenge is therefore to be able to understand and assess tenure arrangements in each context in a way that facilitates shelter interventions. What constitutes “secure tenure” where registries are either non-existent or inaccessible to large segments of the population? When are tenure rights “secure enough” as a basis for humanitarian shelter assistance?

It is on this basis that this meeting on security of tenure in the humanitarian context is convened. It is hoped that through this meeting an operational definition of security of tenure can be advanced – one that recognises the multiplicity of legitimate tenure arrangements, and serves as a basis for equity in the delivery of humanitarian shelter, including to customary rights’ holders, urban dwellers, women and others without formal documented title.

The complexity of security of tenure as a concept and the vast diversity of its forms within, as well as among, countries may be contributing to the emergence of registered title as the de facto preferred tenure form in humanitarian settings. A number of organisations are dedicating considerable resources to build greater clarity and understanding in this area.⁹ And yet, despite these contributions, there is not a clear framework by which to assess and properly take into account security of tenure in the delivery of humanitarian shelter programming.

KEY ISSUE: Legal pluralism and overlapping land tenure systems

Security of tenure varies greatly depending on the context and also upon the policies of the affected state. Many countries are characterised by legal pluralism—the co-existence of parallel laws and authorities that guide and inform the administration of justice on similar matters. Often these are: statutory laws—acts, rules or regulations approved and promulgated by a government; customary

⁸ Human Rights Council Resolution on Adequate housing as a component of the right to an adequate standard of living in the context of disaster settings, 22 March 2012, A/HRC/19/4, para. 4(a).

⁹ For example, the United States Institute of Peace in collaboration with the International Organization for Migration (IOM), the World Bank and USAID offers regular training on “Land, Property and Conflict”. NRC and the Internally Displaced Monitoring Centre (IDMC) have developed a multilingual training course on Housing, Land and Property (HLP). The continuum of land rights developed by the Global Land Tool Network is a well-known tool on security of tenure, and UN Habitat’s Guidance for Practitioners on Land and Natural Disasters provides examples of how to respond to tenure insecurity through documentation.

laws—customs, rules or practices that regulate social behaviour that have developed over time in a specific community and are considered to be mandatory and religious law (for example Sharia).¹⁰

In many countries such as Uganda and Mozambique, customary systems are incorporated into and regulated by state law, regulations and/or jurisprudence. However, in countries where customary rights are not recognised, customary law is law only to the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law. In Liberia for example, rural community members have no formal legal basis for their tenure security, however they enjoy significant *de facto* security in their land rights as recognised by the community members themselves. Security of tenure in these communities, as others, may be a matter of perception.

Whether formally recognised or not, customary land rights can and often do enjoy more legitimacy in the eyes of local community members than statutory rights. In these situations, security of tenure based on informal or customary rights may be at least as “secure” as formally registered rights when considering the relative risk of eviction or similar challenges. Moreover, where customary rights are applied, land is often held in a series of overlapping communal, individual, family, clan and entire community rights. Alternatively land ownership may not be vested at all, but instead considered as reserved for future generations and changing community needs. In Afghanistan customary land tenure is often considered the most reliable given the long recent history of conflict, displacement and the wide ranging ideological differences and ethnic bias of the various governments that have influenced adjustments in the laws around land allocation and ownership. With so many conflicting systems under which to conceivably have owned land the customary systems are still seen as the most reliable and are underpinned by principles of Sharia law which are also often used in conflict resolution.¹¹ In these situations, reliance on formal notions of security of tenure may tend to distort rather than clarify the pattern of land rights.

Mapping customary land rights in post-conflict or disaster situations is not without challenges. Access to and control over land is frequently contested, and customary claims are often constructed on the basis of social differentiation and inequality (particularly among pastoralists, migrants and “autochthones” (indigenous), husband and wives, and elders and youth). However, in many cases the participation of rural community members has proven successful in order to understand and reach a stable consensus on existing customary rights.¹² Community participation in the presence of all relevant parties, particularly landowners and land users can be an effective means of taking stock of existing land tenure arrangements and identifying beneficiaries for shelter assistance. NRC’s Shelter Programme in the DRC has cooperated with the Information Counselling and Legal Assistance (ICLA) Programme to provide building materials to returnees who have reached negotiated agreements through collaborative dispute

¹⁰ Harper, E., *Customary Justice: from Programme Design to Impact Evaluation*, International Development Law Organization (2011).

¹¹ Alden Wily, L. *Putting Rural Land Registration in Perspective: The Afghanistan Case* (2004).

