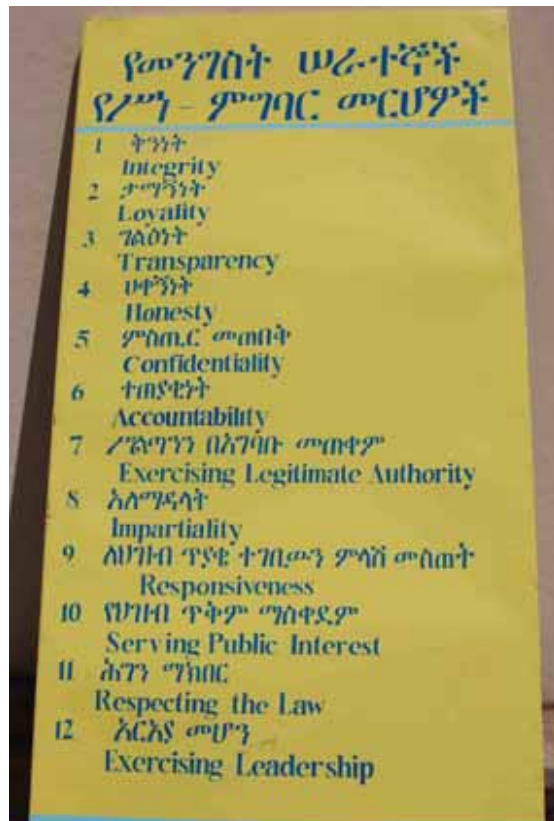


VOLUNTARY GUIDELINES FOR GOOD GOVERNANCE IN LAND AND NATURAL RESOURCE TENURE

ISSUES FROM AN INTERNATIONAL INSTITUTIONAL PERSPECTIVE



Richard Grover
Oxford Brookes University, UK

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The views expressed in this publication are those of the author and do not necessarily reflect the views of FAO.

Cover Image: Mika-Petteri Törhönen
(Principles of good public service in Ethiopia)

List of abbreviations

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
FAO	Food and Agriculture Organization of the United Nations
FIG	International Federation of Surveyors
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
OECD	Organisation for Economic Co-operation and Development
UDHR	Universal Declaration of Human Rights
<i>VG Adequate Food</i>	<i>FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security</i>
<i>VG Planted Forests</i>	<i>FAO Responsible management of planted forests: Voluntary guidelines</i>
WFS	World Food Summit

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Summary

Voluntary guidelines are human-rights based documents that provide a framework and reference point for national and international policies. They need to be derived from international agreements and credible examples of good practice if they are to command wide support. This paper is based on 56 authoritative international documents from which 14 principles about land and natural resources tenure have been derived.

- States should provide and safeguard an enabling environment for good governance in land and natural resources tenure.
- All persons should receive the equal protection of the law and of their human rights, including their property rights.
- Equitable access to land supported by security of tenure and use is essential to provide adequate standards of living.
- Everyone should have the right to own property individually or collectively and not to be deprived of it arbitrarily.
- Tenures and contract terms in tenancy agreements and for secured loans that breach human rights should be outlawed.
- Persons should be protected from unlawful or arbitrary eviction.
- States should establish restitution processes to enable those who have been wrongfully dispossessed to recover their land, housing and property.
- Where the restitution of property to those displaced is not possible, the losers should receive fair compensation.
- Gender discrimination in access to land should be outlawed.
- Racial discrimination in access to land should be outlawed.
- Discrimination in access to land by and in the protection of property rights of indigenous and tribal peoples should be outlawed.
- The development of land and natural resources should be sustainable in recognition of our obligations to future generations.
- Governments should provide an effective regulatory framework within which land and secured credit markets can function effectively without disruption by market failures.
- Initiatives to promote ethical standards in land administration should be supported.

1. Introduction

Voluntary guidelines are human-rights based documents. They are not mandatory or binding unlike laws, although parts of them do incorporate international law. Whilst laws are enforceable with sanctions against those who violate them, the pressure to adopt voluntary guidelines is moral and not legal. There is no reason why the principles incorporated in a *voluntary* guideline have to be restricted to ones derived from international law. International non-binding agreements and internally accepted good practice can also form the basis of the human rights principles they contain. For example, United Nations declarations are not legally binding but can be said to declare certain aspirations (UN 2008). As the guidelines are voluntary, the international agreements on which they draw can include ones that some states have not ratified or have reserved their positions about parts, or even voted against their adoption.

