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Electronic version

URL: <https://journals.openedition.org/poldev/2188>

DOI: 10.4000/poldev.2188

ISSN: 1663-9391

Publisher

Institut de hautes études internationales et du développement

Electronic reference

Miloon Kothari and Patricia I. Vasquez, "Policy Debate | The UN Guidelines on Forced Evictions : A Useful Soft-Law Instrument?", *International Development Policy | Revue internationale de politique de développement* [Online], 6.2 | 2015, Online since 18 December 2015, connection on 09 January 2026.

URL: <http://journals.openedition.org/poldev/2188> ; DOI: <https://doi.org/10.4000/poldev.2188>

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Initial Contribution by Miloon Kothari | Land Grabbing and the UN Guidelines on Evictions: A Promising Soft-Law Approach

1. Introduction

1 Land grabbing is a growing phenomenon across the world, today surpassing all phases of land grabbing from the twentieth century, in terms of sheer numbers of people and communities displaced, and lands acquired. The accelerated process of acquisition of lands and other resources, on which millions of people's lives and livelihoods depend, has been a palpable dynamic across the world for several decades.



- 2 The basic obstacles that block progress on realising land rights for the world's most marginalised are numerous. In addition to armed and ethnic conflict and disasters, there are a range of structural obstacles: political and administrative neglect, legal barriers, governance (policy formulation) that lacks the indivisibility of the human rights approach, the abandonment of land reform as a policy option and contradictory economic and social policies that allow large scale commercial ventures and development projects to take precedence over policies that sustain small scale agriculture and the livelihoods of millions of indigenous people and peasants.
- 3 Perhaps the most pernicious and overarching of the structural obstacles noted above is the persistence of economic policies that are steeped in the neo-liberal framework. Such an approach has promoted unbridled speculation of land and property, placing land rights out of range for a colossal number of people. It also successfully argues against state intervention in the market so that speculation of property and land are controlled. The approach tolerates, and in fact encourages, the growth of national and international commercial enterprises whose main purpose of existence is to seek profits through land and property speculation.
- 4 The above outlined structural obstacles to the realisation of land rights, around which development policies are designed, have also led to the phenomenon of millions of people being displaced from their homes due, ironically, to development. This is in addition to the millions of people who are annually displaced by armed and ethnic conflict and disasters. A robust and sustained local, national and global response is urgently required to grapple with this colossal crisis.
- 5 This paper outlines (1) the recognition in the UN human rights system¹ of the negative impact of evictions as a result of land grabbing and state obligations to minimize displacement through the development of soft law instruments; (2) the main provisions of the primary United Nations operational soft law instrument to minimise the impact of land grabbing, the UN Basic Principles and Guidelines on Development-based Evictions and Displacement (hereafter UN Guidelines on Evictions or UN Guidelines); (3) the numerous uses of the UN Guidelines on Evictions since their adoption in 2007 and (4) the development of an eviction impact assessment tool called for in the UN Guidelines on Evictions.
- 6 The paper concludes with a fervent recommendation that the utilisation and domestication of global standards like the UN Guidelines on Evictions be considerably scaled up.

2. The UN and Forced Evictions

- 7 Instances of land grabbing first came to the attention of the United Nations in the early 1990's. Numerous international NGO's, such as the Habitat International Coalition, using information received from local and national members, approached the UN Commission on Human Rights (UNCHR) in 1993 expressing the urgency of the situation.
- 8 The UNCHR, in response, unanimously adopted a resolution (UNCHR, 1993) entitled 'Forced evictions' which stated, 'forced evictions are a gross violation of human rights, in particular the right to adequate housing'. And it observed that, 'forced evictions and homelessness intensify social conflict and inequality and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society.'
- 9 Subsequently, following receipt of extensive information on the scale of evictions and their negative impact on human rights, the UN Committee on Economic, Social and Cultural Rights adopted General Comment No. 7 on forced evictions (CESCR, 1997). Paragraph nine of the General Comment underlines that State parties are obliged to use all appropriate means to protect the rights recognized in the Covenant and that 'legislation against forced evictions is an essential basis upon which to build a system of effective protection'. The Committee defines the term 'forced eviction' and reaffirms that forced evictions are prima facie violations of the right to adequate housing.
- 10 In 2000, the UN Human Rights Council (UNHRC) appointed a Special Rapporteur on the Right to Adequate Housing (hereafter Special Rapporteur on Housing). From the beginning, the Special Rapporteur on Housing witnessed (during country missions) and received reports on land grabbing and forced evictions around the world. The scale of dispossession caused by evictions prompted the Special Rapporteur to focus the 2004 annual report to the UNCHR on the issue of forced evictions. In the report, the Special Rapporteur reviewed the types of evictions that were taking place, the causes of these evictions and their human rights impacts on specific groups. The Special Rapporteur also reviewed the level of protection offered against evictions by laws and policies at the international, regional and national levels (Special Rapporteur on Housing, 2004).
- 11 In the recommendations of the report, the Special Rapporteur requested the Commission to authorize a process in which he would lead the development of 'clear operational guidelines' for States on forced evictions. This prompted a process which led to the development of the UN Guidelines on Evictions, which were presented to the UN Human Rights Council (Special Rapporteur on Housing, 2007) and formally acknowledged by the Council in December 2007 (HRC, 2007).

