

Dignity in the Rubble? Forced Evictions and Human Rights Law

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1. Introduction

It is people being demolished, not buildings.
Resident of Kibera settlement, Kenya, 2004¹

The world is facing what could fairly be described as a global epidemic of forced evictions, on an unprecedented scale. In a survey of 60 countries for the period January 2001 to December 2002, the Centre on Housing Rights and Evictions (COHRE) conservatively estimated that almost 7 million people were forcibly evicted and exposed to the risk of homelessness and destitution.² In the same surveyed countries, the organisation estimated that a further 6.3 million people were threatened by forced evictions. There is no evidence to suggest that the frequency of forced evictions has declined and recent evidence suggest that the absolute numbers are in fact on the rise.³ Evictions unfortunately continue to occur in circumstances where justification is dubious and due process and remedies are clearly absent.

The problem is not limited to any particular region as section 2 of this paper demonstrates. In the developing South, evictions are often more visible due to the high concentrations of the poor in urban informal settlements and rural and coastal areas. However, low-income tenants and other vulnerable groups in both developed and developing countries face the prospect of forced eviction, often due to weak or poorly

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¹ Centre on Housing Rights and Evictions, *Listening to the Poor: Housing Rights in Nairobi, Kenya*, Consultation Report (Geneva: Centre on Housing Rights and Evictions, 2005) at ch.3.

² Centre on Housing Rights and Evictions, *Forced Evictions: Violations of Human Rights – Global Survey No. 9* (Geneva: COHRE, 2003) at p.12.

³ Note recent evictions and threats of evictions in China, India, Kenya, Zimbabwe and Colombia. See section 2 for discussion.

enforced laws, discrimination, rising income inequality and gentrification of inner cities.⁴ Moreover, informal settlements exist in pockets of many developed countries, mostly populated by marginalised ethnic minorities. In those wealthy countries, that place a strong emphasis on owner-occupation and invest poorly in social housing (for example USA, Canada and even Norway), low-income groups frequently face the prospect of substandard accommodation in the event of mortgage default. In all regions of the world, indigenous people face eviction from ancestral lands or obstacles to restitution of land.

International human rights and humanitarian law is remarkably developed in the case of forced evictions. The United Nations Commission on Human Rights has described forced evictions as a 'gross violation of human rights' and intergovernmental bodies have issued numerous and detailed standards.⁵ International and regional courts and quasi-judicial expert bodies have frequently declared forced evictions to violate a plethora of human rights while certain forced evictions fall foul of international humanitarian, criminal and refugee law.

The *key* legal challenge that lies ahead is to ensure that international guarantees are reflected in national legislation and practice.⁶ While some countries have enacted legislation, implementation is certainly not uniform across the world. This paper, after reviewing the causes of forced evictions, current international and national law and the need for national level implementation, proposes a set of guidelines that, as a check-list, should inform the development of effective regulatory frameworks and the practices of those actors that possess the capacity to carry out forced evictions. The Guidelines also address the need for range of preventive steps to be taken in order to reduce the likelihood of eviction. While the Guidelines seek to bring together the various international standards and guidelines into one document and address a number of under-developed areas, it is arguable that they also require the addition of another layer of detail in order to provide a useful tool for policy-makers and add significant value to the existing set of international standards. Care should also be taken in simply equating the draft guidelines with the current state of international law. Some aspects of the guidelines are more deeply entrenched in international law while other parts of the proposed Guidelines reflect newer developments.

It is perhaps questionable, however, whether there is a pressing need for a new set of international guidelines on forced evictions, as anticipated in the 2004 resolution on forced evictions by the Commission on Human Rights. As section 3 of this paper makes clear, there is a growing acceptance by governments and adjudicators of General Comment No. 7 on Forced Evictions,⁷ which sets out clear standards on forced evictions. Moreover, an examination of the language deployed by local, regional and international human rights organisations demonstrates a consistent use of General Comment No. 7 and the 1993 resolution on forced evictions by the Commission on Human Rights. Additional standards have been developed for specific situations such as development-displacement and refugees and internally displaced persons. Therefore, the adoption of

⁴ Cf. UN-Habitat, *Rental Housing: An essential option for the urban poor in developing countries* (Nairobi: UN-Habitat, 2003).

⁵ See United Nations Commission on Human Rights, Resolution 1993/77 on Forced Evictions, adopted unanimously on 10 March 1993, UN Doc. E/CN.4/. RES/1993/77 (1993), at para 1.

⁶ The development of the guidelines in this paper was very much motivated by requests from national level organizations and partners for help on drafting guidelines for national implementation.

⁷ See n.50 below.

any new standard should be preceded by a thoroughgoing analysis of any significant gaps in the international legal framework on forced evictions and any draft should go through a rigorous process of research and review. The strategy for the adoption of any new guidelines should also be very carefully reviewed. It should not result in the watering down of existing international law, for example through the adoption of ‘voluntary guidelines’⁸ or the instigation of a process that can be easily hijacked by a few states who persistently object in *theory* to the prohibition on forced evictions.⁹ Further, if the intention is update General Comment No. 7, then consideration should be given as to whether the UN Committee on Economic, Social and Cultural Rights is the more appropriate forum for the exercise.

To the minds of the present authors, there are three areas that could merit attention in terms of future legal development by expert UN treaty body committees, *ad hoc* experts or the Commission on Human Rights: (1) specific general comments or guidelines on groups who have not merited significant attention (e.g. women, tenants, residents of informal settlements, victims of natural disasters); (2) specific general comments, statements or guidelines on thematic issues such as land and its relation to economic, social and cultural rights; (3) the adoption of a short one-page set of guidelines by the UN Commission on Human Rights that reflects the principles of General Comment No. 7. A fourth approach would be the adoption of international guidelines for national implementation of the type included in this paper, subject to the various caveats expressed above.

What is most critically needed at the international level is a more effective system for the monitoring of forced evictions, in particular a rapid response system for mass eviction threats or retrogressive measures with significant consequences. The recent mass evictions in Zimbabwe, Sudan, China, Botswana and India demonstrate that the international system lacks a system that can adequately and quickly deal with such large-scale human rights violations, which often create the basis for armed conflict or sharp rises in poverty. In the recent case of Zimbabwe, the UN Special Rapporteur on Right to Housing and human rights organisations quickly responded to the forced evictions while two weeks later the UN-Secretary-General appointed an Special Envoy. The latter is welcome, but it was an *ad hoc* appointment, there is no information on when the report will be delivered and there is no specific mandate for the Envoy takes human rights into account. The international community should therefore consider the creation of a specific mechanism to make inquiries into cases of forced evictions that fall into the above categories and make recommendations to the UN Secretary General. (The inquiries mechanism under Article 20 of the Convention Against Torture provides one possible model.) While such a mechanism may emerge in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, this may be some time in coming.

⁸ In the case of the recently adopted Voluntary Guidelines on the Right to Adequate Food, there are some who point out that greater state involvement in the drafting of guidelines leads to higher levels of acceptance by government of the relevant document. Without addressing the merits of this argument, it is arguable that prohibitions on forced evictions have been addressed more often by states in various international documents, see particularly resolutions of the Governing Council of UN-Habitat, and that the risk of devaluation is more damaging since the prohibition on forced evictions in international law forms part of the bedrock for the protection of economic, social and cultural rights.

⁹ For example, the U.S. government consistently votes against resolutions on forced evictions, yet has condemned many forced evictions in language not dissimilar to General Comment No. 7.

2. The practice of forced evictions

Forced evictions can be caused by one, or any combination, of a range of the following factors:

- Development and infrastructure projects, which are often funded by major international financial institutions;
- Large international events, including global conferences and international sporting events such as the Olympic Games;
- Urban redevelopment and 'beautification' initiatives, aimed at drawing investment into previously neglected areas and creating 'world-class' cities;
- Property market forces, often supported by government intervention, resulting in systematic 'gentrification' of areas, usually at the direct expense of the poorer residents;
- The absence of State support to the poor under deteriorating economic conditions;
- Political conflict resulting in 'ethnic cleansing' of entire communities and groups.

Forced evictions are a global phenomenon, occurring in both developing and developed countries, and in democracies and dictatorships alike. Many evictions are counted not in thousands, but in the tens and hundreds of thousands of people. Recent mass evictions include:

- In July 2000, nearly one million people were evicted in Rainbow Town, Port Harcourt, Nigeria;
- In 2003-4 in Jakarta, as part of an effort to clear various areas of informal occupation, over 100,000 were either evicted or threatened with eviction;
- In early 2004, around 150,000 people were evicted in New Delhi and 77,000 in Kolkata (Calcutta), India. In the Narmada River Valley, the ongoing Narmada Sagar and Sardar Sarovar dam projects will, when finally completed, have displaced over 250,000 people.
- In late May and early June 2005, more than 300,000 urban residents were evicted in Zimbabwean cities which were accompanied by beatings and the arrest of approximately 22,000 people.¹⁰ A further 2 million are threatened according to the Special Rapporteur on the Right to housing.¹¹
- In early June 2005, more than 50,000 people were violently evicted without alternative accommodation from the Mau Forest in Kenya despite a court order against eviction.¹² Seven schools were also demolished.
- In Beijing, China, an estimated 300,000 people have lost their homes as a result of preparations for the 2008 Olympic Games.
- In Colombia, an estimated 1 million children were displaced by armed conflict in the period 1997 to 2003.¹³

¹⁰ Personal communication with Shelter Dialogue, Zimbabwe, 22 June 2005.

¹¹ See Letter to President of Zimbabwe from Centre on Housing Rights and Evictions, 9 June 2005, <http://www.cohre.org/zimbabwe>.

¹² 'Evictions continue despite court order', *The Standard*, 21 June 2005, http://www.eastandard.net/hm_news/news.php?articleid=22945.

¹³ Centre on Housing Rights and Evictions, *Defending the Housing Rights of Displaced Persons* (Geneva: Centre on Housing Rights and Evictions, 2005), p.7. We note that it is difficult to

However, if one also tallies seemingly random evictions at the household level, systematic and large-scale violations can often be revealed. Women regularly face forced and violent eviction by members of their household and in many countries there is no effective legal sanctions against domestic violence or practices of 'widow cleansing', which still exist in some countries.¹⁴ In Ontario, Canada it is estimated that there are more than 50,000 forced evictions each year, mostly of poor tenants.¹⁵ In New York, 30,000 people are physically evicted each year by state officials and 300,000 eviction orders are issued. In Ireland, more than one in thirty Traveller families, an ethnic and indigenous minority, are evicted from the roadside each year.¹⁶ These evictions proceed despite the government's own failure to fulfil its legislative obligations to provide adequate permanent, temporary and transient halting sites. Throughout Europe, the majority of Roma face the frequent prospect of forcibly eviction from informal settlements or tenements.¹⁷

The situation of Indigenous peoples has also not improved markedly. While waves of genocidal evictions by European colonisers were a regular pattern of the past, large-scale forcible evictions from ancestral lands are not an uncommon practice today in Africa, Asia and Latin America. For example, from 1997 to the present, the entire Bushmen community of 2500 people has been forcibly removed from ancestral land in the Central Kalahari Game Reserve in Botswana to make way for mineral exploitation.¹⁸ In India, millions of indigenous peoples are currently being removed from forests.¹⁹ In some western and Latin American countries, evictions continue at a smaller scale and restitution of lands and compensation is still a rare phenomenon.