The primary purpose of voluntary guidelines is to provide a framework and a point of reference against which national and international policies, regulations, and laws can be evaluated. Voluntary guidelines are addressed to a wide range of stakeholders and not just governments, including companies, owners and users of natural resources, and non-governmental organisations. They can be used to set parameters for voluntary acts such as gifts, investment, and commercial transactions by private bodies and individuals as well as policies, regulations and laws.

Voluntary guidelines do need to be based upon the products of international negotiation and agreements or other credible examples of good practice. Examples of good practice include the lending policies of the World Bank and other international development banks. The credibility of voluntary guidelines is likely to be determined by whether governments recognise that they are derived from agreements to which they have subscribed and are therefore willing to adopt. There are, by contrast, examples in the human rights literature of statements about human rights that are not based on legally-binding laws but on documents such as resolutions at international meetings or summits, which are not agreements made by governments or have not necessarily been endorsed by the governments of the countries represented at such meetings. Such documents are often helpful in informing debate, but the principles derived from them are unlikely to carry the same weight as those in international agreements, conventions or declarations.

This paper is based upon 56 authoritative documents. From these a number of principles directly concerned with land and natural resource tenure have been extracted. There are also principles concerned with the institutional environment in which land and natural resource tenure occurs. One might broadly use the term governance to describe these. Without good standards of governance there is unlikely to be protection of property rights or security of tenure. If governance is weak, investors, farmers, foresters, and others who exploit natural resources may be reluctant to commit resources to develop land and natural resources or will demand high levels of compensation due to the risks involved. They may adopt unsustainable means of exploiting the land if they fear their occupancy will be cut short. If the legitimate expectations and claims of citizens that government should reflect their needs and opinions are not met, there may be conflicts that undermine the development of land and natural resources. As governance is about the way in which

society is managed and how competing priorities and interests of different groups are reconciled, what the authorities have to say about the principles of governance is particularly relevant to land and natural resource tenure. Land tenure is a social phenomenon comprising “rules invented by society to regulate behaviour” (FAO 2002, p7). Governance therefore is central to land tenure.

The paper starts by reviewing the previous voluntary guidelines and codes of conduct that FAO has produced and extracts the principles in these of relevance to land and natural resource tenure. Voluntary guidelines on land and natural resource tenure must build upon this work and be compatible and consistent with it. The paper then goes on to review the principal international human rights documents and what they say about land and natural resource tenure. There are insights into tenure that can be gained by examining how human rights principles and international human rights law have been adapted to deal with extreme situations, such as dispossession and discrimination based upon race or gender.

The conclusions are drawn together under 14 headings:

- Good governance, democracy and respect for human rights and fundamental freedoms
- The rule of law
- Access to land
- Ownership of property
- Lawful tenures
- Security of tenure
- Restitution
- Resettlement
- Gender discrimination in access to land
- Racial discrimination in access to land
- Discrimination against indigenous and tribal peoples
- Sustainability
- Land administration
- Ethical standards in land administration.

For convenience these are presented as a synthesis at the start of the paper and can be used to explore the authorities from which they are derived.

2. Synthesis of findings

This study has examined 56 authoritative international documents for the insights they provide into land and natural resource tenure. In this section the conclusions from these are summarised under 14 headings. Two of these are concerned with the enabling environment for land and natural resource tenure, namely that it should take place within an environment of good governance (1) and respect for the rule of law (2). The next six headings are concerned with access to land (3) and security of property rights and security of tenure. They include how security can be provided and appropriate responses to when dispossession or resettlement occurs. Three areas examine discrimination in access to land, by gender (9), by race (10), and for indigenous peoples (11). Access to land involves responsibilities, particularly to others who may be affected by one's actions and to future generations who will be affected by the impact current activities have on the environment. Section 12 discusses sustainability. The land market is one that is inherently imperfect because of the impact of land uses on others and because location grants a degree of monopoly power. Section 13 examines land administration and the role of government. Section 14 considers the behaviour of those working in land administration since unethical behaviour on their part can undermine equitable and efficient land and natural resource tenure.

2.1 Good governance, democracy and respect for human rights and fundamental freedoms.

States should provide and safeguard an enabling environment for good governance in land and natural resource tenure.