<http://dspace.cigilibrary.org/jspui/bitstream/123456789/7917/1/Putting%20Rural%20Land%20Registration%20in%20Perspective%20The%20Afghanistan%20Case%202004.pdf?1>

¹² During the 1990s and 2000s, the main innovative approaches included: community land mapping, participatory land mapping, decentralized land registration and certification, and community-based management of land.

resolution procedures.

In Puntland (Somalia) World Vision secured land for a housing construction project through a consensus-driven customary law process, with extensive engagement of the council of elders, Sharia representatives, local government, host community and beneficiary participation. Each beneficiary was eventually allocated a 100 square metre block of land on the site and through robust advocacy and extended consultation these blocks were officially signed over to beneficiaries for individual ownership. The housing erected on each block was also signed over to beneficiaries with joint ownership in the name of husband and wife.¹³ In responding to the 2010 floods in Pakistan, IFRC and the Pakistan Red Crescent Society undertook a tenure programme in Sindh province. Sindh was the worst affected province, with 1.5 million people rendered homeless, the majority of who were tenant farmers without any type of ownership or documentation. In order to overcome the challenge of supporting these people with the provision of shelter agreements were signed between the beneficiary farmers (*Haris*) and the landlords (*Zaminders*). These agreements stipulated a minimum five year period in which the landlord agreed not to evict them.¹⁴

KEY ISSUE: Urban contexts

The overlapping ownership patterns common to customary landholdings are also seen in urban contexts. In fact, nowhere is the diversity of tenure forms more apparent.

Urban and peri-urban areas are frequently characterised by a relatively high percentage of renters (documented and undocumented) in multiple occupancy buildings or in informal settlements.¹⁵ In some areas informal settlements outnumber legally planned developments and are increasing more rapidly.¹⁶ For instance, in Nairobi a reported 2.65 million people (out of a population of 4 million) live in informal settlements.¹⁷ Furthermore, population density in these settlements can be as high as 1000 people per hectare. The majority of slum-dwellers (92 per cent) are rent-paying tenants with no tenure security, either legal or perceived.¹⁸ Non-empirical evidence suggests that between 30 per cent and 50 per cent of urban residents in the developing world lack any kind of legal document to show they have tenure security.¹⁹ This is true even among individuals who hold formal legal title, as illustrated by a 2005 study by the Central Statistical Bureau in Indonesia, which found that out of those that own their home, only 32 per cent can show legitimate proof in the form of a certificate from the national land agency.²⁰

¹³ World Vision; *No Fixed Address: Housing, Land and Property Issues in a Stateless Somalia*, i-Rec Conference 2013.

<http://www.i-recconference2013.ch/Home.aspx>

¹⁴ IFRC, *A new lease of life for the landless*, video case study (24 July 2012). <http://www.youtube.com/watch?v=hDh2JI5cUjM>

¹⁵ In Sao Paulo, for example, only 35 per cent of the population have formal tenure arrangements. UN-Habitat and Global Land Tool Network: *Monitoring Security of Tenure in Cities* (2012), pg. 46.

¹⁶ USAID *Land Tenure and Property Rights, Volume 1: Framework* (2005) p. 12.

http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Framework_Tool_0.pdf

¹⁷ British Red Cross, *Learning from the City*. (2013) London.

¹⁸ USAID, *Property Rights and Resource Governance, Country Profile – Kenya*.

http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_LandTenure_Kenya_Profile.pdf

¹⁹ World Bank, *Land Policies for Growth and Poverty Reduction*. (2003) Washington, D.C.: World Bank.

²⁰ UN Habitat, *State of the World's Cities 2006/2007* (2006) p. 95.

It is not just the overwhelming number of undocumented dwellers in urban areas which presents challenges for the humanitarian community; it is also the physical lack of space. Space is a premium in any urban area leading to an increasing need for multiple-occupancy buildings, such as the construction of multi-storey dwellings, but also for house/flat shares, including the sharing of single bedrooms. This results in several forms of tenure co-existing on the same plot, for instance, in Kolkata, 'thika' tenants rent plots and then sublet rooms to others who sublet beds on a shift system, with each party entitled to certain rights.²¹ With such complicated overlapping arrangements existing before a disaster or conflict, it is unsurprising that the issue of land tenure in an urban context has presented such a challenge to the humanitarian community in recent operations such as the response to the 2010 earthquake in Haiti.²² A particular situation characterising post-conflict settings is the presence of displaced individuals in urban informal settlements or in temporary rental accommodation. In Iraq, the Representative on Internally Displaced Persons (IDPs) noted that over 75 per cent of IDPs live in rented accommodation or with host families, while over 20 per cent live in irregular settlements, former military camps, tents and public buildings. At the time of the Representative's visit, an estimated half a million persons, the majority of whom are believed to be IDPs, were living in informal settlements on property which they did not own.²³