The evictions that followed the recent Tsunami are perhaps the most graphic example of the perversity of the practice of forced evictions. While the world focused on emergency relief efforts, some governments and other actors in the region have exploited the situation to evict poorer coastal dwellers and indigenous peoples. In Sri Lanka, set-back 'safety' regulations have prevented residents returning to rebuild their homes near the coast yet luxury hotels have now sprung up in many of these areas.²⁰ In India, indigenous peoples have been removed from forests for their 'own protection' while in Banda Aceh, Indonesia, affected residents have been kept in military camps against their wishes. One

determine the extent to which all those displaced were forcibly evicted but there is considerable overlap between the two categories.

¹⁴ See Human Rights Watch, *Double Standards: Women's Property Rights Violations in Kenya* (Vol. 15, No. 5(A) – March 2003).

¹⁵ See Aoife Nolan, 'Workshop Report' in Malcolm Langford and Bret Thiele, *Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: University of NSW Press, forthcoming 2005).

¹⁶ See Letter to President of Ireland from Centre on Housing Rights and Evictions, 9 November 2005, <http://www.cohre.org/ireland>

¹⁷ See generally, Bill Edgar et. al. *Policy Measures to Ensure Access to Decent Housing for Migrants and Ethnic Minorities*, Joint Centre for Scottish Research, December 2004; Comments of the European Roma Rights Center (ERRC) and the Centre on Housing Rights and Evictions (COHRE) on the occasion of the Article 16 Review of Greece, Hungary and Turkey under the European Social Charter supervision cycle XVII-1.

¹⁸ Fred Bridgland, 'Law erases Bushmen's rights to Kalahari', *The Age*, May 9, 2005.

¹⁹ See Jayati Ghosh, 'Saving Forests and People', http://www.macroscan.com/cur/jun05/cur130605Saving_Forests.htm.

²⁰ See Letter from Tsunami Relief and Rehabilitation, 22 June 2005 (on file with authors).

author recently characterised the Tsunami response in some countries as the ‘great land theft’.²¹

The consequences of forced eviction for families and communities, and particularly for the poor, are severe and traumatic: property is often damaged or destroyed; productive assets are lost or rendered useless; social networks are broken up; livelihood strategies are compromised; access to essential facilities and services is lost; and often violence, including rape, physical assault and murder, are used to force people to comply.²²

In particular, the troubling situation of violence against women before, during and after forced eviction has been carefully documented.²³ Women, because they are the ones most likely to be at home when forced evictions take place, are most likely to suffer the brunt of violence when evictions are carried out by force. In addition, forced evictions have been recognized as a contributing factor to situations of domestic violence, as family tensions tend to rise before and after forced evictions, and male family members often feel a loss of identity and control as economic providers for the family. When forced evictions lead to a long-term lack of economic and housing security, women are again placed at increased risk of violence and exploitation due to systems of gender based discrimination.

Children are also disproportionately affected by violence in situations of forced eviction. While forced evictions are universally detrimental to all its victims, forced evictions have particularly serious implications for children. In a study on ‘Urban Children and the Physical Environment,’ Sheridan Bartlett from the City University of New York and the International Institute for Environment and Development in London found that ‘The worst situation for children is forced displacement or eviction. This can result in economic upheaval and the destruction of social networks, but it is also traumatic for children in its own right.’²⁴ The Bartlett study went on to note that ‘The impacts of eviction for family stability and for children’s emotional well-being can be devastating; the experience has been described as comparable to war for children in terms of the developmental consequences. Even when evictions are followed by immediate relocation, the effects on children can be destructive and unsettling.’

A recent example of the impacts of forced evictions upon victims is found in an informal settlement on the outskirts of Harare, Zimbabwe:

On 2 September 2004, riot police, war veterans and members of the youth ‘militia’ reportedly went to Porta Farm to forcibly evict some 10,000 people, many of whom have been living there since 1991. The police were acting in defiance of a court order

²¹ See Scott Leckie, ‘The Great land theft’, *Forced Migration Review*, forthcoming 2005.

²² See UNHCHR, *Fact Sheet No.25 - Forced Evictions and Human Rights* (Geneva: UNHCHR, 1996), available at <http://www.unhchr.ch/html/menu6/2/fs25.htm>; Scott Leckie, *When Push Comes to Shove: Forced Evictions and Human Rights* (Habitat International Coalition, 1995); Jean Du Plessis, ‘Pom Mahakan: People of the Fort’, in Proceedings on UNESCO Round Table discussion on ‘Social Sustainability in Historic Districts’ held at the World Urban Forum, Barcelona, 13 September 2004 (forthcoming, 2005); and Jane Weru ‘Kenya’s Urban Tragedy’, in *Habitat Debate* Vol. 6 No. 4. (2000).

²³ Centre on Housing Rights and Evictions, *Violence: The Impact of Forced Eviction on Women in Palestine, India and Nigeria* (Geneva: COHRE, 2002).

²⁴ See Sheridan Bartlett, *Urban Children and the Physical Environment*, City University of New York and the International Institute for Environment and Development (London), available at: <http://www.araburban.org/childcity/Papers/English/Sheridan%20Barlett.pdf>

prohibiting the eviction. According to eye-witness testimony the police fired tear gas directly into the homes of the Porta Farm residents.²⁵

Eleven people died, five of them children under the age of one.

Indeed, the prospect of being forcibly evicted can be so terrifying that it is not uncommon for people to risk their lives in an attempt to resist; or, even more extreme, to take their own lives when it becomes apparent that the eviction cannot be prevented. According to Human Rights Watch, 'a wave of almost daily protests [in opposition to evictions] swept [through] cities across China from September to December 2003.'²⁶ This opposition included a number of suicides and attempted suicides, including the following:

In August a Nanjing city man who returned from a lunch break one day to find his home demolished, set himself afire and burned to death at the office of the municipal demolition and eviction department. In September, resident Wang Baoguan burned himself to death while being forcibly evicted in Beijing. On October 1, China's National Day, Beijing resident Ye Guoqiang attempted suicide by jumping from Beijing's Jinshui bridge to protest his forced eviction for construction related to the 2008 Beijing Olympics²⁷.

Similar incidents have occurred elsewhere, for example in Lahore, Pakistan, a man recently tried to burn himself to death in front of the Chief Justice, in despair at 'having lost his life savings when the highways department demolished his house as an encroachment'.²⁸ In South Africa, on 14 January 2005, a protesting Pietermaritzburg hawker drank almost a litre of paraffin fuel and swallowed some tablets, when she realised that the police were going to confiscate the shelter in which she ran her pavement tuckshop. The hawker had been trying for two years to get a trading licence. Another hawker on the scene said: 'I have been a target for so many years that I have lost count. I am not here out of boredom – I'm here because I have a family to support with the money I make.'²⁹

It is worth looking in more detail at the South African example, as it offers an instructive illustration of the persistence of the problem of forced evictions, even in a country hailed for its progressive housing policies, laws and programmes. Of course, a South African audience would not need reminding of the effects that forced evictions can have on families and communities. Most South Africans are fully aware of how this brutally blunt tool was systematically used – initially to serve the ends of colonisation and later, under Apartheid, to manipulate and engineer the demographic, political, social and economic landscape of the country, to the benefit of a racial elite. In the process, a high price was paid by millions of people across many generations, and is still being paid today.³⁰

²⁵ Amnesty International Press Release AI Index: AFR 46/028/2004 (Public) *Zimbabwe: Another death at Porta Farm - 11 people now dead following police misuse of tear gas* (1 October 2004) p.1.

²⁶ Human Rights Watch, *Demolished: Forced Evictions and the Tenants' Rights Movement in China* (New York: Human Rights Watch, 2004) at p.4.

²⁷ *Ibid.* at pp.3-4.

²⁸ 'Lahore: Lawyer tries to commit suicide in CJ's presence', *Dawn Newspaper Group*, 15 September 2004, available at <http://www.dawn.com/2004/09/15/local17.htm>.

²⁹ 'Hawker's Despair', *Witness Echo* 20 January 2005.

³⁰ L. Platzky, and C. Walker *The Surplus People: Forced Removals in South Africa* (Johannesburg: Ravan Press, 1985); S. Field (ed.), *Lost Communities, Living Memories: Remembering Forced Removals in Cape Town* (Cape Town: David Philip, 2001); O. Badsha, & H.

In the words of Don Mattera:

*Armed with bulldozers
they came
to do a job
nothing more
just hired killers*

*We gave way
there was nothing we could do
although the bitterness stung in us
and in the earth around us*

*'The Day They Came For Our House'
Don Mattera (1983)*

Given this bitter legacy, and given the widespread awareness in South Africa of the consequences of forced removals on the lives and livelihoods of the affected people, it is most surprising to find that the practice is still a regular occurrence in South Africa. Although on a smaller scale than during the pre-1994 era and although on the basis of more diverse ideological justifications, forced evictions are being implemented on a daily basis in South Africa, by private landowners, companies and various levels and spheres of government.

Accurate numbers are difficult to obtain, and will remain elusive until comprehensive eviction monitoring systems are put in place. Yet some disturbing trends are beginning to emerge. In rural areas, high numbers of farm dwellers are being evicted from their homes due to factors such as gaps in protective laws; a lack of awareness amongst farm dwellers as to their rights; lack of adequate support or appropriate legal redress from the justice system, labour disputes, restructuring of commercial farming operations, mechanisation, changes in land use, and coercion by farm owners.³¹

In the words of Judge Dunstan Mlambo³²

Although evictions, exploitation, degradation and abuse have no place in our fledgling rainbow nation, these abhorred facets of apartheid-era life continue unabated for many of our rural communities.

Hughes, *Imijondolo: a photographic essay on forced removals in the Inanda District of South Africa* (Johannesburg: Afrapix, Raven Press, 1995).

³¹ Agriculture and Land Affairs Portfolio Committee, Parliament of South Africa (2000) 'Consideration and Adoption of Report on Provincial Study Tour (1 November 2000)', reproduced by *Parliamentary Monitoring Group*, available at <http://www.pmg.org.za/docs/2000/viewminute.php?id=1>); Programme for Land and Agrarian Studies (PLAAS) (2004) *Submission to the Portfolio Committee on Agriculture and Land Affairs, National Assembly, 13 October 2004*, available at <http://www.uwc.ac.za>; Statistics South Africa (2004) *Agricultural Census (Census of Commercial Agriculture), 2002*, available at <http://www.statssa.gov.za/publications/information.asp?ppn=frrqr>; M. Wegerif, 'Creating long term tenure security for farm dwellers', unpublished discussion paper presented to the National Land Tenure Conference, Durban 26-30 November 2001.

³² *AGM - Keynote address by Judge Dunstan Mlambo*, Rural Legal Trust, 2003, available at http://www.rlt.org.za/rlt_trustees.html, p.1.