3. The UN Guidelines on Evictions: Main Provisions

- 12 As stated by the Special Rapporteur in his 2007 report, the UN Guidelines on Evictions, while firmly based on existing international human rights law, offered several new prescriptions, based on experiences gathered worldwide since the adoption of General Comment no. 7 by the UN Committee on Economic, Social and Cultural Rights in 1997. They address all aspects of eviction scenarios, from stringent criteria outlining when they can occur, how they should proceed, how to monitor the impact on specific populations, intersectional human rights, and the actors involved throughout all of the above processes.

- 13 In particular, the UN Guidelines on Evictions (Special Rapporteur on Housing, 2007) define the practice of forced evictions (paras. 4-8)² and lay down stringent criteria under which displacement can occur in ‘exceptional circumstances’, with ‘full justification’ and procedural guarantees (para. 21). Further, they enumerate detailed steps to be taken by States to protect human rights prior to, during, and after evictions (paras. 37, 58). Prior to displacement, they call for comprehensive ‘eviction-impact assessments’ (paras. 32, 33, 42). After displacement, they call for provision of compensation, restitution and adequate rehabilitation consistent with human rights standards (paras. 42, 60-63, 69, 70).
- 14 Across displacement scenarios, they provide useful guidance on other phenomena that lead to displacement, such as disasters and climate change induced displacement (paras. 52, 55) and establish a ‘right to resettle’ consistent with the right to adequate housing for displaced communities living in adverse conditions (paras. 16, 52-56). They also call on States, in pursuance of an ‘immediate obligation’, to guarantee security of tenure to all those currently lacking titles to home and land (paras. 23, 25).
- 15 There are also a number of provisions dealing directly with particular populations that are often at-risk across geographies. To this end, they provide a strong gender perspective, including protection and entitlements to women (paras. 7, 15, 26, 29, 33, 34, 38, 39, 47, 50, 53, 54, 57 and 58). They also protect children’s right to adequate housing (paras. 21, 31, 33, 47, 50, 52, 54, 56).
- 16 There are a number of other human rights that intersect, with varying levels of dependency, with the right to adequate housing. The UN Guidelines enumerate a handful of the most proximate, including the human right to work/livelihood (paras. 43, 52, 63), human right to land (paras. 16, 22, 25, 26, 30, 43, 56, 60, 61, 63, 71), the human right to food (paras. 52, 57), the human right to health (paras. 16, 54-57, 63, 68) and the human right to education (paras. 16, 52, 57, 60, 63).
- 17 The UN Guidelines also stress the obligation of both State and non-State actors (paras. 11, 71-73) and call for States to take intervening measures to ensure that market forces do not increase the vulnerability of low income and marginalised groups to forced eviction (paras. 8, 30).
- 18 It is useful to summarise the various sections of the UN Guidelines on Evictions according to the following categories: (a) Scope and Nature of the UN Guidelines; (b) Implementation of Member State Obligations; (c) Preventative Strategies, Policies and Programmes; (d) Safeguards Prior to Evictions; (e) Safeguards During Evictions; (f) Safeguards After an Eviction and (g) Remedies for Forced Evictions, including Compensation.

3.1 Scope and Nature of the UN Guidelines on Evictions (paragraphs 1 -10)

- 19 The intention of the UN Guidelines, while recognizing the wide range of contexts in which forced evictions take place, was to focus on providing guidance to States on measures and procedures to be adopted in order to ensure that development-based evictions are not undertaken in contravention of existing international human rights standards and do not thus constitute ‘forced evictions’. The UN Guidelines provide a practical tool to assist Member states and agencies in developing policies, legislation, procedures and preventive measures to ensure: (i) protection of the right to adequate housing for all those currently threatened with eviction; (ii) that forced evictions do

not take place; and (iii) to provide effective remedies to those whose human rights have been violated, should prevention fail.

- 20 The UN Guidelines define ‘forced evictions’, in the context of existing international standards, as, ‘acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.’ (Special Rapporteur on Housing, 2007, para. 4)

3.2 Implementation of Member State Obligations (paragraphs 21-27)

- 21 The UN Guidelines place an obligation on States to ensure that *evictions only occur in exceptional circumstances*. According to the UN Guidelines, evictions require, ‘full justification given their adverse impact on a wide range of internationally recognized human rights’. Any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting general welfare;³ (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines. The protection provided by these procedural requirements applies to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law.
- 22 To this end, the UN Guidelines call on States to adopt legislative and policy measures prohibiting the execution of evictions that do not conform to international human rights obligations. More immediately, the UN Guidelines recommend that States take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land.

3.3 Preventive Strategies, Policies and Programmes (paragraphs 28-36)

- 23 The UN Guidelines also contain a number of recommendations to prevent violations before they occur. States should take specific preventive measures to avoid and/or eliminate underlying causes of forced evictions, such as speculation in land and real estate. States should review the operation and regulation of the housing and tenancy markets and, when necessary, intervene to ensure that market forces do not increase the vulnerability of low-income and other marginalized groups to forced eviction.
- 24 States should ensure sufficient protection against physical or economic pressures on residents to leave or be deprived of adequate housing or land and give priority to exploring strategies that minimize displacement. If eviction is unavoidable, States must ensure that comprehensive and holistic impact assessments are carried out prior to the initiation of any project that could result in development-based eviction and displacement, and ensure that ‘eviction-impact’ assessment also includes exploration of alternatives and strategies for minimizing harm.
- 25 There are examples of such strategies working in practice. A popular campaign against La Parota Dam in southern Mexico was successful. In 2003, the Mexican government

proposed the project, which would have flooded 17 000 hectares of land and displaced more than 25 000 people. The US\$1 billion project had a number of powerful public and private sector stakeholders. According to International Rivers, the Federal Electricity Commission held ‘false consultations and prevented attendance by those opposed to the dam’. The Mexican grassroots organisation, MAPDER, built a strong campaign to oppose the dam. They collaborated with international organisations including the Habitat International Coalition and various UN bodies. Nearly a decade after the dam was announced, the government announced a moratorium on the project. This significant victory was a result of a successful grassroots campaign working with the UN Special Rapporteur on Adequate Housing and on the Rights of Indigenous Peoples.⁴