Given the co-existence of different tenure arrangements, the informalities of housing markets and the constant changing environment of urban areas there is a distinct need to understand the *de jure* and *de facto*²⁴ tenure systems which exist, along with the political systems that are in place. Finding housing solutions in emergencies in big cities is extremely complex and such difficulties are not just restricted to developing cities but have also been seen in the response to the Great East Japan Earthquake 2011, where amongst many other issues, incomplete land registries and lack of proof of ownership continue to delay the recovery process.²⁵

Statistics suggest that by favouring those beneficiaries who have documentary evidence of tenure, the majority of urban dwellers and especially the most vulnerable will be excluded from humanitarian assistance. Humanitarian organisations must work with communities and local organisations so as to understand existing complexities in tenure arrangements pre crisis. By doing so, the humanitarian community will be able to address some of the worst forms of inequality and insecurity that are found in urban shelter responses²⁶ and avoid prolonged camp displacement and consequential forced evictions such as those that have recently been reported in Port-au-Prince, Haiti.

²¹ Payne, G., *Urban Land Tenure Policy Options* (2001) p. 3.

²² The 2010 earthquake displaced over 1.2 million people, and in Port au Prince an estimated 70 per cent of the population lived in slums, many of which were undocumented tenants with an average living space of less than 2m². IFRC, *Evaluation of the Haiti Earthquake 2010: Meeting Shelter Needs, Issues, Achievements and Constraints* (2011).

²³ Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Consultation background paper: Security of Tenure - Commentary and Recommendations by UN Human Rights Mechanisms* (2012), p. 9.

²⁴ In this instance *de jure* means the law of the state and *de facto* is the reality on the ground.

²⁵ Japan News, *Land confusion hinders relocation of areas hit by disaster* (August 26, 2012).

<http://www.accessmylibrary.com/article-1G1-300815446/land-confusion-hinders-relocation.html>

²⁶ Report of the Special Rapporteur A/66/270, *supra* note 6, para. 34.

KEY ISSUE: Disadvantaged groups, including vulnerable women

Experience from within the humanitarian sector has shown that conflicts and disasters disproportionately affect the most vulnerable, and furthermore, exacerbate existing inequalities in the affected societies. The Special Rapporteur on adequate housing has identified that refugees and internally displaced persons are among the groups most affected by tenure insecurity.²⁷ When women also happen to have insecure tenure — as they often do because their access to housing and land frequently hinges on a relationship with a man, or because they face additional hurdles as sole head of a household, they are particularly vulnerable.²⁸ Demographic changes that accompany conflict result in higher numbers of women-headed households and widows who face additional barriers in access to secure land and housing, particularly in contexts with discriminatory marital property and inheritance laws. The World Bank has noted that globally, land ownership remains largely restricted to men, both by tradition and law.²⁹ In Afghanistan, for example, around 50 per cent of the population (women) are customarily barred (through social discrimination) from land holding; given the high numbers of widows and a large proportion of *de facto* female-headed households through out-migration of males for work, this is proving more and more constraining.³⁰

Most humanitarian shelter programmes aim to provide assistance for the most vulnerable, including particularly disadvantaged women. However, despite this objective, in practice where women face existing discrimination in access to land, they are ineligible for shelter programmes that require land ownership. The Special Rapporteur on adequate housing has noted that in most housing reconstruction programmes, tenure documentation and legal proof of rights are prerequisites for establishing beneficiary eligibility, with the consequence of excluding the poorest and most vulnerable, including those residing in informal settlements with temporary or informal rights of tenure. In South Sudan, for example, some of the most vulnerable returnees, including widows, are unable to pay registration fees for government-allocated land. They are not only at risk of eviction, but are excluded from shelter assistance from international organisations as a result of being unable to prove ownership. The effect of this emphasis on individual property ownership is therefore the exclusion of many displaced women from assistance, and particularly the most economically and socially disadvantaged (widows, older women, single heads of households).

NRC's experience of providing legal assistance in over 15 conflict-affected countries also shows that women are less likely to hold formal documentation as proof of identification, as well as tenure documentation. This decreases their chances of inclusion in humanitarian programmes. An NRC survey in Afghanistan found that while 83 per cent of men have *tazkeras* (ID cards), only 18 per cent of women do. In Afghanistan *tazkeras* are often necessary for access to assistance as they may be cross referenced with VRF (voluntary return form) or IDP documentation as proof of identity and displacement.