In urban areas, informal settlers, tenants and homeowners are being evicted for a variety of reasons, including inner city regeneration projects, alleged criminal activities, health and safety conditions in buildings, and alleged illegal occupation. In addition, evictions are increasingly being tested as a method to recover unpaid rents, rates and utility bills.³³

In the case of Johannesburg, the extended spate of evictions in the inner city is officially justified in the name of the Johannesburg Inner City Regeneration Project (ICRP). The strategy underlying this ambitious project is complex, with many cross-cutting components. Key amongst these is the clearance of an estimated 235 'bad buildings', which are seen to be at the centre of developmental 'sinkholes', perceived hotbeds of degeneration and crime. According to the ICRP, these 'sinkholes' need to be eliminated, or turned into socio-economic 'ripple ponds', which should then be incrementally linked with each other, "gradually cleaning up the city, block by block", thus spreading an upward spiral of confidence and meeting the overall goal of "raising and sustaining private investment leading to a steady rise in property values".³⁴ Turning around the fortunes of the Johannesburg CBD is perceived as essential in the process of re-establishing confidence in the province and, indeed, the country on the world stage.

The problem from the perspective of this paper is that, in the process, the end begins to justify the means, and the rights of ordinary people are severely compromised. The Johannesburg inner city evictions will affect an estimated minimum of 25,000 people. If present practice continues, which includes using urgent applications for eviction in terms of health and building safety laws, few if any of the evicted are likely to be provided with any alternative accommodation, or compensation for loss of personal belongings, nights spent on the pavement, or any of the other effects of being evicted. There is no dispute that some of the buildings in question are indeed 'unhealthy', 'unsafe', and at times do serve as bases for criminals. Yet research clearly shows that the vast majority of the affected people are, quite simply, ordinary poor people, trying to earn a living on the streets of Johannesburg. Indeed, they are themselves very often the victims of crime, unprotected by an under-resourced police force, rather than the criminals they are made out to be. In the name of clearing these depressed areas, they are being evicted with no credible alternative housing or tenure options being provided.³⁵

³³ African National Congress Western Cape, 'ANC repeats call for immediate moratorium on all evictions and water cut-offs by DA Unicity', 22 June 2001, available at <http://www.anc.org.za/ancdocs/pr/2001/pro621.html>; M. Butler, 'Rates policy will make the poor poorer', *Witness*, 13 September 2004; Centre on housing Rights and Evictions, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, Consultation Report (Geneva: Centre on Housing Rights And Evictions, 2005), <http://www.cohre.org>; Housing Portfolio Committee, Parliament of South Africa, 'Northern Cape Visit Committee Report: Adoption; Western Cape Evictions', 20 June 2001, reproduced by Parliamentary Monitoring Group (<http://www.Pmg.Org.Za/Docs/2001/Viewminute.Php?Id=762>); Marie Huchzermeyer 'Housing rights in South Africa: invasions, evictions, the media and the courts in the cases of Grootboom, Alexandra and Bredell' *Urban Forum* Vol. 14 Iss. 1, pp.8-107; 'Evictions Loom in Suburbs' [of Cape Town], *Sunday Times*, 8 July 2001; 'The poor unite to fight for their homes' *Witness Echo*, 2 September 2004.

³⁴ P. Garson, *New confidence in inner city regeneration*. City of Johannesburg Official website, 2004, available at http://www.joburg.org.za/2004/aug/aug13_inner.swtm; N. Fraser, 'Sinkholes and Ripple Ponds'. City of Johannesburg Official website, 2003, available at www.joburg.org.za/citichat/2003/mar10_citichat.stm).

³⁵ COHRE, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, Consultation Report (Geneva: Centre on Housing Rights and Evictions, 2005), available on www.cohre.org).

Interestingly, the language used to explain forced evictions in Johannesburg has a similar ring to the language used in many other large eviction projects around the world. The reasons given are often highly technical, and are invariably connected with notions of 'the public interest'. The formulations used in speeches, official website pages and power point presentations are, frequently, rhetorical and compelling, with the implication that questions, criticism or resistance to the evictions, amounts to disloyalty to ideals attached to the 'greater good' of Johannesburg. Who, after all, would want to argue against the cause of turning the City of Johannesburg around?

Leckie notes that:

[V]irtually no eviction is carried out without some form of public justification seeking to legitimize the action. Many of the rationale behind the eviction process are carefully designed to create sympathy for the evictor, while simultaneously aiming to portray the evicted as the deserved recipient of these policies – a process appropriately labelled 'bulldozer justice' by the retired Indian Supreme Court Justice Krishna Iyer.³⁶

And, indeed, what reply could the group of Indian villagers, facing imminent displacement by the Hirakud Dam in 1948, possibly have had to the great Jawaharlal Nehru when he told them: "If you are to suffer, you should suffer in the interest of the country".³⁷

There is of course great merit in accounting publicly for courses of action that will affect people's lives. Explanations by the authorities as to why specific evictions are planned, open up the possibility of public dialogue on the merits of planned evictions. However, what is very interesting about most official discourse around evictions is the virtually total absence of attempts by authorities to prevent the evictions through creative alternatives. Once a planned eviction project has been decided on, discussion usually turns to the more logistical issues of why, how and when; and seldom about possibilities of averting the evictions through community-based, locally appropriate alternatives. This unfortunate gap in thinking and practice relates to the fact that the input to be made by the affected groups is almost universally under-rated, and discounted against the technical expertise commissioned by the implementers of such eviction projects.

This is a dangerously short-sighted approach. For example, those villagers displaced by the Hirakud Dam in India would have had many things to say about the dam, about the affect it would have on their livelihoods and their traditions, on their river and, indeed, on the 'natural order of things'. To listen to these stories would have taken time, and to hear them properly would have taken skill. However, had the implementers, experts and politicians taken the time and developed the skills to listen to those villagers, they may have been able to pre-empt and prevent some of the massive mistakes subsequently made. But living at a time when development and other experts were singing the praises of mega-dams, the affected villagers had no audience amongst decision makers.

In the end, it would take more than half a century of mistakes before the lessons that those villagers could have taught, were finally being learnt, the hard way. In November

³⁶ Scott Leckie, *When Push Comes to Shove: Forced Evictions and Human Rights* (Habitat International Coalition, 1995).

³⁷ A. Roy, 'The Greater Common Good', *Outlook India*, 24 May 1999.

2000 the World Commission on Dams concluded, after a two-year investigation which included intensive public consultation, that while

[D]ams have made an important and significant contribution to human development, and benefits derived from them have been considerable... in too many cases an unacceptable and often unnecessary and high price has been paid to secure those benefits, especially in social and environmental terms, by people displaced, by communities downstream, by taxpayers and by the natural environment.”³⁸

3. International law and forced evictions

In the contrast to the above practices, a dense web of international law seeks to ensure that human rights are protected in cases of proposed or actual evictions. They commonly require that evictions can only proceed in accordance with national law, in certain prescribed circumstances and with due process. This section details the various international standards and jurisprudence that has emerged in the context of various human rights and international humanitarian, criminal, labour and refugee law.

3.1 Right to adequate housing

The right to adequate housing was recognised as long ago as 1948, in the Universal Declaration on Human Rights, as well as in 1966 in the International Covenant on Economic, Social and Cultural Rights. It has been consistently re-affirmed as an independent right by the international community, for example by the General Assembly in 1986 and 1987³⁹ and in the text of the Convention on the Elimination of Racial Discrimination. However, the 1987 International Year of Shelter for the Homeless marks the clear beginning of a more focused attention on the topic of forced evictions within the UN system, which has resulted in the development of numerous legal standards. Since these standards draw their authority from the right to adequate housing, the protection against forced eviction has been characterised by an emphasis upon substantive and not just procedural protections. Interestingly, recent developments in civil and political rights jurisprudence indicate that courts are moving away from narrowly constrained visions of due process to recognise that various civil rights demand some level of substantive protection (see section 3.3 below).

At the international level, the Committee on Economic, Social and Cultural Rights was the first UN institution to begin systematically condemning forced evictions as a human rights violation. Following its comprehensive rebuke to the Dominican Republic in 1990 and 1991,⁴⁰ and the seminal finding that forced evictions were a human rights violation,⁴¹

³⁸ World Commission on Dams, *Dams and Development: a New Framework for Decision-Making: The Report of the World Commission on Dams* (Earthscan, 2000). See also P. Williams, ‘Reviving Rivers’, *World Rivers Review* Vol. 13 Iss. 4 (August 1998).

³⁹ Realization of the right to adequate housing, A/RES/41/146, 4 December 1986, 97th plenary meeting. The resolution states in part that the General Assembly: ‘1. Expresses its deep concern that millions of people do not enjoy the right to adequate housing; 2. Reiterates the need to take, at the national and international levels, measures to promote the right of all persons to an adequate standard of living for themselves and their families, including adequate housing.’

⁴⁰ See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Dominican Republic*, E/C.12/1990/8 (1990), para. 249.

the Committee has regularly scrutinised legislation and policy, the justifications for threatened evictions and whether compensation and alternative accommodation was provided to victims. This has principally been in the context of its review of implementation by States parties of the right to adequate housing in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, the Committee expressed concern that

- [T]he right to security of tenure is not enjoyed by all tenants in Canada...The Committee regretted that there were no figures available from the Government on the extent of homelessness, on the numbers of persons evicted annually throughout the country, on the lengths of waiting lists or the percentage of houses accessible to people with disabilities (Concluding Observations, 1993).⁴²
- [P]ractices of forced evictions without consultation, compensation or adequate resettlement appear to be widespread in Kenya, particularly in Nairobi (Concluding Observations on Kenya, 1993).⁴³
- [A] large number of households [in the United Kingdom] have experienced harassment or illegal eviction and notes that the national housing policy is not adequate to address this problem which particularly affects private tenants who are single parents, have low incomes or, in general, are among the most vulnerable groups of society. (Concluding Observations on United Kingdom, 1994).⁴⁴

In some cases its recommendations, have been very specific. During its review of The Philippines, the Committee, after affirming the general principles, urged the Government to extend indefinitely the moratorium on summary and illegal forced evictions and demolitions, promote greater security of tenure, take the necessary measures, including prosecutions wherever appropriate, to stop violations of laws such as R.A. 7279.⁴⁵ It also urged that certain laws criminalising trespass - PD 772 and PD 1818 – be repealed that all existing legislation relevant to the practice of forced evictions should be reviewed so as to ensure its compatibility with the provisions of the Covenant. The Committee also noted that when ‘relocating evicted or homeless persons or families, attention should be paid to the availability of job opportunities, schools, hospitals or health centres, and transport facilities in the areas selected.’

This position was also reflected in the Committee’s General Comment No.4 on Right to Adequate Housing of 1991, which states that: ‘instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of

⁴¹ For a history of the case see the interview with Scott Leckie in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: Centre on Housing Rights & Evictions, 2003) at p.157.

⁴² *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Canada*, U.N. Doc. E/C.12/1993/5 (1993), para 17-18.

⁴³ *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Kenya*, U.N. Doc. E/C.12/1993/6 (1993), para. 16.

⁴⁴ *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. E/C.12/1994/19 (1994), part 1(C).