Good governance in land and natural resource tenure is difficult to achieve unless there is good governance in society at large. The Vienna Declaration on Human Rights (1993) argues that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing (paragraph 8). FAO (2007) sets out the consequences of weak governance for land tenure and land administration (section 3). The Rio Declaration (paragraph 2.32) noted the relationship between environmental problems, unsustainable development and poor governance. The World Food Summit (objective 1.1) identified the need for good governance to achieve food security. Poor governance results in insecurity and encourages the pursuit of short-term unsustainable gains without regard to the long-term consequences. Security of property rights, tenure and use rights require an enabling environment of good governance. Those undertaking investment need to have confidence that they will enjoy fair returns on their labour and capital and not be prematurely deprived of their property.

An enabling environment for good governance in land and natural resource tenure requires governance that is responsive to the needs of its citizens and other residents, such as migrant workers and refugees, and is accountable to its citizens. Responsiveness and accountability in governance require transparency in decision-making and the ability of citizens to participate in that decision-making and, through peaceful and political means, to influence the outcomes. Participation cannot be realised if citizens do not have access to information, are not free to discuss it with others, and listen to and impart conclusions, opinions and analysis.

An enabling environment can be secured through:

- The ability of citizens to participate in government. This may be directly and individually, for example, in grass-roots decision-making in areas that particularly affect them personally, such as food security and shelter, or through free and fair elections (UDHR article 21, ICCPR article 25, World Food Summit Plan of Action Commitment 7.5).
- Peaceful assembly and freedom of association so that citizens can join with others to campaign and lobby government (UDHR article 20, ICCPR articles 21 and 25).
- Freedom of thought and conscience (UDHR article 18, ICCPR article 18).
- Freedom of opinion and expression (UDHR article 20, ICCPR article 19).
- Freedom to receive and impart information and ideas (UDHR article 19, ICCPR article 19).

The achievement of an enabling environment for good governance requires governments to promote human rights and to make people aware of their civil, political, economic, social and cultural rights (*VG Adequate Food* Guideline 1.2). It means empowering individuals, human rights defenders, and civil society to make demands of governments to fulfil their human rights obligations and devise policies that meet their needs (*VG Adequate Food* Guidelines 1.2, 1.4, 1.5). This may require building capacity in civil society to do so. Officials should be educated and trained in human rights (*VG Adequate Food* Guideline 11.9).

As many of the decisions that affect land and natural resource tenure are taken by local governments, for example those on spatial planning and zoning, it is important that the enabling environment for good governance also applies at a local level (Habitat Agenda paragraphs 184, 186 and 189). This may require the strengthening of government institutions in rural areas and providing them with the authority and resources to take local decisions (World Food Summit Plan of Action Commitment 3.3 and Objective 3.5).

2.2 The rule of law

States should take steps to ensure that all persons receive equal protection of the law and of their human rights and fundamental freedoms. States should ensure that everyone is entitled to a fair and public hearing by an independent tribunal in the determination of his or her rights, including property rights.

The Universal Declaration of Human Rights (UDHR) states that all persons are entitled to equal protection of the law (article 7) and that everyone has the right to an effective remedy by national courts for acts violating his or her fundamental rights (article 8). All persons are to be equal before courts and tribunals (ICCPR article 17).

The determination of rights and obligations should be through a fair hearing in public before a competent, independent and impartial tribunal (UDHR article 10, ICCPR article 17). This would seem to imply that cases involving issues about property rights, including inheritance, land registration, eviction, compulsory purchase and taxation, the owners, occupiers and users of land and natural resources are entitled to public and independent hearings. Tribunals and other bodies set up to hear matters such as appeals against tax assessments, appeals against spatial planning and zoning

decisions, evictions, or claims for compensation in compulsory purchase ought to be impartial and independent, have fair rules of procedure, hear cases in public, and be staffed by competent persons.

2.3 Access to land

Access to land is essential to provide an adequate standard of living for health and well-being. Without access to land there cannot be access to adequate housing. For rural communities, access to land is essential for there to be access to adequate nutrition. Access to land can be provided in a variety of ways, including individual and collective ownership, customary rights of access, and renting. It must be equitable and supported by security of tenure and use rights.

The right to an adequate standard of living for health and well-being for a person and his or her family is affirmed by the UDHR (article 25.1) and ICESCR (article 11). This includes food and housing, with ICESCR recognising that there is a fundamental right to be free from hunger (article 11.2). The Convention on the Rights of the Child states that every child has the right to an adequate standard of living (article 27). Although parents and guardians have the primary responsibility of providing for their children, the State should take appropriate measures to assist, particularly with regard to housing and nutrition.