3.4 Safeguards Prior to Evictions (paragraphs 37-44)

- 26 Prior to carrying out any eviction, the UN Guidelines call for States to fully explore all possible alternatives to eviction. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate. During planning processes, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, including women and vulnerable and marginalized groups, and, when necessary, through the adoption of special measures or procedures.
- 27 Such participation should include the following elements: (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.
- 28 The UN Guidelines articulate the steps that States should take prior to taking any decision to initiate an eviction. The relevant authorities should demonstrate that the eviction is unavoidable and consistent with international human rights commitments that protect general welfare.
- 29 A positive example of the critical need for such safeguards is contained in the set of core principles on large scale land acquisitions put forward by Olivier De Schutter, the former Special Rapporteur on the Right to Food. In the recommendations, the UN Guidelines on Evictions are used as a basis upon which to enact legislation to protect local communities from human rights violations that occur before, during and after evictions (Special Rapporteur on the Right to Food, 2009).
- 30 A pertinent example that illustrates the adverse impact of not consulting affected communities is the case of the Anuak in the Gambella region of Ethiopia. The Anuak depend on the land for all of their needs and, despite promises to the contrary, indigenous inhabitants are rarely consulted and most often evicted through a process of violent coercion. This form of dispossession is made possible by collusion between

property speculators and the Ethiopian government (Oakland Insitute, 2013). The Oakland Institute, for example, has done significant work documenting abuses in this area. In their 2013 report, *Unheard Voices*, they documented how the Anuak community in Ethiopia's Gambella region have been adversely affected, in avoidable ways, by property speculators enabled by the Ethiopian government (Oakland Insitute, 2013).

3.5 Safeguards During Evictions (paragraphs 45-51)

- 31 The UN Guidelines lay down conditions regarding monitoring to safeguard human rights during the process of eviction. The procedural requirements for ensuring respect for human rights standards include the mandatory presence of governmental officials or their representatives on site during evictions. In addition, neutral observers, including regional and international observers, should be allowed access upon request to ensure transparency and compliance with international human rights principles during an eviction.
- 32 Attention must be paid to avoid unnecessary additional disruption in the lives of affected groups. Evictions must not take place in (i) inclement weather; (ii) at night; (iii) during festivals or religious holidays; (iv) prior to elections; or (v) during or just prior to school examinations. States and their agents must take steps to ensure that no one is subject to direct or indiscriminate attacks or other acts of violence.

3.6 Safeguards After an Eviction (paragraphs 45-51)

- 33 The UN Guidelines state that the government and any other parties responsible for providing just compensation and sufficient alternative accommodation, or restitution when feasible, must do so immediately upon the eviction, except in cases of force majeure.
- 34 The UN Guidelines state that identified relocation sites must fulfil the criteria for adequate housing according to international human rights law. These include: (a) security of tenure; (b) services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors, and ensuring the physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centres and other social facilities, whether in urban or rural areas; and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered (CESCR, 1991).
- 35 To ensure compatibility of resettlement processes with the UN Guidelines, States should ensure that, in the context of any case of resettlement, numerous criteria are followed. First, that no resettlement shall take place until such time as a comprehensive resettlement policy consistent with the UN Guidelines and internationally recognized human rights principles is in place. Second, resettlement must ensure that the human rights of women, children, indigenous peoples and other

vulnerable groups are equally protected, including their right to property ownership and access to resources, and that 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. Third, the right of affected persons, groups and communities to full and prior informed consent regarding relocation must be guaranteed. The Member State shall provide all necessary amenities, services and economic opportunities at the proposed site. Fourth, sufficient information shall be provided to the affected persons, groups and communities on all State projects and planning and implementation processes relating to the concerned resettlement, including information on the purported use of the eviction dwelling or site and its proposed beneficiaries.

3.7 Remedies for Forced Evictions, Including Compensation (paragraphs 59-63)

- 36 The UN Guidelines also recommend remedies for people and communities that have faced forced eviction, including, as applicable (i) a fair hearing; (ii) access to legal counsel; (iii) legal aid; (iv) return; (v) restitution; (vi) resettlement, rehabilitation and compensation.
- 37 The UN Guidelines state that when eviction is unavoidable, and necessary for the promotion of general welfare, the Member State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods, including rights or interests in property. This compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case. The UN Guidelines make the important point that cash compensation should, under no circumstances, replace real compensation in the form of land and common property resources. Where land has been taken, those evicted should be compensated with land commensurate in quality, size and value, or better.
- 38 The UN Guidelines offer prescriptions for preventing evictions and ensuring safeguards of the human rights of those threatened with eviction prior to, during and after eviction. In addition they also call upon States to actively monitor and carry out evaluations to determine the consequences of evictions. States are also called upon to entrust an independent national body, such as a national human rights institution, to monitor and investigate forced evictions and State compliance with these UN Guidelines and international human rights law. These can form elements of national eviction acts that can be enacted.