⁴⁵ *Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Philippines* U.N. Doc. E/C.12/1995/7 (1995), para. 31.

international law.⁴⁶ This General Comment, an authoritative interpretation of Article 11 of ICESCR, further provided that States are obliged to take immediate measures to confer legal security of tenure upon those persons and households currently lacking such protection. In the same year, the UN Sub-Commission on Human Rights, also an expert body, passed a resolution in similar terms and continued to do so until 1998.⁴⁷

The political arm of the United Nations human rights machinery quickly affirmed these conclusions. The Commission on Human Rights resolved in 1993 that ‘the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing’.⁴⁸ The resolution went on to urge governments to eliminate the practice and confer legal security of tenure to all persons and recommend that they provide remedies to those who had been forcibly evicted. The Commission issued a comparable resolution in 2004. Worryingly, the later resolution appears to place more emphasis on states eliminating evictions that are inconsistent with national law. It is clear, nonetheless, from the language of the resolution that states must ensure that national law conforms to international standards.⁴⁹

Since these developments in the early 1990s, there have been a series of international standards issued that provide a deeper analysis of the duties of states to prevent and remedy forced evictions. One of the most notable of these developments was General Comment No. 7 on Forced Evictions by the Committee on Economic, Social and Cultural Rights.⁵⁰ The document was groundbreaking. It elaborated the various criterion that must be satisfied in order for an eviction to avoid falling foul of the right to housing in Article 11 of the ICESCR and continues to be regularly used in official and advocacy statements on forced evictions. The stipulations essentially fall into a five-fold typology:

⁴⁶ See Committee on Economic, Social and Cultural Rights, *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991) at para. 18.

⁴⁷ Their resolutions are available at:

http://www.unchs.org/programmes/housingrights/unhrp_resolutions.asp

⁴⁸ Paragraphs 1-4 of the Commission on Human Rights resolution 1993/77. read:

1. Affirms that the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing;
2. Urges Governments to undertake immediate measures, at all levels, aimed at eliminating the practice of forced evictions;
3. Also urges Governments to confer legal security of tenure to all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups;
4. Recommends that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities which have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups....

⁴⁹ *Prohibition of forced evictions*, Commission on Human Rights Resolution: 2004/28. The resolution states in part:

1. *Reaffirms* that the practice of forced eviction that is contrary to laws that are in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing;...
5. *Also recommends* that all Governments ensure that any eviction that is otherwise deemed lawful is carried out in a manner that does not violate any of the human rights of those evicted;

⁵⁰ Committee on Economic, Social and Cultural Rights, *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997).

substantive justification, consultation on alternatives, due process, right to alternative accommodation and non-discrimination. These criteria are substantially reflected in the attached guidelines. The General Comment also set out a number of positive obligations which require that states take steps to reduce the risk of forced evictions. For example, legislation against forced evictions was viewed as essential.

The General Comment No. 7 has received significant support from governments and adjudicators. In 2004 and 2005, the Committee of Ministers of the Council of Europe issued two recommendations on Roma and Travellers.⁵¹ It is useful to quote a provision from the latter document in full:

Member states should establish a legal framework that conforms with international human rights standards, to ensure effective protection against unlawful forced and collective evictions and to control strictly the circumstances in which legal evictions may be carried out. In the case of lawful evictions, Roma must be provided with appropriate alternative accommodation, if needed, except in cases of *force majeure*. Legislation should also strictly define the procedures for legal eviction, and such legislation should comply with international human rights standards and principles, including those articulated in General Comment No. 7 on forced evictions of the United Nations Committee on Economic, Social and Cultural rights. Such measures shall include consultation with the community or individual concerned, reasonable notice, provision of information, a guarantee that the eviction will be carried out in a reasonable manner, effective legal remedies and free or low cost legal assistance for the persons concerned. The alternative housing should not result in further segregation.⁵²

In the 2004 recommendation, the Committee of Ministers provided, perhaps for the first time at the international level, extensive guidance on protection of Traveller and nomadic groups from forced evictions.⁵³

⁵¹ See Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe (Adopted by the Committee of Ministers on 1 December 2004, at the 907th meeting of the Ministers' Deputies) and Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe (Adopted by the Committee of Ministers on 23 February 2005 at the 916th meeting of the Ministers' Deputies).

⁵² Recommendation Rec(2005)4, *ibid*, para. 26.

⁵³ The recommendation calls on states establish a legal framework on forced evictions that conforms with international human rights standards in the same terms as the 2005 recommendation (para. 30) and then states:

31. in countries, which do not differentiate between encampment areas and short-stay areas, set a time-limit to the length of stay on sites so as to prevent them being transformed into a zone of exclusion as a result of their users becoming sedentary on the spot; allow the rotation of Travellers between the sites while refraining from setting a maximum authorised length of stay that is shorter than the longest school period between two periods of school holidays and offering those who wish to become sedentary alternatives to settling on existing sites;

32. authorise Travellers' associations to assert the rights of individual Travellers before the competent courts in the event of expulsions, as defendant, or plaintiff and at all stages of the procedure;

33. make statutory provisions for appeal against decisions banning access to certain sites or prohibiting encampment;

34. define as part of a Traveller's caravan, and therefore of his or her place of residence, an area bound by a perimeter of a few metres around the caravan

Recommendation Rec(2004)14 (n.51 above).

In the case of in *SERAC v Nigeria*, the African Commission on Human and Peoples' Rights refers approvingly to the General Comment No. 7 in the context of its condemnation of Nigeria's destruction of villages in Ogoniland: 'The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".⁵⁴ The principles are also generally reflected in a recent decision on housing rights of Roma by the European Committee on Social Rights in *ERRC v Greece*⁵⁵ and have been applied in a sweep of cases that have been handed down by the Constitutional Court of South Africa.⁵⁶ For example, the latter ruled in *Port Elizabeth Municipality* that:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual. [para 18]

Section 6(3) [of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which gives effect to sec 26(3) of the Constitution] states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme. [para 28]

However, the Committee in General Comment No. 7 offered only a broad indication of the principles that should guide State parties in determining the conditions under which an eviction would be permissible, stating that 'some evictions may be justifiable, such as in the case of the persistent non-payment of rent or of damage to rented property without any reasonable cause...'. On one hand, this opaqueness is unsatisfactory since States and other actors often look to the Committee for guidance on how they might comply with the Covenant. Would it be useful to clarify under what circumstances can residents in informal settlements, indigent tenants, mortgage defaulters, indigenes and rural peoples with insecure official legal tenure can ever be evicted?

⁵⁴ Communication 155/96 at para. 63.

⁵⁵ In Complaint No. 15, the Committee stated at para. 51: '51. The Committee considers that illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned. The Committee considers that on these three grounds the situation is not satisfactory.'

⁵⁶ See for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC); ⁵⁶ *Jaftha v Schoeman and others, Van Rooyen v. Stoltz and others*, 2005 (2) SA 140 (CC) at para. 27; *President of South Africa & Ors vs Modderklip Boerdery & Ors*, Constitutional Court of South Africa, Case CCT 20/04, Unreported judgment of 13 May 2005.

On the other hand, such generality might be appropriate.⁵⁷ The South African Constitutional Court recently commented in a forced evictions case, that pitted a property owner, 40,000 poor unlawful occupiers and the state against each other, that the principle of reasonableness should be deployed: ‘The precise nature of the state’s obligations in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.’⁵⁸ The European Court of Human Rights, while concerned with a more emasculated right to housing, also simply queries whether the interference has a legitimate aim and it is proportionate to that aim. The Committee also, to a large extent, addresses these concerns in its procedural categories, which provide a series of checks and balances to reduce the chances that residents are deprived of their existing housing or land or are rendered homeless by the evictions. Further, historical conceptions of justice demand that some groups should be granted greater protection than others, for example indigenous peoples.

Further, attempts to provide more detailed lists of justification – for example the Urban and Development Housing Act 1992 of the Philippines– can be subject to abuse if there is no judicial review of the reasonableness of the action. In this case, the legislation authorises evictions from dangerous and hazardous areas. While this is an important justification, such areas are home to most informal settlements. Consequently the Act has been employed to evict resident without due process in many cases although it is arguable that legal remedies must be provided to residents under the Act. The attached guidelines nevertheless attempts to deal with this omission by providing some further detail on relevant vulnerable groups and peoples for whom specific protection is often necessary.

However, one area that the General Comment No. 7 does not address specifically is the question of indirect evictions, including ‘market’ and constructive evictions. For example, many evictions result from cuts to social security benefits, a matter over which the government has a large degree of control. Further, the failure of governments to regulate broad market forces, for example gentrification or even a slum-upgrading program can lead to evictions as formal and informal owners use the improved conditions to evict tenants in order to secure higher rents. Constructive evictions can occur when the government forces tenants to move, for example by cutting off water supplies.⁵⁹

In addition to the General Comment No.7, two other key international documents put flesh on the general rule on the prohibition of forced evictions. The guidelines on development–based displacement, developed by a group of experts and submitted by the UN Secretary-General to the Commission on Human Rights in 1997,⁶⁰ are notable for

⁵⁷ In fairness to the Committee, these issues are occasionally dealt with in their concluding observations and the Committee does not yet have the benefit of a individual complaints mechanism.

⁵⁸ *President of South Africa & Ors vs Modderklip Boerdery & Ors*, Constitutional Court of South Africa, Case CCT 20/04, Unreported judgment of 13 May 2005 at para. 43.

⁵⁹ See *Van der Walt & Ors v Lang & Ors* (1999), and *Ndhladhla & Ors v Erasmus* (Land Claims Court, 1998), as cited and referred to in S. Liebenberg & K. Pillay (eds.) *Socio-Economic Rights in South Africa* (2000).

⁶⁰ ‘The Practice Of Forced Evictions: Comprehensive Human Rights Guidelines on Development-Based Displacement’ E/CN.4/Sub.2/1997/7, 2 July 1997.

their detailed prescriptions on adequate resettlement and compensation. Many of the paragraphs are reflected in the attached recommended guidelines.

Secondly, the World Bank Guidelines on Involuntary Settlement⁶¹ play an important role in regulating World Bank funded development projects and have been partially reflected in the policies and procedures of the regional development banks, for example the Asian Development Bank and Inter-American Development Bank. Together with the World Bank Inspection Panel, these guidelines provide the only form of recourse for affected communities. Implementation of the Panel's decisions has been criticised however.⁶² The extent to which the Guidelines embody a human rights approach is also questionable. There is no strict criteria or, most importantly, process for determining when involuntary settlement should be carried out. The guidelines simply state that 'Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs'⁶³ and that 'Bank experience has shown that resettlement of indigenous peoples with traditional land-based modes of production is particularly complex and may have significant adverse impacts on their identity and cultural survival.'⁶⁴ The weight of this policy is also directed towards the development of a resettlement plan by borrowing states. Further, the guidelines do not apply to World Bank technical advice on land and social policy, which often has significant implications for security of tenure of poor households.

3.2 Other economic, social and cultural rights

Forcible eviction of people from their homes commonly violates a wide range of other economic, social and cultural rights. In India, the Supreme Court first derived the prohibition on forced evictions in India from the right to a livelihood.⁶⁵ Removal of pavement dwellers from the street would deprive the victims of access to work opportunities according to the Court. Other commonly affected rights include education, health and social security.