The right to food does not of itself provide a right of access to land since it could be satisfied by ensuring that all have an adequate income from work or social security safety nets to purchase food and that food supplies are secure and available. However, for the rural population, access to land often determines whether they have adequate food so that the right to adequate food cannot be divorced from the question of access to land. The right to adequate housing must involve access to land. Access to land does not necessarily mean the ownership of land. Housing or land can be rented, including being rented from a public, collective or voluntary body, such as a social housing organisation or a co-operative. Access to land could be through membership of a collective or mutual body or through customary land tenure.

There is a right to work and to earn a living by work that is freely chosen or accepted (ICESCR article 6). This would seem to imply that there should be fair access to land and natural resources on a non-discriminatory basis so that the work that requires them can be freely chosen. Access to land can be by purchasing or renting it or through other forms of grant. There is no implication that land has to be made available free of charge or that fair and non-discriminatory access has to be access for free.

Access to land and legal security of tenure are regarded by the Habitat Agenda as prerequisites for sustainable rural and urban settlements and ways of breaking the vicious circle of poverty (paragraph 75). They require governments to be committed to provide adequate supplies of land and to remove obstacles that hamper equitable access to land. The failure to adopt appropriate land policies and land management practices is a primary cause of poverty, causes increased living costs, and the occupancy of hazard-prone land. The Habitat Agenda contains commitments to legal security of tenure and access to land for all people and ensuring transparent and

accessible systems for transferring land rights and legal security of tenure (paragraph 40).

2.4 Ownership of property

States should take effective measures to ensure that everyone has the right to own property alone as well as in association with others. States should ensure that no-one shall be arbitrarily deprived of his or her property either by the State or other public body or any other natural or legal person.

The right to own private property alone or in association of others is affirmed by article 17 of UDHR. The ownership of property also implies the right to dispose of it through sale, gift, lease, or license, provided that this is done without coercion and between willing disposers and acquirers. ICCPR (article 1) and ICESCR (article 1) state that all peoples may dispose of their natural wealth and resources on the basis of mutual benefit. However, no peoples should be deprived of their own means of subsistence.

A particular situation in which property may be owned with others is during marriage. UDHR article 16 affirms that men and women are entitled to equal rights during marriage and at its dissolution. The property rights of women in marriage and at its dissolution, as well as those of men should be protected (ICCPR article 23.4).

The UDHR affirms that no-one shall be arbitrarily deprived of his or her property (article 17.2). ICCPR (article 17) provides that no-one shall be subject to arbitrary or unlawful interference with his or her privacy, family or home. The Convention on the Rights of the Child affirms that this applies to children and, by implication, to the parents and guardians with whom they reside (article 16). Transfers and transactions made under duress should not be recognised as being valid (Pinheiro Principle 15). The European Convention on Human Rights explicitly identifies that the persons who are entitled to the peaceful enjoyment of their possessions include both natural and legal persons (article 1 Protocol 1).

The right to peaceful enjoyment of property cannot be regarded as an absolute right. ECHR allows the state to enforce such laws as it deems necessary to control the use of property in the general interest. ECHR (article 1 Protocol 1), the American Convention on Human Rights (article 21) and the African Charter on Human and People's Rights (article 14) allow for persons to be deprived of their property in the public interest. Case law under the ECHR has led to rulings that there must be a proportionate balance between the general benefit and the losses to an individual and that losses to individuals should be fairly compensated. Thus the Convention helps to establish appropriate limits on the rights of the individual to the peaceful enjoy of his or her property compared with the needs of society and, on occasions, to place limits on these. These limits may restrict the rights of the individual in cases in which the unfettered pursuit of individual rights can cause harm to others, for example, through pollution or nuisance. Persons may therefore be required to obtain permission to pursue certain rights, such as development or building, where these impact upon others or common property resources. They may have to register their ownership in the interests of providing security of property rights for all by removing uncertainty

over ownership. The right of individuals to enjoy their property is compatible with requiring them to contribute fairly towards taxation.