4. Uses of the UN Guidelines on Evictions

- 39 Since their acknowledgement in 2007 by the UNHRC, the UN Guidelines on Evictions have been utilised in numerous ways by local, national and international civil society organisations, independent institutions, academic bodies, various UN bodies and multi-lateral organisations. Examples of such use illustrate the valuable role that human rights soft law instruments can play including as a global standard that can act as a restraining instrument against one of the most persistent impacts of global neo-liberal economic and globalisation policies and the development projects that are the means through which these policies are implemented.

4.1 Translations

40 A recent survey by the author, of the work of international organisations, academic bodies and civil society organisations, reveals that the UN Guidelines on Evictions have been translated into twenty-two languages.⁵ The translations (along with manuals and handbooks) have significantly assisted local civil society organisations, for example, to understand human rights associated with land grabbing and displacement, comprehend the onerous responsibilities governments face in ensuring evictions occur only in ‘exceptional circumstances’, and to develop strategies around the principles and provisions of the UN Guidelines to counter displacement.

4.2 Manuals and Handbooks

41 A number of organisations have prepared manuals and handbooks⁶ on how to use the UN Guidelines. These publications have been useful for local civil society groups as explained above. In addition, NGOs at the national and international level and UN agencies have used the handbooks as training and advocacy material. Handbooks have also been developed to assist in specific tasks such as ‘legal observing’ to ensure that the human rights of potential victims of eviction are not violated during the process (Human Rights Centre, 2011). Most recently, a detailed manual was prepared by the Housing and Land Rights Network (HLRN) in India on ‘How to respond to Forced Evictions’ (Chaudry, 2014).

42 The HLRN manual outlines all of the national and international laws applicable in situations of forced eviction. The manual refers to a number of UN treaties and conventions in the sections dealing with international law and norms. The UN Guidelines on Evictions are used to detail the remedies available for these problems, specifically as with regard to ‘Fair and Just Compensation’, ‘Restitution and Return’, and ‘Resettlement and Rehabilitation’. The UN Guidelines have also been referenced in a number of resource books that compile cases and materials on human rights and are frequently used across the world as textbooks for university courses on human rights (Steiner et al., 2008; Saul et al., 2014).

4.3 Legal Petitions/Court Judgements

43 Increasingly, civil society organisations and independent institutions with a legal mandate have been using the UN Guidelines on Evictions as a basis for argument in their affidavits as petitioners or amicus curiae. These petitions have, on numerous occasions, influenced court judgements (HLRN India, 2013) and convinced the judges about the value of international human rights hard and soft law.

44 The case, *Sudama Singh and Others vs. Government of Delhi and Anr.* was brought to the Indian High Court to seek intervention on behalf of slum dwellers in Delhi. The petitioners sought the provision of alternative land in response to the demolition of their ‘jhuggies’ (hutments). The petitioners sought this compensation via a claim on their right to adequate housing. The High Court judges used both Indian constitutional law as well as the UN Guidelines to uphold this right to adequate housing. In particular, the judges referred to one of the key substantive paragraphs of the UN Guidelines that details basic human rights standards for eviction and relocation (Special Rapporteur on Housing, 2007, para. 35). A similar precedence was set in the ‘Muthurwa’ case where the

judge, lacking the existence of national law on evictions, used the UN Guidelines as a basis for the final judgement. In this case, the judge also called for a national law on evictions in Kenya to be modelled on the UN Guidelines (High Court of Kenya, 2010). Another significant judgement from the Kenyan High Court regarding the situation in Kibera Slum in Nairobi also uses the UN Guidelines as a guide to the resolution of the resettlement rights of the slum residents. Judge G.V. Odunga states in the judgement that, ‘the UN Guidelines on Evictions should be seen as part of Kenyan Law’ (High Court of Kenya, 2014).

- 45 In a path breaking development, the Mexican Supreme Court issued a ‘Protocol’ in 2014 intended to serve as a reference for judges as they adjudicate cases where large infrastructure, mining, and development projects can cause human rights violations. The ‘Protocol’ refers to all infrastructure, mining, and large-scale development projects in Mexico including roads, oil and mineral extraction, dams, large real estate projects, tourist developments, and power plants. This wide focus means that the Protocol could have a significant impact on the way such cases are heard and interpreted in Mexico and could be interpreted to include any and all urban or rural construction projects. The Protocol uses the UN Guidelines, as a basis for its arguments (Suprema Corte de Justicia de la Nacion, 2014).