However, what is missing from much legal analysis of forced evictions is the manner in which forcible evictions from the home are accompanied by direct violations of economic, social and cultural rights, in particularly the right to work, food, health, water and education. Forced evictions in rural areas often result in removal of people from land they use for agriculture, while other large-scale forced evictions result in the destruction of property used to maintain a livelihood and the destruction of health facilities, schools, water and sanitation services and cultural and religious centres.

Nevertheless, the most quoted international standard on the right to food, the General Comment no. 12 on the Right to Adequate Food, curiously omits mention of forced evictions despite the fact that the leading international organisation on the right to food,

⁶¹ Involuntary Resettlement (Revised April 2004), OP 4.12.

⁶² See Dana Clark, 'The World Bank and Human Rights: The Need for Greater Accountability', *Harvard Human Rights Journal*, Vol. 15, Spring (2002), 205. Clark notes that resettlement programmes have rarely provided adequate compensation or livelihoods. The inability of the Panel to supervise its recommendations means it has little control over the remedying of violations.

⁶³ Paragraph 2(a).

⁶⁴ Paragraph 9.

⁶⁵ See *Olga Tellis v Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351.

FIAN International, devotes a significant part of its advocacy activity to fighting forced evictions in rural areas.⁶⁶ In order to partly address this deficiency, the opening section of the proposed guidelines addresses the need for States to ensure sufficient protection against evictions from productive land and confiscation and destruction of property used to sustain livelihoods or protect other economic, social and cultural rights.

3.3 Civil and political rights

The interdependency of human rights is clearly demonstrated in the case of forced evictions. The most voluminous jurisprudence on forced evictions has emerged from courts and quasi-judicial bodies concerned with civil and political rights, namely the right to respect for the home, right to privacy, right to life and right to freedom of movement and right to property. What is clear from recent judgments is that there is a discernible trend towards strengthening protections against forced evictions through the enforcement of the human rights.

The European Court on Human Rights has developed a significant body of jurisprudence on forced evictions under the right to respect for the home, privacy and family life in Article 8 of the European Convention on Human Rights and Fundamental Freedoms. If an eviction will result in the strong likelihood of homelessness, the Court will closely examine the justification for the action. In *Marzari v Italy*, for example, considerable weight seems to have been attached to the efforts by the public authorities to finding a disabled tenant alternative accommodation.⁶⁷ In *Connors v United Kingdom* the Court appeared to be moving towards more clearer principles:

[T]he eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a 'pressing social need' or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.⁶⁸

The Court went onto award €15,000 in compensation for the distress caused by the eviction.

The *Connor's* decision finds resonance in recent jurisprudence emanating from the United Nations Human Rights Committee. Article 17 of the International Covenant on Civil and Political Rights has a similarly worded protection against arbitrary interference with the home. In its 2005 Concluding Observations on Kenya, the Committee recommended:

The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.⁶⁹

It is noteworthy that the language in this recommendation is almost indistinguishable from that contained in General Comment No 7.

⁶⁶ See www.fian.org

⁶⁷ (1999) 28 EHRR CD 175.

⁶⁸ *Connors v United Kingdom*, (European Court of Human Rights, Application no. 66746/01, 27 May 2004) at para. 95.

⁶⁹ *Concluding Observations of the Human Rights Committee: Kenya*, 28 March 2005, CCPR/CO/83/KEN.

However, the Court's judgments are not necessarily consistent.⁷⁰ The Court was only partly moved by the plight of Gypsy families in England in the earlier case of *Chapman v UK*. For environmental reasons, the Chapmans' were denied planning permission to locate their caravans on their own property.⁷¹ The United Kingdom was permitted a wide margin of appreciation in its planning decisions since the Court was 'not persuaded that the consensus [amongst European states] is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation.' Nevertheless, the Court did articulate a general rule, however, that states have a positive obligation to 'facilitate a gypsy way of life'. Further, Travellers have been successful in recent and similar cases under the Human Rights Act in the United Kingdom, which incorporates the rights in the European Convention.⁷² Moreover, a European consensus is beginning to emerge on Roma and Traveller rights as demonstrated by recent recommendations from the Council of Europe.⁷³

The jurisprudence of the previous European Commission on Human Rights (where complainants first lodged their cases) also helps illuminate the legal meaning of 'home' and prevent its conflation with proprietary notions. The Commission defined a home to be place where a person lives on a settled basis, which implies a degree of stability and continuity.⁷⁴ The Commission declined to give an exhaustive definition but indicated that the concept depends on the circumstances of each case: the existence of sufficient links between the individual or family and the relevant property.⁷⁵

In decided cases, this has actually meant that *occupation* is more important than *ownership*. For example, in *Loizidou v Turkey* the mere intention of an applicant to build a home on his property in northern Cyprus – an objective frustrated by the Turkish occupation – was held insufficient for the purposes of designating the property a home.⁷⁶ Yet, in *Khatun v UK* the right to non-interference with one's home was held to cover all occupiers, including partners, children, relatives and lodgers.⁷⁷ However, in *Gillow v UK* the Court was prepared to endorse the applicant's claim that their house in Guernsey was a home – despite their absence of 18 years from the island – because they contained "sufficient continuing links" with the property: they had retained ownership, left furniture and always intended to return.⁷⁸

Other cases have raised queried traditional or conventional notions of home.⁷⁹ In *Chapman v UK*, the European Court of Human Rights strongly affirmed that the

⁷⁰ For a similar conclusion see, Christopher Baker, David Carter and Caroline Hunter, *Housing and Human Rights Law* LAG Books, 2001) at 34.

⁷¹ (2001) 10 BHRC 48. See also the earlier case of *Buckley v U.K.* (1995) 19 EHRR CD20.

⁷² See *Secretary of State v. Chichester D.C.* [2004] EWCA Civ. 1248.

⁷³ N.51 above.

⁷⁴ *Wiggins v U.K.* (1978) 13 DR 40.

⁷⁵ See *Buckley v U.K.* (1995) 19 EHRR CD20. See comments on this aspect in Christopher Baker, David Carter and Caroline Hunter, *Housing and Human Rights Law* LAG Books, 2001) at 20.

⁷⁶ (1995) Series A No. 310; 20 EHRR 99. The Court stated "it would strain the meaning of the notion of "home" in article 8 to extend it to comprise property on which it was proposed to build a property for residential purposes".

⁷⁷ (1998) 26 EHRR CD 212.

⁷⁸ (1986) Series A no 109;11 EHRR 335.

⁷⁹ The term home has sometimes been used to include an office: see *Niemetz v Germany* (1992) Series A no 251-B; 16 EHRR 97. The French text of the Convention uses the word 'domicile' which has a meaning broader than home in English.

occupation of a caravan may constitute a home. This case concerned groups with a traditional nomadic lifestyle and it is not clear whether it would apply to all persons whose prime place of occupation was a moveable home. For example, in the earlier case of *Khanthak v Federal Republic of Germany*, the Commission left open the question of whether a camper van constituted a home. However, the more principled approach by the Court seems to indicate that the type of structure is irrelevant: it is the person's relation to that structure and place that is important. Therefore, it would be clearly arguable that for homeless persons a regular place/s for 'sleeping rough' would constitute a home.⁸⁰ Further, even the illegality of the home – on account of zoning laws, trespass laws – has been held irrelevant by the Court, although the basis for the illegality may influence the extent of the government's obligations.⁸¹ The issue was recently raised in *Öneryildiz v Turkey*, a case concerning the destruction of homes of slum-dwellers by an avoidable gas explosion. However, the Court decided to address the issue under the right to life and the property rights of the residents to their housing 'structures' and avoided the Article 8 issue.⁸²

With respect to other civil and political rights, more serious forced evictions have been adjudged to fall foul of the prohibition on cruel and degrading treatment by both the Committee Against Torture⁸³ and the European Court of Human Rights.⁸⁴ In India, the prohibition on forced evictions has been derived from the right to life. In *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors.*,⁸⁵ the Supreme Court said stated:

[I]t is the duty of the State to construct houses at reasonable rates and make them easily accessible to the poor. The State has the constitutional duty to provide shelter to make the right to life meaningful...[and] ...[T]he mere fact that encroachers have approached this court would be no ground to dismiss their cases. Where the poor have resided in an area for a long time, the State ought to frame schemes and allocate land and resources for rehabilitating the urban poor.

More recently in 2002, the Court in *SAHAJ v Vadora Municipal Corporation* (19 Dec 2003) accepted that the petitioners had made a *prima facie* case that demolition of 'hutments' without the provision of alternative accommodation violated the right to housing and shelter in the constitution.

The situation is mixed, however, in countries such as the United States, where victims of forced eviction can only resort to due process or equal protection provisions. Federal legislation in the United States permitting eviction of tenants on account of a drug

⁸⁰ Cf. the US case of *Pottinger v City of Miami*, 810 F. Supp. 1551 (1992), 16 November 1992.

⁸¹ In *Chapman v UK* the European Court of Human Rights found that planning laws denying the right of the applicant to base her caravan on her property were a justified interference with her home. South African courts have come to more sympathetic conclusions in relation to illegal occupation: see *Modderklip v South Africa & Ors* (Supreme Court of Appeal of South African, Decision of 27 May 2004).

⁸² *Öneryildiz v Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002. See comment in Malcolm Langford, "Slum-Dwellers Rights to Life & Property", *ESC & Housing Rights Case Law Update* Issue 1, May 2004.

⁸³ *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002).

⁸⁴ See for example, *Selcuk & Asker v Turkey*, 12/1997/796/998-999 at paras 74-78.

⁸⁵ (1997) 11 SCC 121. For discussion, see Colin Gonsalves, 'The Right to Housing – The Preserve of the Rich' *Housing & ESC Rights Litigation Quarterly* Vol. 1 Issue 2 (2005) at pp.1-3.

offence committed on the premises⁸⁶– with or without the knowledge of the tenant – were upheld by the Supreme Court,⁸⁷ despite contrary decisions by State courts on similar legislation.⁸⁸ On the other hand, compensation was awarded to a tenant whose water was shut off in order to evict her.⁸⁹

Forced evictions may also violate the freedom to choose a residence within the territory of a state, which is protected in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination. The Human Rights Committee has commented on the right to freely choose one's residence as follows:

Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.⁹⁰

Therefore, any restriction on right of person to choose a place to reside is a *prima facie* violation of the ICCPR. A State must turn to paragraph 3 of the article and prove that the restriction is contained in law and is justified, for example to protect public order or public health.⁹¹ Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.⁹²

This right has been successfully invoked in a number of cases. In *Maria Mejia v. Guatemala*,⁹³ the Inter-American Commission found that the forcible removal of 40 people from their homes in order to escape threats and attacks from military personnel violated the right of freedom of movement and the right to choose one's residence as set forth in Article 22(1) of the Inter-American Convention on Human Rights. A Berlin Administrative Court struck down an order by the Commissioner of Police that a Turkish national, with a work permit dating back 15 years, was prohibited from specifically living in the districts of Kreuzberg, Tiergarten or Wedding.⁹⁴ The Constitutional Courts of

⁸⁶ Human Rights Watch, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, (New York, 2004).