The compulsory acquisition of property by the state, the ECHR appears to argue, is not a breach of human rights providing that the benefits to society are sufficient and that those who lose their property are fairly compensated. Case law under ECHR has ruled that the State may in the public interest deprive individuals of their property, for example, to construct infrastructure or undertake land reforms or urban renewal, provided that it follows due process and pays fair compensation. The ACHR (article 21) and ACHPR (articles 14 and 21) similarly allow for persons to be deprived of their property for reasons of public utility or social interest providing they are compensated.

2.5 Lawful tenures

States should take effective measures to outlaw those tenures and contractual terms in tenancy agreements and secured loans that breach human rights and fundamental freedoms. States should be encouraged to pass legislation or reinforce laws to prevent unfair contract terms in tenancies and in loans secured against real estate and natural resources. The definition of fair terms should be such as to create and maintain a market that is fair to both tenants and landlords and to borrowers and lenders.

The conditions in tenancy or loan agreements that breach human rights are:

- Ones that impose slavery or servitude (UDHR article 4, ICCPR article 8).
- Ones which prohibit the tenant or borrower from exercising his right to freedom of movement or right of residence (UDHR article 13.1, ICCPR article 12.1).
- Ones which prevent the tenant or borrower from exercising his right to free choice of employment (UDHR article 23.1).
- Ones that prevent the tenant or borrower from receiving just and favourable remuneration (UDHR article 23.3).
- Ones that result in the tenant or borrower or a member of his family being imprisoned as a result of the inability to fulfil a contractual obligation (ICCPR article 11).

Certain tenures impose conditions on the tenants so that they or their families cease to be free persons. Those who work the land can find themselves in conditions of slavery or servitude or be unable to leave their land to live elsewhere or pursue other kinds of work. Governments must define fair tenancy conditions. They must do so in ways that are fair to landlords as well as tenants so that distortions and inefficiencies in the land market are avoided. The intention should be to create a market that is fair to both parties rather than one that is weighted towards the interests of either party. It is important that governments introduce safeguards to ensure that tenants do not renege on legitimate and freely contracted tenancy conditions or make them unenforceable by landlords.

Certain types of condition in loans can result in the debtor ceasing to be a free person in the event of default. They may find themselves in debt bondage or virtually imprisoned on the land until the debt is paid. Loan and credit markets need to be considered alongside tenancy terms since farmers may own the land but lack the

capital to work it. They may borrow money or enter into some other kind of agreement to raise capital, such as loans of seed, pre-sales of crops, or sharecropping. There may be unfair terms that infringe human rights in these agreements even though the conditions of land ownership or in a tenancy agreement do not. Secured lending cannot be divorced from land and natural resource tenure. Lending on a secured basis creates rights over land for the lender.

Governments must define the parameters of fair loan conditions. The American Convention on Human Rights (article 21.3) prohibits usury and other forms of exploitation of man by man. Whilst the term usury does not have the same meaning for Muslims and Christians, the idea that there should be fair contract terms and conditions is one that is embraced by both religions and by many secular governments. There may be asymmetry in the information available to borrowers and lenders about the terms and conditions as well as differences in bargaining power. Governments can ensure that the terms and conditions are made explicit and are set out and advertised in standard ways. Unfair conditions can include excessive rates of interest and arrangement fees as well as ways in which compound interest is calculated that produce excessive growth in the debt. These can often be concealed from the borrower, for example, by the way in which interest is calculated not being made explicit. Borrowers can be placed under pressures of time to consent to an agreement. Governments can provide protection against asymmetries in bargaining power by providing, for example, for cooling off periods in which the borrower can seek advice and withdraw from the contract without penalty. Governments can protect borrowers from unscrupulous lenders through licensing lenders and withdrawing licenses in the event of breaches of fair terms and conditions. They can also give protection to the borrower by requiring that the enforcement of security in the event of default is through the courts. The courts are in a position to consider whether the terms of a loan are fair or whether the conditions are contrary to human rights.

The definition of fair loan terms must be fair to both the lender and the borrower. Whilst the borrower needs to be protected against unfair terms, the lender must be able to exercise security over the property in the event of default. The intention should be to produce a fair market that neither advantages nor disadvantages either party. It is important that governments introduce safeguards to ensure that borrowers do not renege on legitimate and freely negotiated loan conditions and allow lenders to enforce security in the event of a breach of covenant.