²⁷ Report of the Special Rapporteur A/66/270, *supra* note 6, paras. 11-13; Report of the Special Rapporteur on the human rights of internally displaced persons, March 2013, A/HRC/23/44, para. 21.

²⁸ Report of the Special Rapporteur A/66/270, *supra* note 6, para. 20.

²⁹ World Bank, World Development Report 2012: *Gender Equality and Development* (2012).
<https://openknowledge.worldbank.org/handle/10986/4391>

³⁰ Alden Wily, L., *Putting Rural Land Registration in Perspective: The Afghanistan Case* (2004).

Worldwide, women also have much higher rates of illiteracy, which affects their ability to complete applications for assistance as well as to participate meaningfully in land allocation processes and other transactions involving written documentation.

The humanitarian community must work hard to ensure that existing discrimination on the basis of gender and other factors is not reinforced in humanitarian response. In the wake of the 2004 Indian Ocean tsunami, it was reported that the international response on many occasions strengthened those who were better off and/or more articulate whilst marginalizing those who had few assets, notably women.³¹ Relief efforts were also found on occasion to have directly undermined women's pre-existing rights, such as their rights to housing or land in matrilineal communities.³²

Therefore one of the greatest challenges in the provision of equitable humanitarian assistance is to find ways to incorporate disadvantaged groups, including vulnerable women, in relief programmes. The principles of equality and non-discrimination in international law place an obligation on aid organisations as well as governments to pay particular attention to addressing existing inequalities and protecting the most vulnerable. This will include expanding the current understanding of security of tenure to reflect the situation that most displaced women are in. If the humanitarian community broadens its criteria to include more diverse tenure arrangements other than freehold, including customary recognition of tenure and arrangements governing informal settlements this would enable more vulnerable groups to access assistance. Even where it is actually not the case that customary and other arrangements provide greater *de facto* security to women, in light of principles of equity and the special vulnerability of women, the humanitarian community should consider taking a greater risk in order to accommodate them. Women's frequent lack of documentation and illiteracy should not constitute additional barriers to eligibility considerations based on tenure. Rather, these constraints should be recognized and incorporated into programmes accordingly, for example through the provision of legal assistance to those who are affected.

³¹ Telford, J. and Cosgrove, J., *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report*, Tsunami Evaluation Coalition (2006), p. 104, cited in the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, August 2011, A/66/270, para 19.

³² Lyons, M. and Schilderman, T., eds. *Building Back Better: Delivering People-Centred Housing Reconstruction at Scale*, Practical Action (2010) (with respect to communities in Sri Lanka); ActionAid, *Tsunami response: a human rights assessment* (2006), pp. 43-47, cited in Report of the Special Rapporteur A/66/270, *supra* note 6, para 19.

DISCUSSION QUESTIONS AND POSSIBLE ELEMENTS FOR AN OPERATIONAL DEFINITION

As set out in the introduction and explored in this working paper, the current tendency of the humanitarian community toward restrictive understandings of security of tenure presents particular challenges for humanitarian shelter assistance – in particular in ensuring equity. In order to better understand the implications of and common dilemmas, the following questions are put forward for discussion:

1. As shelter providers or as donors, what do you consider to be the key elements for eligibility for humanitarian shelter assistance, bearing in mind any accountability requirements?
2. In your experience, are registered landowners in fact favoured in the provision of humanitarian shelter assistance?
3. How can the humanitarian community ensure equitable shelter assistance; including between ‘recognised’ property owners, (those with documented legal title to land) and others with tenure status reliant on customary/religious systems and community perception?
4. What is your impression of the increasingly common practice of putting in place agreements or memoranda of understanding among beneficiaries, landowners and local authorities or others?
5. If the humanitarian community were to adopt a policy of “secure enough” tenure for the purposes of delivering emergency and transitional shelter, what should be the key elements or indicators to establish what is secure enough?³³ Possible elements might include:
 - Duration of occupancy
 - Absence of contrary claims
 - Documentation
 - Investment in the property (improvements)
 - Payment of rent, utilities, taxes, etc.
 - Use of the property as a source of livelihood (agricultural or commercial use, rental space, collateral for credit, etc.)
 - Community norms on forms of ownership and occupancy rights
 - Community consultation / consensus / verification

³³ The concept of “secure enough” tenure based on indicators is partially inspired from the Notional Typology of Land Tenure & Property Rights (Payne, G. and Durand-Lasserve, A., *Holding on: security of tenure – types, policies, practices and challenges* (2012) www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx; and UN-Habitat and Global Land Tool Network *Monitoring Security of Tenure in Cities* (2011)).