4.4 Use by UN and Regional and National Human Rights Bodies

- 46 The UN Guidelines are being increasingly used by different parts of the UN human rights system while assessing the situation of evictions. The UN Committee on Economic, Social and Cultural Rights has revised its State Reporting Guidelines to suggest that States take into account the UN Guidelines on Evictions while preparing their reports (ESC, 2009). The UNCESCR has also used the UN Guidelines on Evictions in a number of concluding observations that contain recommendations for States on resolving forced eviction cases (ESC, 2014). UN Country Teams have used the UN Guidelines on Evictions in documents aimed at influencing national government policies on housing and displacement. The UN’s Afghanistan Protection Cluster (2012), for example, drew upon the UN Guidelines on Evictions in article 8b of its Guidelines for Mitigating Harm and Suffering in Situations of Forced Evictions to require local authorities to hold extensive consultations with the local population and demonstrate that the proposed eviction is unavoidable prior to initiating the eviction-inducing project.
- 47 UN Agencies are also increasingly citing the UN Guidelines on Evictions in their manuals, reports and factsheets. UNESCO refers to the guidelines in its manual on empowering the poor using legislative means (Formisano Prada, 2011). UNHCR, recognising the emphasis on substantive and procedural safeguards in the UN Guidelines on Evictions, has cited them in its handbook on the protection of IDPs (Global Protection Cluster, 2010). OHCHR makes extensive use of the UN Guidelines on Evictions in its factsheet on forced evictions (OHCHR and UN Habitat, 2014). The recent report from UN Women (2015) on the State of the World’s Women also cites the UN Guidelines on Evictions.
- 48 The African Commission on Human and People’s Rights (2010) made extensive use of the UN Guidelines while preparing the principles and guidelines on the implementation

of economic, social and cultural rights in the African Charter on Human and Peoples' rights.

- 49 National Human Rights Commissions are also using the UN Guidelines to monitor local human rights situations, proposing national standards on evictions, resettlement and rehabilitation and in their reports to the UNHRC under its Universal Periodic Review process (National Human Right Commission of Bangladesh, 2013).
- 50 A number of UN Special Rapporteurs have used the UN Guidelines on Evictions in their reports to assist with further standard setting (for example, the Special Rapporteurs on the Right to Food and on Housing) and as guidance for countries on how to deal with forced evictions (Special Rapporteur on Eritrea) and land-grabbing (Special Rapporteur on Cambodia).

4.5 Policy Recommendations by National and International Civil Society Groups and Independent Institutions

- 51 The UN Guidelines on Evictions have been used extensively by national and international civil society organisations. The uses have ranged from reports to various bodies in the UN Human Rights System: in fact-finding reports; in manuals and handbooks, as mentioned above, and in court affidavits and policy documents at national and international levels. These policy documents have also been utilized during the reviews of guidelines and safeguarding policies of multi-lateral institutions such as the International Finance Corporation (IFC) and the World Bank (Bugalski and Pred, 2013).⁷
- 52 Recommendations by broad based NGOs have had an impact on, for example, the IFC (2012) which has included references to the UN Guidelines on Evictions in its Guidance Note on Land Acquisition and Involuntary Resettlement.
- 53 Academic institutions are also using the UN Guidelines in policy submissions, for example, on the need for reform in relation to the increasing appetite for land in East Asian extractive industries (Mohan et al., 2012).
- 54 The Council of Europe (2011) has also referred to the UN Guidelines in its recommendations to local and national authorities to halt land grabbing that continues to severely impact the Roma. In this case, the Congress of Local and Regional Authorities of the Council of Europe refers to the supranational UN Guidelines to establish a legal standard for the protection of Roma from land-grabbing. The Congress specifically invokes the UN Guidelines in article 6i of Recommendation 315 (2011) to urge the Committee of Ministers of the Council of Europe to protect the housing rights of the Roma by calling on Member States to adhere to the UN Guidelines.

4.6 Academic Analysis of the Relevance of the UN Guidelines on Evictions

- 55 Since the emergence of the UN Guidelines in 2007, a number of eminent academics from across the disciplines (sociology, law, human rights, trade and investment, planning), geography, environment, gender studies, climate change, transitional justice and so forth) have written about their relevance. These academics have held up the UN Guidelines as a global soft-law standard that can be of great use to tackle a range of human rights situations.

- 56 A number of scholars have written about the potential of the UN Guidelines as a standard that can 'regulate the functioning of the right to property' and 'support arguments for a human right to property'. John G. Sprankling, for example, argues that the UN Guidelines are an important step in the recognition of an 'international property law' imbued with human rights principles in that they 'delimit the capacity of states and certain non-state actors to conduct large-scale evictions of citizens in order to facilitate development projects' (Sprankling, 2012).
- 57 Cottier et al. (2011) have stated that the UN Guidelines are one of a set of global standards that the right to property is subject to. The UN Guidelines, according to the authors, recognise the 'strong links between property in land and other human rights, such as the right to adequate housing, self-determination, food, work and security of the person and home....'.
- 58 The relevance of the UN Guidelines has also been pointed out by scholars in the context of the right to food and land grabbing. Olivier De Schutter (2011) has written about the protective nature of the requirement in the UN Guidelines to ensure 'security of tenure' for peasants as a safeguard against being removed from the lands on which their livelihood depends. In a similar vein, Elizabeth Gorman (2014) has argued that the UN Guidelines are one of the, 'International Provisions (that) Call for Vindication of Small Landholders' Human Rights' based on 'solid international law'. Surya Subedi (2011) has argued for the Cambodian government to use the provisions of the UN Guidelines that call for a search for alternatives to land grabbing and evictions and adequate resettlement should it be necessary.
- 59 While the UN Guidelines were primarily intended for use in situations of 'development based displacement', a number of scholars have correctly pointed out the significance of the UN Guidelines in situations (before and after) disasters and conflict. They have invoked the use of the UN Guidelines for issues ranging from climate change to transitional justice.
- 60 Jeanette Schade (2013), for example, in a chapter on climate change and planned relocation suggests that the UN Guidelines add value to the discussion on the relevance of economic, social and cultural rights in the context of climate change. The UN Guidelines achieve this through the provisions that can, 'protect against relocation as adaptation that is unnecessary or not the best option to sustain the livelihoods of the affected' and by, 'linking adequate housing to the maintenance of livelihoods they contain important entitlements that protect against the livelihood risks of landlessness, joblessness, marginalisation and certainly homelessness'.
- 61 In the context of transitional justice and the critical right to restitution, a number of scholars have referred to the UN Guidelines as an important component of the body of international instruments that promote the idea that, 'when housing rights are accepted as subject to restitution, they have expanded the potential scope of restitution programs greatly'. As pointed out by Rhodri Williams (2007), the UN Guidelines stress that forced evictions in violation of housing rights are closely associated with the broader concept of arbitrary displacement: 'This link reinforces the gravity of forced evictions by recognizing that they not only take the form of isolated violations of housing rights but also represent one of the central means of carrying out acts of mass displacement such as ethnic cleansing'.