2.6 Security of tenure

States should protect persons from unlawful or arbitrary eviction or other forms of interference with their property. Governments should introduce or maintain legislation that outlaws forced eviction. Legislation should set out the circumstances in which eviction is permissible and the processes to be followed. Governments should take powers to enforce this legislation so that third parties and public officials comply with it.

In many parts of the world people are at risk of being displaced from their land or homes as a result of forced or illegal evictions. Forced or illegal eviction breaches ICCPR article 17, which states that no-one shall be subject to arbitrary or unlawful interference with his privacy, family or home. The Pinheiro Principle 5 sets out the

right of everyone to be protected from arbitrary displacement from his home and land. The property rights lost may be ownership, occupancy or use rights, including customary or traditional ones, and such rights may be individual or collective (Pinheiro Principle 15). Forced or illegal eviction may include the demolition of housing and the destruction of agricultural areas.

Governments should legislate to prevent forced evictions (Right to adequate housing, paragraph 9). They should legislate to provide security of tenure. Protection is needed against harassment and other threats that may be used to persuade people to leave their homes or land involuntarily. Such actions need to be made illegal. The proof that an action was intended to cause people to leave their land involuntarily may be difficult to achieve so it may be necessary to create a strict liability without the need to prove intent. Often these actions are carried out by persons who are not part of the State apparatus, for example, landlords, mobs, private militias or state forces working privately for individuals or companies, so it is necessary for governments to take steps to be able to enforce laws on security of tenure (paragraph 8). Sometimes forced evictions are the work of public officials so that the state needs to exercise proper control over those working for public bodies and to punish officials who engage in illegal activities. Governments may also need to undertake other measures to prevent forced evictions, such as better education and training of officials and improving the capacity of civil society to respond to threats of forced evictions.

In legislating against forced evictions, governments need to define the circumstances in which eviction is lawful. These are likely to include persistent non-payment of rent or damage to rented property without reasonable cause (Right to adequate housing, paragraph 11). The actions should be reasonable and proportionate (article 14). Eviction should not result in homelessness or the violation of other human rights. Therefore governments need to ensure that there is adequate alternative housing or access to productive land is available (paragraph 16).

It is important for legislation to govern the process of lawful eviction, including what is reasonable force and when it may be used. This should provide for (Right to adequate housing, paragraph 15):

- Consultation with those affected;
- Reasonable notice of the date of eviction;
- The reasons why the eviction is to take place;
- The identification of those to be evicted;
- Government officials to be present during the eviction;
- No evictions to take place at night or in bad weather;
- Legal remedies to be available to those threatened with eviction; and
- Legal aid to be available to enable those affected to seek redress through the courts.

The rights of tenants and other legitimate occupiers of housing, land and property should be recognised, including claims by family members, spouses, dependents and heirs (Pinheiro Principle 18).

Governments must ensure that legal evictions are not discriminatory and, in particular do not discriminate against women, children, older persons, indigenous people, and ethnic and other minorities (Right to adequate housing, paragraph 10).

2.7 Restitution

Where persons have been dispossessed of their land, housing or property, States should establish restitution processes to enable them to recover the property they have lost so that they can regain their homes and livelihoods. These processes should be accompanied by safeguards of the interests of secondary occupants, particularly where they acquired the property of those displaced in good faith. The processes should satisfy the requirements set out in the Pinheiro Principles.

The problem that displaced persons face, whether displaced as a result of conflict, expropriation, or forced eviction is that they have lost their homes and their livelihoods. The starting point for the Pinheiro Principles is that the problem of loss of livelihood and homes can only be addressed by the displaced persons returning home. This means that they must have their property returned to them. Central to the Pinheiro Principles is the right for refugees and displaced persons to have restored to them the land, property or housing of which they were arbitrarily or unlawfully deprived (Principle 2). This can only happen if they have the right to return voluntarily and without coercion (Principle 10).

There are many practical problems in developing a restitution policy, including what claims will be recognised, how claims are to be made, and what forms of compensation are possible. However, the Pinheiro Principles (Principles 11 – 14) set out the features of an appropriate restitution policy.