⁸⁷ *Rucker v Davis*, No. 00-1770, 00-1781 (U.S. Mar. 26, 2002).

⁸⁸ See *Housing Authority of the City of Pittsburgh v Fields*, (No. 79 C.D. 2000); *Housing Authority v Thomas*, 723 A.2d 119 (New Jersey Supreme Court, Appeal Division, 1999).; *Woodland Manor Apartments v Flowers*, No. 96-C-0201 (Pa. CP. Lehigh County Nov. 4, 1998); *Owner's Management v. Moore*, No. L-95-259 (Ohio Ct. Appeal. June 21, 1996) ; *Village West Apartments v Miles*, No. 95-XX-0001 (Ky. Cir Ct. Jefferson County July 10, 1995); *Syracuse Housing Authority v Boule*, No.96/2160LT (N.Y. City Court Onondaga County Dec. 23, 1996);

⁸⁹ See *Runyon v. Irwin*, No.94 CVF200 (Washington, Ohio, House Mun. Ct. July 17, 1995).

⁹⁰ Human Rights Committee, *General Comment No. 27: Freedom of movement, (Article 12)* (1999) at para. 7.

⁹¹ The full text of Article 12(3) reads "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

⁹² General Comment No. 27 (n.90 above). para.14.

⁹³ Case 10.533, Report No. 32/96, Inter-Am.C.H.R., OAE/Ser.L/V/II.95 Doc. 7 rev. at 370 (1997).

⁹⁴ Berlin Administrative Court (VwG Berlin), Decision of 26 August 1977, (1978) *Neue Juristische Wochenschrift* 68; (1977) *Yearbook* 747.

Belarus⁹⁵ and Russia⁹⁶ have ruled that temporary absences from a home do not justify a denial of the right to maintain the dwelling, even if such denial is provided for in legislation.

Cases of destruction or confiscation of personal property – immovable and movable – by state officials and agents have also been successful before the European Court of Human Rights.⁹⁷ The protection of possessions under Article 1 to Protocol 1 to the European Convention makes such decisions straightforward. However, the Court looks carefully at whether there is a legitimate aim for the action and can be objectively justified.

3.4 Humanitarian and criminal law

The earliest incidents of specific international prohibitions on forced removals are actually traceable to international humanitarian law. In situations of international armed conflict, the 1949 Geneva Convention No. IV forbids mass forcible transfers as well as external deportations from occupied territory.⁹⁸ The exception to the rule was removal that is necessary for the ‘security of the civilians’ or ‘imperative military reasons’.⁹⁹ But upon cessation of hostilities in the relevant area, restitution of land and home was to be granted to those affected civilians.¹⁰⁰ These protections were later extended to internal conflicts within a state in the 1977 Protocol II¹⁰¹ but there is no explicit reference to the remedy of restitution.¹⁰² In a number of cases before war crimes tribunals, individuals have been prosecuted for conducting forced removals.¹⁰³

Many international scholars contend that the prohibition of forced removals extends beyond situations of armed conflict and is part of the corpus of international customary law.¹⁰⁴ This position was affirmed by the Appeal Chambers of the International Criminal Tribunal on Former Yugoslavia: ‘It is by now a settled rule of customary international

⁹⁵ Decision No. J-38/96 of the Constitutional Court of Belarus, 25 June 1996, (1996) *Bulletin on Constitutional Court Case-Law* 191.

⁹⁶ Decision of the Constitutional Court of Russia, 23 June 1995, *Rossiyskaya Gazeta*, 04.07.95, (1995) 2 *Bulletin on Constitutional Case-Law* 191.

⁹⁷ See *Akdivar and Others v. Turkey*, App. no. 00021893/93, Judgment 16 September 1996.

⁹⁸ Article 49, *Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949*, U.N.T.S. Vol. 75, p. 287, entered into force Oct. 21, 1950.

⁹⁹ *Ibid.* The relevant part of the article states: ‘Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement.’

¹⁰⁰ *Ibid.* Article 134 also provides that ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.’

¹⁰¹ Article 17(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force Dec. 7, 1978.

¹⁰² Article 17(2) of Protocol II, *ibid.*, only states that if displacements had to be carried satisfactory living conditions must be maintained

¹⁰³ See *Tadic case, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-T (Oct. 2, 1995) and *Nikolic, Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61*. IT-95-2-R61 (Oct. 20, 1995).

¹⁰⁴ Declaration of International Law Scholars on Forced Relocation, Originally written and submitted for *Doe v. Unocal*, 110 F.Supp.2d 1294 (C.D. Cal. 2000) litigation, <http://homepage.ntlworld.com/jksonc/docs/bancoult-d3b.html>.

law that crimes against humanity do not require a connection to international armed conflict.¹⁰⁵ The Rome Statute of the International Criminal Court is consistent with this ruling, characterising forcible transfer as a crimes against humanity. Deportation or forcible transfer of population is defined as ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’ and the Assembly of States parties to the Statute has set out a five-element definition of the crime.¹⁰⁶ There have been recent calls, for example, for the indictment of the President of Mugabe before the International Criminal Court on account of large-scale forcible removals, although such action would require a recommendation from the Security Council since Zimbabwe has not ratified the Statute.¹⁰⁷

3.5 Indigenous peoples

While international law has long concerned itself with regulating the confiscation of private property, redressing centuries of brutal evictions and dispossession of indigenous peoples has only received attention in recent years. Sadly, as discussed in section 2, large-scale forced evictions and systematic dispossession of indigenous peoples continues in many countries. Much attention has focused on the development of the Draft Declaration of Indigenous Peoples by the former Working Group on Indigenous Peoples under the UN Commission on Human Rights. The document is clear on the subject of redress:

Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.¹⁰⁸

The draft declaration also provides for continuing protection of indigenous lands.¹⁰⁹ However, despite resting in the bowels of the Commission for two decades, the declaration is yet to shed its status of ‘draft’.¹¹⁰

¹⁰⁵ See *Tadic* (n. 103 above), pp.35-36.

¹⁰⁶ 1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

¹⁰⁷ See ‘Augustine Mukaro, ‘EU/UN slam govt’, *Zimbabwe Independent*, 10 June 2005, available at <http://www.theindependent.co.zw/news/2005/June/Friday9/2514.html>

¹⁰⁸ Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 (1994).

¹⁰⁹ See preambular para. 5.

¹¹⁰ See ‘UN Commission Debates Draft Declaration on Indigenous Peoples’, Oral Statement of Sanchay Chakma of AITPN under Agenda Item 15 of the 61st Session of the United Nations

The ILO Convention No. 169 (Indigenous and Tribal Peoples Convention, 1989) likewise provides similar textual protections, namely three separate articles on recognition of ownership (Article 14) safeguarding of natural resources (Article 15) and protection from removal (Article 16). Relocation is forbidden except in exceptional circumstances and where there is free and informed consent of the peoples concerned, although the latter protection is later watered down in the text. Where possible indigenous peoples shall have the right to return and compensation shall be provided in the form determined by the victims. However, only 14 states have ratified the convention. While these states have sizeable indigenous populations,¹¹¹ no state in Africa or Asia has ratified the convention and evictions of indigenous peoples in these regions is ongoing.

Perhaps the strongest protections can be found in the widely ratified International Bill of Rights (ICCPR and ICESCR) as well as the Convention on Elimination of Racial Discrimination. The Conventions contain a number of rights such as protections against racial and ethnic discrimination, arbitrary removal and forced evictions as well as the right to a minority lifestyle. The Committee on the Elimination of Racial Discrimination, which monitors implementation by states parties to the latter treaty, has recommended that States:

[R]ecognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the rights to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.¹¹²

However, the International Bill of Rights also contains the right of peoples to self-determination in Article 1. The language of Article 1 is clearly relevant in the context of forced evictions:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The debate over whether indigenous peoples constitute a peoples for the purposes of international law is long and tortured debate.¹¹³ The general fear of states is the recognition of the right to external self-determination thereby raising the possibility of

Commission on Human Rights: Indigenous Issues, available at http://www.unpo.org/news_detail.php?arg=02&par=2371

¹¹¹ The ratifying states are: Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay and Peru.

¹¹² See CERD General Recommendation XXIII: Indigenous Peoples, adopted at its fifty-first session (1997).

¹¹³ See James Anaya. *Indigenous peoples in international law*, 2d ed. (New York, Oxford: Oxford University Press, 2004); Patrick Thornberry *Indigenous peoples and human rights* (Manchester : Manchester University Press, 2002).

secession. However, there is an emerging consensus that there is, at a minimum, a right to *internal* self-determination, which carries rights of participation, self-managements and some form of sovereignty or control over some ancestral lands. At the Commission on Human Rights Working Group on Indigenous Populations and elsewhere, an increasing number of State delegations have supported the language of self-determination in the Draft Declaration on the Rights of Indigenous Peoples, provided that it poses no threat to the territorial integrity of States.¹¹⁴

Further, the Human Rights Committee recently interpreted that article 27 of the ICCPR, which protects the lifestyle of minorities, should be interpreted in light of the right to self-determination¹¹⁵ and in a series of cases on Finland the Committee closely reviewed the effect of logging and mining activities on reindeer herding of indigenous Sami.¹¹⁶ The Inter-American Court has also come down with rulings under the Inter-American Convention on Human Rights that mirror the protections contained in the ILO Convention. In the *Awas Tingni* cases, the Court held that that the State was obliged to delimit, demarcate and title the territory of the indigenous population and ensure that the territory was protected interference in accordance with the right to property.¹¹⁷ A number of restitution cases at the national level have also been successful.¹¹⁸

3.6 Refugees and internally displaced persons

The most well known international remedy for those who have been forcibly evicted has been the grant of asylum in another country, if the affected individual has left their home state and applied for refugee status.¹¹⁹ But the remedy is premised on consideration of future circumstances – fear of persecution upon return – as opposed to the existence of prior human rights violations.¹²⁰ The African variant, however, enlarges the criteria for the definition of fear of persecution.¹²¹ Nonetheless, it is certainly arguable that past and potential forced evictions constitute a ground for establishing the threat of persecution. The Refugee Convention also provides that housing conditions of refugees in the host country should not be less than those of nationals, which means that security of tenure and protection against forced evictions should be equally extended to such groups.¹²²

¹¹⁴ These include Argentina, Bolivia, Canada, Chile, Colombia, Denmark, Finland, Mexico, New Zealand, Norway, Peru and Switzerland. See Sarah Pritchard, 'Indigenous Peoples' Rights And Self Determination', *Human Rights Defender Manual*, Diplomacy Training Program, February 2001, available at <http://beta.austlii.edu.au/au/other/HRLRes/2001/8/>.

¹¹⁵ See _____.

¹¹⁶ See for example *Länsman et al. v. Finland* (Communication No 511/1992).

¹¹⁷ Inter-Am. Ct. H.R., *The Mayagna (Sumo) Indigenous Community of Awas Tingni*, Judgment of Aug. 31, 2001 (Ser. C) No. 79.

¹¹⁸ See Bret Thiele, 'Enforcing the Right to Restitution: Legal Strategies for Indigenous Peoples and the Role of International Law' in Scott Leckie (ed.) *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (New York: Transnational Publishers, 2003), pp. 361-374.