62 Increasingly, recent literature, including book length treatments of development-induced displacement and resettlement, refer to the UN Guidelines on Evictions as a standard that encapsulates the human rights approach to dealing with such forms of displacement. Bogumi Terminski (2015), in fact, recognises the UN Guidelines on Evictions as the first global standard that proposes a ‘right to resettlement’ for communities being forced to live in life and health threatening conditions.⁸ Grant Dawson and Sonia Farber’s (2012) assessment is that the UN Guidelines on Evictions are an important piece in the ‘doctrinal shift’ in international human rights law and institutions that, ‘considers those displaced by development and those displaced by other human rights violations within the same creedal category’.

5. Uses of the Eviction Impact Assessment Tool

63 The UN Guidelines on Evictions called on States to ensure that comprehensive and holistic impact assessments are carried out prior to the initiation of any land acquisition measures. The UN Guidelines also stated that compensation, in case of displacement, has to be consistent with the results of the eviction impact assessments.

64 The UN Guidelines, while calling for an impact assessment exercise, did not develop the tool itself. Subsequent to the adoption of the UN Guidelines in 2007, the Housing and Land Rights Network (HLRN) of the Habitat International Coalition (HIC) has developed such a tool. This Eviction Impact Assessment Tool (EViA) has now been used in numerous land grabbing cases both prior to and following an eviction (HIC and HLRN, 2015). The results from these surveys demonstrate the manifold human rights impacts that accompany an eviction.

65 The result of one such exercise, the Baljeet Nagar case in New Delhi (HLRN India 2012), is indicative of the scale of human rights violations. In this case, it was found that, overall, the average family who lost a home in the demolition suffered from a wide array of problems stemming from their eviction. This included, at a minimum, basic issues such as loss of access to housing/shelter, including the loss of documentation supporting tenure security. There were also a number of ancillary effects, including significant reduction in access to livelihood activities, which resulted in loss of wages, substantial reduction in monthly spending on food, and a substantial increase in expenses related to procuring water. There were also a number of health effects, including a substantial rise in both injuries and expenses related to health, both as a direct result of the demolition and its aftermath, as well as the exacerbation and creation of chronic health conditions. Accessibility of education for children was also acutely diminished. Finally, families suffered from the destruction of numerous assets and possessions.

66 Similar studies undertaken in Nairobi, Kenya (Ishani and Lamba, 2012), demonstrate the adverse impacts of forced evictions. The results of these surveys have been used in courts to convince judges to halt evictions or to ensure adequate compensation, commensurate with the findings from the impact assessments. In the rulings on the Baljeet Nagar case in India and the Muthurwa case in Kenya, the judgements take into account the results of the impact assessments (High Court of Kenya, 2010).

67 In both these cases, the affected community and community leaders were able to learn from, and utilise, the UN Guidelines on Evictions and the EViA to advocate for a human rights approach to the process of land acquisition. In the Baljeet Nagar case, this

resulted in a halt to the evictions and, in the Muthurwa case, negotiations based on the court ruling are underway to ensure adequate resettlement and compensation for the affected community.

6. Conclusion

- 68 The United Nations has developed numerous soft-law instruments to counter the phenomenon of land grabbing. Communities, community-based and civil society organisations and independent institutions are increasingly using a range of strategies to apply these instruments.⁹ Some of these strategies have been outlined above in relation to the use of the UN Guidelines on Evictions. A sobering assessment of the situation on the ground related to land grabbing, however, is that these UN norms are not making a significant difference, neither in the quantity of land being expropriated, nor in reducing the number of people displaced from their homes and lands. At all levels, we need clearer recognition and analysis of the many obstacles that are blocking the implementation of these norms.
- 69 As the struggle against such onerous odds continues, civil society groups are increasingly relying on soft-law instruments such as the UN Guidelines on Evictions to frame their demands around the global recognition of international human rights law, including the commitments of States to implement the obligations that arise from this recognition. The challenge before us all is, therefore, to devise means, in collaboration with local and national civil society groups, independent institutions, relevant UN bodies and governments at all levels to enable more rigorous application of internationally recognised human rights norms, through laws, policies and administrative actions..
- 70 One major step forward would be to work towards the establishment of such human rights standards at national policy and legislative levels and to empower (or create, where lacking) institutions that can monitor the implementation of these standards. The realisation of such actions, backed by the UN system where necessary, can significantly assist in stabilising the lives of millions of the world's citizens who currently face an uncertain and bleak future.