¹¹⁹ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

¹²⁰ *Ibid.*, Article 1.

¹²¹ Convention Governing Specific Aspects of Refugee Problems in Africa, U.N.T.S. Vol. 1001 No 45, entered into force June 20, 1974.

¹²² Convention relating to the Status of Refugees, U.N.T.S. Vol. 189 No. 150, entered into force April 22, 1954, Article 21.

With respect to internally displaced persons, there is no specific international treaty. Nevertheless, the UN Guiding Principles on Internal Displacement set out a set of principles not dissimilar to General Comment No. 7.¹²³ States and other international actors are to avoid and prevent conditions that might lead to displacement, seek alternatives, follow due process and provide legal remedies.

There is also a growing body of law that focuses upon the right of refugees and internally displaced to voluntary return, and which extends beyond situations of international armed conflict as noted earlier. Leckie concludes that, '[w]hile it may still be difficult to argue that the displaced have a formal right to housing and property restitution under international human rights law, the indications of the emergence of this norm are now overwhelming.'¹²⁴ These principles are perhaps best captured in the draft Principles on Housing and Property Restitution for Refugees and Displaced Persons, which states in part:¹²⁵

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy to displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

The principles also comprehensively, perhaps more than any other international document, set out positive state obligations to prevent displacement¹²⁶ and establish the necessary institutional and remedial mechanisms.¹²⁷

4. Conclusion: From the international to the national

The scale of the evictions problem and the weight of international law demand an urgent response at the national level. It is important for every government to regularly and thoroughly re-assess the situation in their country with respect to forced evictions, and to take urgent steps including the passing of laws, formulation of policies and implementation of programmes to ensure that the types of injustices described are eliminated.

There are some countries that have implemented strong legislative protections against forced evictions. For example in South Africa, the *Prevention of Illegal Evictions Act* provides for court proceedings in all cases of evictions and the adjudicator must consider

¹²³ UN Doc. E/CN.4/1998/53/Add.2 (1998).

¹²⁴ Scott Leckie, 'New Directions in Housing and Property Restitution' in Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (New York: Transnational Publishers, 2003), p.1.

¹²⁵ Housing and property restitution in the context of the return of refugees and internally displaced persons, Final report of the Special Rapporteur, Paulo Sérgio Pinheiro, submitted in accordance with Sub-Commission resolution 2004/2, E/CN.4/Sub.2/2005/** 2 May 2005.

¹²⁶ Ibid, para. 5.

¹²⁷ Ibid, section V.

all relevant factors, including access to alternative accommodation.¹²⁸ Importantly, ‘public interest’ is defined to include ‘interest of the health and safety of those occupying the land and the public in general.’ In an attempt to provide some form of historical fairness and prevent ‘queue-jumping’, residents who have informally settled on a site for less than six months are given fewer rights.¹²⁹ Legislation from The Philippines, France and United Kingdom is also noteworthy although the legislation does not always conform with international law.¹³⁰

However, it should be noted that ways have been found around even the best legislation. In the case of South Africa, many evictions are being effected in Johannesburg not under the PIE Act but through the use of health and building safety legislation instead. Ostensibly, this is because the buildings must be urgently cleared and eviction would be in the interest of the occupants. However, in many cases it is simply because the latter legislation is a much quicker, cheaper and easier means to the same end. Clearly, protective legislation is only one step towards securing the protection of rights.

There is also an important need to develop a culture that respect the importance of developing community-based, locally appropriate alternatives to evictions. Take for instance, the small community of Pom Mahakan (300 residents) who reside next to Mahakan Fort in central Bangkok. In January 2003 the residents were served with an eviction notice by the Bangkok Metropolitan Administration (BMA) and were offered relocation to a place 45 kilometres away, on the outskirts of Bangkok. What is most interesting about the resistance by the residents to the evictions is that they supplemented it with a number of additional, pre-emptive activities. Working with a coalition of NGOs, professionals and human rights activists, they put forward a highly innovative land-sharing plan as an alternative to eviction and relocation. The plan included the renovation of the older buildings and the integration of the residences into an historical park.¹³¹ The residents even started implementing aspects of their plan by creating meandering pathways amongst the buildings and ancient trees, and turning the oldest house in the settlement into a museum and exhibition area for their proposals. In response, many outsiders rallied to their support. Yet, despite the public support for the land-sharing plan, repeated invitations for dialogue, petitions and pleas, even from the UN Committee on Economic, Social and Cultural Rights, the Bangkok Metropolitan Administration failed to appreciate the enormous value of this community-driven initiative, and refused to seriously consider the proposals put before them. In August 2003 an administrative court ruled that the eviction was legal and could go ahead¹³². In January 2004, the authorities started work on the unoccupied areas of Pom Mahakan, including moving the canal pier and excavating certain areas. Nevertheless, at the time of writing the people of Pom Mahakan remain in their homes.

International organisations and national non-state actors such as corporations (banks, developers, mining companies and others, and parastatals such as electricity utilities), should also be obliged to take stock of the effects of their activities on the housing rights of families and communities, and to take appropriate action where necessary to ensure

¹²⁸ See section 6, Prevention of Illegal Evictions Act 1998.

¹²⁹ Ibid., section 6(2).

¹³⁰ See Centre on Housing Rights & Evictions, *Forced Evictions and Human Rights: A Manual for Action*, (Geneva: Centre on Housing Rights & Evictions, 1999), pp.86-96.

¹³¹ G. Bristol, et al. ‘The Pom Mahakan Report’, 2003, available at <http://www.glbristol.com/modules.php?name=Academia>

¹³² *Bangkok Post*, 30 August 2003 and 25 April 2004.

that there are no negative impacts or consequences. In addition, it is important for all civil society organisations and groups concerned with human rights and development, to identify the effects of forced evictions on their spheres of work and constituency groups, and to form alliances and develop methodologies to counter these.

The attached guidelines seek to comprehensively reflect the existing state of international law and in a number of instances provide additional detail. A section on the obligations of non-state actors has been added which reflects emerging international law, as encapsulated in the OECD Guidelines on Multinational Enterprises, the UN Sub-Commission's draft Resolution on Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights and the World Bank guidelines on resettlement. But the challenge is to not only incorporate international law in legislation, policies and procedures but to establish a political and social culture that does not tolerate forced evictions.

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I. INTRODUCTION

1. Definition of forced evictions

Forced evictions are defined as the permanent or temporary removal of individuals, families and/or communities against their will from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection as outlined in the Guidelines for the Prevention and Remedy of Forced Eviction (hereinafter 'Guidelines').

2. Forced evictions constitute human rights violations

Forced evictions constitute *prima facie* violations of a wide range of internationally recognised human rights.¹³³ The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights

3. Associated human rights violations

States shall ensure that any other activities which accompany evictions and violate other human rights, such as confiscation or destruction of productive land, the destruction of property, schools, health care, water and sanitation facilities and cultural property and the dislocation of social networks and occur with provision of, and access to, appropriate forms of legal or other protection as provided for in these Guidelines.

II. GENERAL OBLIGATIONS

4. State obligations

States have the primary obligation for prohibiting, preventing and remedying forced evictions in their jurisdiction and in areas under their effective control, whether carried out or threatened by State or non-State actors.

States have obligations to prevent their own citizens and companies operating under their jurisdiction (public and private) from carrying out forced evictions in other states, to ensure that international organisations of which they are a member do not carry out or promote forced evictions, and to take steps through financial and technical assistance to other states to ensure the elimination of forced evictions.

The aforementioned obligations of States with respect to forced evictions does not relieve other entities from their obligations in this regard: see Part VI. .

¹³³ These include the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment.

5. Prohibition of forced evictions

States shall take steps to legally prohibit forced evictions within their territory and areas of *de facto* control.

States shall apply appropriate civil and/or criminal penalties against any person or entity, operating within its jurisdiction, whether public or private, who carries out a forced eviction.

6. Non-discrimination and equality

States shall ensure that protections against forced evictions, the right to secure tenure and the right to adequate housing shall be guaranteed without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

States shall guarantee the equal right of women and men to the enjoyment of the rights articulated within the present Guidelines.

States should take specific action to provide sufficient protection to groups and peoples who are vulnerable to forced eviction.

7. Prevention of forced evictions

States shall secure, by all appropriate means including the provision of security of tenure, the maximum degree of effective protection against the practice of forced evictions for all persons under their jurisdiction.

8. Legal remedies and monitoring

States shall provide legal remedies to those who have been forcibly evicted and adequately monitor all evictions which take place under their jurisdiction.

9. Crimes against humanity and war crimes

States shall take all steps to ensure that deportation or forcible transfer of population, as defined under international customary law and the Rome Statute of the International Criminal Court, constitute crimes against humanity and war crimes (when committed during armed conflict) in the national legal framework. States shall ensure that perpetrators of such crimes are and can be prosecuted by national and/or international courts.

III. PREVENTION OF FORCED EVICTIONS

10. Right to housing and adequate standard of living

The right to adequate housing includes the right to secure legal tenure, the right to access to essential services and the right to affordable, habitable, physically accessible, appropriately located and culturally appropriate housing.¹³⁴

States should take all steps within their maximum available resources to ensure that everyone enjoys their right to adequate housing and to an adequate standard of living in order to decrease their vulnerability to being forcibly evicted.

11. Right to secure tenure

States should enact and enforce legislation guaranteeing universal security of tenure. Regardless of the type of tenure conferred - for example rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property - residents should be adequately protected against forced eviction.

12. Review of legislation

States should carry out a comprehensive review of relevant national legislation with a view to ensuring the compatibility of such legislation with the norms contained in the present Guidelines and other relevant international human rights provision.

State should repeal, amend and/or enact national legislation as necessary to bring national legislation into compliance with the aforementioned standards.

13. Legislative framework on forced evictions

States should adopt appropriate legislation and policies to ensure the effective protection of individuals, groups and communities from forced eviction. Such legislation should include measures which: (a) conform to these Guidelines and international human rights law, and (b) are designed to control strictly the circumstances under which evictions may be carried out. Such legislation must also apply to all agents acting under the authority of the State or who are accountable to it. States are also encouraged to adopt constitutional provisions in this regard.¹³⁵

14. Abolition of existing forced eviction plans

States should take immediate steps to ensure that all existing plans involving forced evictions are eliminated.

¹³⁴ See further elaboration see Committee on Economic, Social and Cultural Rights, *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991) at para. 8.

¹³⁵ For example, section 26(3) of the Constitution of South Africa states: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

States should place a moratorium on all evictions until a proper legislative and institutional framework is in place to prevent and remedy forced evictions.

15. Non-retrogressive measures

States should refrain from introducing any retrogressive measures with respect to *de jure* or *de facto* protection against forced evictions. This includes measures that negatively and unreasonably impact upon a person's ability to earn or attain an adequate income sufficient to ensure the satisfaction of basic needs.

States should, where prices and income levels are determined by other actors, take all steps to ensure that these actors respect human rights, including to an adequate income, social security, adequate housing and the right to an adequate standard of living.