Comments by Patricia Vasquez | The UN Eviction Guidelines: Between Positive Developments and Implementation Challenges

- 71 Miloon Kothari's paper does an excellent job of highlighting the increasing focus of UN bodies on the issue of land grabbing and evictions. This process started in the 1990s with the UNCHR resolution entitled 'Forced Evictions' (UNHCR 1993), and led to the formal acknowledgement, in 2007 by the Human Rights Council, of the UN Basic Principles and Guidelines on Development based Evictions and Displacement (Special Rapporteur on Housing, 2007).
- 72 The UN Evictions Guidelines—hereafter the Guidelines—are part of an essential body of international instruments for the protection of the rights of minorities. These tools are particularly useful in countries where local laws are not always properly applied, are confusing or, sometimes, insufficiently comprehensive to deal with specific human

rights or other violations. In these scenarios, international instruments, such as the Guidelines, have become indispensable in shaping domestic legal systems. This is particularly important in the case of minority groups whose right to land ownership or use may be affected by development projects.

- 73 Latin America is a case in point where, in recent decades, international jurisprudence and general guidelines have steadily and firmly advanced the recognition of the rights of indigenous people. Rulings by the Inter-American legal system, in cases related to natural resource development and the impact on indigenous populations, have played a key role in shaping domestic laws in countries with large indigenous groups and weak or imperfectly implemented laws.
- 74 Three emblematic legal cases that were instrumental in this respect come to mind. First, in an unprecedented decision—*Comunidad Mayagna (Sumo) U'was Tingni v. Nicaragua* (2000)—the Inter-American Court of Human Rights ruled in favour of state recognition of the right to property of members of the Awas Tingni community of Nicaragua, taking their uses and customs into consideration. Second, in the *Comunidad Saramaka v. Suriname* (2007) case, the same court went further than in its previous ruling in that it not only recognised the right of the Saramaka community to collective land ownership. It also introduced the need for consultations to get the free, prior and informed consent (FPIC) of the community when industrial projects are likely to affect them. The ruling also stipulated that the state had to share part of the benefits of such projects with local communities. Finally, the *Pueblo Indígena Kichwa de Sarayaku v. Ecuador* (2014) case spelled out the elements of a good consultation process and stressed that the latter should take place in the early stages of the conception of an extractive project.
- 75 These observations are in line with the, overall, positive picture portrayed by Kothari with regard to the recent development of ‘numerous soft-law instruments to counter the phenomenon of land grabbing’. The full implementation of these legal instruments, however, has faced many challenges. Kothari’s paper could therefore benefit from a more indepth discussion of the challenges experienced in the implementation of instruments similar to the Guidelines, and from the operational suggestions thereof, in order to draw lessons to be applied to their implementation. The next section focuses on three areas in which such challenges have been prominent in recent years.

1. Implementation Challenges

1.1 Free Prior and Informed Consent (FPIC)

- 76 In Section 3.4 (‘Safeguards prior to Evictions’), Miloon Kothari emphasises the importance of dialogue and consultation with the affected persons during the early planning of eviction processes. Prior consultation is essential and an absolute must. However, its implementation has proved to be problematic.
- 77 The limitations for a successful implementation of the process of consultation can be observed with regards to the adoption of the Free Prior and Informed Consent (FPIC) introduced by the ILO Convention 169 (binding) and the UN Declaration on the Rights of Indigenous Peoples (non-binding). Criticism around the quality, timing and extent of the implementation of FPIC has expanded across Latin America and African countries.

A key factor of such criticism is the discontent among communities concerning their lack of veto power over projects in their territories that may disrupt their livelihoods.

- 78 Perhaps the source of the discontent is the fuzzy wording of article 6.1(a) in ILO Convention 169. The article calls for the consultation process to be carried out ‘through appropriate procedures’. This rather imprecise wording opens the door to vague interpretations of the consultation procedures to be applied. The vague definition of consultation is not incidental. It reflects governments’ boundaries when it comes to granting territorial rights to indigenous peoples.

1.2 Compensation

- 79 In Section 3.7 (‘Remedies for Forced Evictions, Including Compensation’), Kothari addresses the the requirement of the Guidelines for states to provide fair and just compensation for losses resulting from evictions. The paper also rightly emphasises, in Section 4.3 (‘Legal Petitions/Court Judgments’), the usefulness of the Guidelines when used as legal tools for domestic courts to argue in favour of compensation for affected people, with reference to the Indian High Court case *Sudama Singh and Others vs. Government of Delhi and Anr.* Likewise, the author highlights, in Section 4.4 (‘Use by UN and Regional and National Human Rights Bodies’), the successful use of the Guidelines by courts in Nairobi (Kenya), as well as in the *Baljeet Nagar* case in India, to argue in favour of a human rights approach to land evictions.
- 80 These are positive examples of how this international instrument complements domestic legal systems for the protection of the rights of local populations, as mentioned above. However, there are also many other examples around the world of difficulties in the implementation of fair and just compensation processes. In Uganda, plans to build the country’s only oil refinery have been caught up in long disputes over compensation mechanisms for those affected by the project under the Resettlement Action Plan (RAP). In Ecuador, construction of the 500 kilometre Oleoduto de Crudos Pesados (OCP) pipeline led to serious popular unrest in the departments of Sucumbios and Orellana in 2002, due to differences over the amount and type of compensation for communities and individuals living along the OCP route.
- 81 Compensation is difficult to apply even when no evictions are envisioned. Very often, obstacles to compensation agreements could be simply resolved with increased monitoring or transparency. In Uganda, for example, the most common land-related disputes resulting from oil extraction in the Lake Graben region do not relate to land evictions. Rather, disputes among affected local communities generally relate to two issues: 1) a lack of understanding about the amount and extent of the compensation to affected communities; and 2) poor follow up of resettlement action plans.
- 82 The paper could benefit from briefly acknowledging some of these implementation difficulties for a more balanced view.

1.3. Rights to Exploit Subsoil Resources

- 83 The Guidelines reflect the constitutional mandate of most countries in Latin America and Africa, and do not contemplate compensation for subsoil resources. Only rights to surface land are to be compensated. The constitutions of those countries do not recognize individual rights to subsoil resources. The government –not individuals– has the constitutional right to develop subsoil resources for the benefit of the people. While

this is a constitutional fact, it still creates much confusion and sometimes results in bloody disputes among communities that for generations inhabited specific lands now claimed by the state for development due to the value of the subsoil. Kothari's piece might benefit from a short discussion on this issue, given that it is an important source of conflict between local communities and investors, especially in relation to the extractive industry in Latin American and African countries.

- 84 Land controversies become deeper where there is a history of illegal allocation of land rights or where land ownership laws remain unclear or are not properly applied. For instance, in Kenya, the purchase of land by individuals in areas where oil and natural gas reserves were recently found is generating much resistance among local communities that have lived in those territories for generations. The disputes are more pronounced when the purchases are made by people from outside the area, in what locals view as a speculative move in expectation of better land values once oil and gas are developed. Past land rights abuses by governments and uncertainty around community ownership of lands feed the controversy. This is particularly the case when natural resources are involved.

2. Conclusion

- 85 Miloon Kothari's paper offers a good summary of the positive uses of the Guidelines and some of the challenges of implementation. The paper could benefit from a more in-depth discussion of such challenges, with regard to both the Guidelines themselves and other similar soft-law instruments developed in recent years to counter the phenomena of land grabbing and evictions.
- 86 The UN Eviction Guidelines are welcome and necessary. Yet, drawing on the lessons learned with regard to the soft-law instruments mentioned above, they could be improved as follows:
- They could include more operational requirements in order to address some of the typical practical land-related issues.
 - They could emphasise government accountability by increasing civil society monitoring actions in relation to eviction plans and practices.
 - The concept of effective and fair consultations in the context of land evictions should probably be defined more precisely; more specifically, it should include detailed monitoring actions by various stakeholders to ensure the fairness, timeliness, and effectiveness of the consultations in relation to land evictions.
 - The transparency of eviction plans and actions should also be stressed.

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NOTES

1. This paper only reviews the development towards and the content of the UN Guidelines on Evictions. A number of other attempts to address the human rights dimensions of land grabbing have been made by other UN experts, including the former Special Rapporteur on the Right to Food, Olivier de Schutter. The work of the right to food mandate is reviewed elsewhere by Christophe Golay (2015). It is also the contention of the author that the UN Guidelines on Evictions are the only operational soft-law instrument to emerge from the UN human rights system that deal exclusively with the human rights consequences of land grabbing and subsequent evictions and displacement of people and communities.
2. The paragraphs mentioned in this section—between 3 and 3.1—refer all to Special Rapporteur on Housing (2007).
3. In the UN Guidelines, the promotion of general welfare refers to steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable.
4. See: Special Rapporteur on Housing (2008: para. 82).
5. For the numerous translations see: <http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx> (accessed on 17 December 2015). For additional translations into languages from the South Asia see: <http://www.hic-sarp.org/translations.html> (accessed on 17 December 2015).
6. See for instance: Chenwi (2008) and OHCHR Mexico and HIC-AL (2009).
7. See also: IAP et al. (2010).
8. See also: Satiroglu and Choi (2015); Dawson and Farber (2012).
9. For an engaging discussion on the advantages and limitations of using human rights instruments and mechanisms, in the context of agrarian struggles, see the article by Monsalves Suarez (2011).

ABSTRACTS

Editor's note: These papers are a contribution to the 'Policy Debate' section of *International Development Policy*. In this section, academics, policy-makers and practitioners engage in a dialogue on global development challenges. Papers are copy-edited but not peer-reviewed. Instead, the initial thematic contribution is followed by critical comments and reactions from scholars and/or policy-makers. **This debate can be pursued on the Journal's blog (<http://devpol.hypotheses.org/965>)** where you are invited to share your reflections under your name.

In the initial paper 'Land Grabbing and the UN Guidelines on Evictions: A Promising Soft-Law Approach', the author puts the establishment of the United Nations Guidelines on evictions in the context of growing international concerns with the negative impact of land grabbing on local populations; describes their main features; and highlights their uses in different spheres (academia, jurisprudence, development practice and human rights advocacy). He then concludes with a positive assessment of this soft-law instrument, but he also stresses that much more remains to be done to ensure the protection of international human rights standards. In her comments, Patricia Vasquez, from the Graduate Institute's Centre on Conflict, Development and Peacebuilding, suggests that Kothari's comprehensive evaluation of the Guidelines could benefit from a more in-depth analysis of the lessons learned in the implementation of other soft-law instruments developed in recent years to counter evictions related to land grabbing.

INDEX

Keywords: agricultural change, civil society, commodities, empowerment, food security, foreign direct investment (FDI), human rights, international cooperation, land rights, large-scale land acquisitions, livelihood security, property rights, right to food, agriculture

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