16. Development-based displacement

States should ensure that eviction impact assessments (human and environmental) are carried out prior to the initiation of any project which could result in development-based displacement, with a view to fully securing the human rights of all potentially affected persons, groups and communities.

17. Market-based displacement

States should review the operation and regulation of the housing and tenancy markets to ensure that market forces do not increase the vulnerability of low-income and other marginalised and vulnerable groups to eviction.

States should, in cases where the price of land and housing that is owned or occupied by such groups significantly increases, ensure there is sufficient protection against physical or economic pressures for residents to leave or be deprived of living in housing, or on land, that accords with the right to adequate housing.

18. Natural disasters and environment

States should take steps to minimise the occurrence of natural disasters and environmental degradation, which create the conditions for displacement. States should take concerted action at the national and international level to ensure that climate change, deforestation and desertification does not respectively result in the displacement, particularly in coastal areas, forest, arid and semi-arid areas.

Natural disasters should not be used a pretext for forcible evictions: residents should not unreasonably prevented from returning to their homes and legal remedies should be provided in those exceptional cases where return is not feasible. Where evictions are proposed for the purpose of protecting the environment, they must only occur in accordance with these Guidelines.

IV. MARGINALISED AND VULNERABLE GROUPS AND PEOPLES

19. Women

States shall ensure the equal right of men and women to legal security of tenure; property ownership; equal access to inheritance; the control of and access to housing, land and property and to housing, land and property restitution.

States should ensure that affected women are adequately represented and included in relevant consultation and decision-making processes, for example with respect to alternatives to eviction or resettlement, and have the appropriate means and information to participate effectively.

States shall take specific and comprehensive preventive measures to ensure that private actors do not forcibly or violently evict women from their homes.

20. Indigenous peoples

States shall recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.

States should ensure that the remedy of compensation is only used when the remedy of restitution of indigenous lands, territories and/or resources is not factually possible or when the affected group knowingly and voluntarily accepts compensation in lieu of restitution. Such compensation may take the form of alternative lands and territories.¹³⁶

21. Refugees and internally displaced persons

State shall ensure that refugees, asylum seekers and internally displaced persons within their jurisdiction are effectively protected against forced evictions.

States shall ensure that all refugees and displaced persons have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal. States shall prioritise the right to restitution as the preferred remedy to displacement and implement the Principles on Housing and Property Restitution for Refugees and Displaced Persons.

22. Farmers and agricultural workers

States shall take steps to guarantee secure legal tenure for small and subsistence farmers, agricultural workers and landless labourers in rural areas to ensure that they have sufficient protection against forced eviction from their homes and lands they occupy.

¹³⁶ See CERD General Recommendation XXIII: Indigenous Peoples, adopted at its fifty-first session (1997).

23. Tenants

States shall ensure that tenants are legally protected from forced evictions. Legislation should require written contracts, affordable rents, non-discrimination, access to independent tribunals or courts and access to legal aid in cases of evictions. Grounds for evictions should be limited as far as possible and evictions based on rent arrears or social behaviours should be limited as far as possible in the absence of alternative accommodation. Notice periods should be adequate and should not prejudice the right of the tenant to due process protections.

States should consider a system of accreditation for landlords and carrying out tenancy inspections to ensure that tenants are adequately protected against forced evictions and other violations of their human rights.

States should ensure that the rights of displaced tenants, social occupancy rights holders and other legitimate occupants or users of housing, land and property are recognised within laws or programs governing housing, land and property restitution.

24. Informal settlements

States should ensure that the protection against forced eviction is extended to residential settlements that are not authorised under law. The grounds for eviction should be clearly specified and strictly controlled, alternatives to evictions shall be sought in consultation with the affected group together with due process provision of adequate and appropriately located alternative accommodation within the maximum available resources of the state. Regularisation programmes that aim to provide security of tenure to informal settlements should ensure that tenants of informal owners are not forcibly evicted and, where appropriate, should be considered as the beneficiaries of such programs. Displaced residents should also be recognised within laws or programs governing housing, land and property restitution.

25. Nomadic groups

States should protect groups that practice a nomadic lifestyle from forced evictions. Where insufficient halting sites are provided for nomadic groups, criminal or other laws prohibiting trespass should be suspended or appropriately amended.

States should take steps to provide a sufficient number of adequate halting sites for permanent and temporary occupation in genuine consultation with the affected groups. Restrictions on nomadic groups on the use of land and property for non-sedentary forms of housing should be strictly controlled. Livelihoods associated with a nomadic lifestyle should also be protected.

IV. PROTECTION AGAINST FORCED EVICTIONS

26. Exceptional circumstances

States shall ensure that evictions only occur in exceptional circumstances. Evictions require full justification given their potential extremely negative impact on a wide range of international recognised human rights. Any eviction must be warranted by law, reasonable in the circumstances, proportionate and can only be carried out in accordance with the Guidelines and international human rights and humanitarian law.

States shall ensure that exceptions to the prohibition on forced evictions such the 'interest of society' or 'public interest' should be read restrictively, so as to again ensure that evictions only occur in exceptional circumstances.

27. Alternatives to forced evictions

States shall fully explore all possible alternatives to eviction. In this regard, all affected persons, including women, children, racial and ethnic minorities, the elderly, the disabled, indigenous peoples, and illiterate persons shall have the right to all relevant information and the right to full participation and consultation throughout the entire process and to propose any alternatives.

States shall ensure that, in the event that agreement cannot be reached on the proposed alternative by the affected persons, groups and communities and the entity proposing the forced eviction in question, that an independent body, such as a court of law, tribunal, or ombudsman be called upon to adjudicate or mediate the dispute.

28. Due process

States shall ensure that appropriate procedural protection and due process be given in any eviction case. These include:

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) all persons carrying out the eviction to be properly identified;
- (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (g) provision of legal remedies; and

(h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

29. Court order

States should adopt legislative measures prohibiting any eviction without a court order. The court shall consider all relevant circumstances of affected persons, groups and communities and any decision be in full accordance with principles of equality and justice and internationally recognized human rights and humanitarian law.

30. Alternative land and housing

States shall ensure that evictions do not result in individuals being rendered homeless or vulnerable to the violation of other human rights.

States shall, where those affected are unable to provide for themselves, take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

V. LEGAL REMEDIES

31. General

States shall ensure that all persons threatened with eviction, notwithstanding the rationale or legal basis thereof, have the right to:

- (a) a fair hearing before a competent, impartial and independent court or tribunal
- (b) legal counsel, and where necessary, sufficient legal aid
- (c) effective remedies.

32. Appeal

States shall ensure that all persons have a right to appeal any judicial or other decisions affecting their rights as established pursuant to the present Guidelines, to the highest national judicial authority.

33. Compensation

States shall ensure that all persons subjected to any eviction not in full accordance with the present Guidelines, should have a right to compensation for any losses of land, personal, real or other property or goods, including rights or interests in property not recognised in national legislation, incurred in connection with a forced eviction. Compensation should include land and access to common property resources and should not be restricted to cash payments.

34. Resettlement

States shall ensure, in cases where evictions have been deemed lawful and in compliance with the present Guidelines, the right of all persons, groups and communities to suitable

resettlement which includes the right to alternative land or housing, which is safe, secure, accessible, affordable and habitable.

States shall ensure that resettlement is only carried out in exceptional circumstances, when in the public interest, or where the safety, health or enjoyment of human rights so demands, particular persons, groups and communities may be subject to resettlement. Such resettlement must occur in a just and equitable manner and in full accordance with law of general application.

All persons, groups and communities have the right to suitable resettlement which includes the right to alternative land or housing, which is safe, secure, accessible, affordable and habitable.

In determining the compatibility of resettlement with the present Guidelines, States should ensure that in the context of any case of resettlement the following criteria are adhered to:

(a) No resettlement shall take place until such a time that a full resettlement policy consistent with the present Guidelines and internationally recognized human rights is in place.

(b) Resettlement must ensure equal rights to women, children and indigenous populations and other vulnerable groups including the right to property ownership and access to resources. Resettlement policies should include programmes designed for women with respect to education, health, family welfare and employment opportunities.

(c) The actor proposing and/or carrying out the resettlement shall be required by law to pay for any costs associated therewith, including all resettlement costs.

(d) No affected persons, groups or communities, shall suffer detriment as far as their human rights are concerned nor shall their right to the continuous improvement of living conditions be subject to infringement. This applies equally to host communities at resettlement sites, and affected persons, groups and communities subjected to forced eviction.

(e) That affected persons, groups and communities provide their full and informed consent as regards the relocation site. The State shall provide all necessary amenities and services and economic opportunities.

(f) Sufficient information shall be provided to affected persons, groups and communities concerning all State projects as well as to the planning and implementation processes relating to the resettlement concerned, including information concerning the purpose to which the eviction dwelling or site is to be put and the persons, groups or communities who will benefit from the evicted site. Particular attention must be given to ensure that indigenous peoples, ethnic minorities, the landless, women and children are represented and included in this process.

(g) The entire resettlement process should be carried out in full consultation and participation with the affected persons, groups and communities. States should take into account in particular all alternate plans proposed by the affected persons, groups and communities.

(h) If after a full and fair public hearing, it is found that there is a need to proceed with the resettlement, then the affected persons, groups and communities shall be given at least ninety (90) days notice prior to the date of the resettlement; and

(i) Local government officials and neutral observers, properly identified, shall be present during the resettlement so as to ensure that no force, violence or intimidation is involved.

VI. MONITORING

35. Domestic monitoring

States should actively quantitatively and qualitatively monitor the number and type of evictions that occur within their territory and make these statistics public available without charge on a regular basis.

36. Domestic agencies

States should designate specific public agencies to be entrusted with monitoring forced evictions and reviewing the enforcement for the prohibition on forced evictions.

VI. RESPONSIBILITIES OF NON-STATE ACTORS

37. Armed conflict

Non-state actors engaged in armed conflict shall fully respect international humanitarian and human rights law with respect to forced evictions, including house demolition.

38. International organisations

International financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, should take fully into account the prohibition on forced evictions under international human rights law and related standards.

International organisations should establish or accede to complaint mechanisms for cases of forced evictions that result from their own practices and policies. Legal remedies should be provided to victims in accordance with those stipulated in Section V. of the Guidelines.

International organisations should work with national governments and share expertise on the development of national housing, land and property restitution policies and programs and help ensure their compatibility with international human rights, refugee and humanitarian law and related standards. International organisations should also support the monitoring of their implementation.

39. Transnational corporations and other business enterprises

Transnational corporations and other business enterprises shall respect the right to housing, including the prohibition on forced evictions within their respective spheres of activity and influence,

40. International events

International organisations, business enterprises, associations and other entities, such as the International Olympic Committee, that are concerned with the organisation of international events (such as the Olympics, trade fairs, etc.) must respect the prohibition on forced evictions, develop rules and procedures to ensure that forced evictions do not occur in the planning, conduct or aftermath of an international event, compensate victims of forced evictions and ensure that their partners ensure likewise.

VII. OTHER

41. Savings clause

The provisions contained within the present Guidelines are without prejudice to the provisions of any other international legal instrument or national law which ensures the enjoyment of all human rights, and specifically as they relate to the prohibition on the practice of forced evictions.