- The procedures, institutions, mechanisms and legal frameworks should comply with international human rights law.
- Efficient and timely processes should be established to handle restitution claims.
- The restitution process must be accessible by all regardless of their current place of residence.
- Processes must be non-discriminatory and recognise the claims of men and women and boys and girls.
- Separated and unaccompanied children should have the right to participate in the restitution claims process.
- The rights of tenants, customary occupiers and subsidiary members of households should be respected.
- Assistance should be provided for those needing it, including the illiterate and disabled.
- Restitution claims and their adjudication should be handled by an independent and impartial body.
- There should be consultation with those affected.
- The land returned should have security of tenure.
- Appropriate land registration and cadastral systems should be established for the registration of rights.
- Secondary occupants, who have taken over the property of displaced persons, should be protected from arbitrary or unlawful eviction and provided with the safeguards of due process, consultation, reasonable notice of eviction, and legal redress, and possibly alternative housing.

2.8 Resettlement

Where the restitution of property to those displaced is not possible, the losers should receive fair compensation for their losses. Where their previous conditions did not meet minimum standards, the compensation should be sufficient to raise their standard of living to a minimum level. The losses compensated should include all ownership and occupancy rights, including legal and customary rights. Governments should establish resettlement and compensation processes that satisfy World Bank requirements even if the World Bank is not involved in the funding of the project.

The solution favoured in the Pinheiro Principles is that of specific recovery. In other words, that displaced persons should have the actual property they have lost returned to them. In many situations this is not feasible. For example, the property is no longer available because it has been used in the construction of infrastructure, like a dam. It has been destroyed and so cannot be replaced. In circumstances where specific recovery is not possible compensation is the only option. This can be monetary compensation or compensation in kind through the provision of alternative housing or land (Pinheiro Principle 21). Sometimes resettlement has the aim of improving living standards by relocating people to a more favourable location or allowing improvements, such as land reforms, to take place.

The World Bank policies on involuntary resettlement provide principles for governments to follow in such cases (Operational Policy 4.12 and Background Paper 4.12).

- The resettlement plan should be an integral part of the project and its costs should be part of the full economic costs that must be provided for in the project budget.
- Those displaced should not subsidise the project. Rather the gainers should compensate the losers out of their gains or the losers should share in the benefits from the project. The project should not result in impoverishment or other loss to one group whilst others benefit.
- Resettlement plans must prevent or mitigate any adverse environmental impacts.
- The losses to the losers that are compensated should include intangible costs and losses, such as losses of land that is culturally or religiously significant.
- The losers should include all who suffer loss, including owners, occupiers, those with customary rights of access for productive or recreational purposes, sharecroppers, nomads, labourers, and seasonal labourers, irrespective of whether these have legal claims to the land.
- The resettlement plan must minimise the disruption from resettlement.
- There should be due consideration of the impact upon host communities.
- There should be consultation with all those affected by a project.
- Baseline information should be collected to establish who is entitled to compensation and what the impact of the project and resettlement plan have been.
- Compensation must be timely and at fair replacement value for the assets, income and livelihoods lost. It should reflect the realistic aspirations of those affected. Cash compensation is appropriate where the numbers of persons affected are small, they have legal rights of title, are not a vulnerable group, and they can purchase alternative property through the market. Otherwise it should be in the form of land with access to equipment, training and credit.

- Housing and services provided in resettlement plans must meet minimum standards irrespective of what conditions were like prior to resettlement.

2.9 Gender discrimination in access to land

States should take steps to legislate or maintain existing laws against gender discrimination in access to land, including discrimination in ownership of land, the occupancy of land and the use of land, and in land transactions and inheritance. There should be no discrimination between men and women in land owned in marriage. The laws should outlaw discrimination in land administration including land registration, and in credit markets for secured loans. There should be equality before the law for everybody irrespective of gender. Governments should tailor their services so as to be sensitive to the needs of women.

The UDHR affirms that everyone is entitled to enjoy human rights and fundamental freedoms without discrimination (article 2) and the ICCPR provides for the rights to be enjoyed without discrimination according to gender (articles 2, 3 and 27). Moreover, the Convention on the Rights of the Child states that if children are to enjoy the rights set out in it, they must be protected from discrimination against their parents (article 2). Households headed by women are particularly likely to experience discrimination.

In the World Food Summit Plan of Action the governments pledged to ensure gender equality and the empowerment of women (Objective 1.3). It stated that governments will:

- Introduce and enforce gender-sensitive legislation providing women with secure and equal access and control over land, credit and other productive resources.
- Ensure that institutions provide equal access for women.
- Provide for equal gender opportunities for education and training in food production, processing and marketing.
- Tailor technical services to women producers and increase the number of female advisors.
- Improve gender-disaggregated data and research into the effects of the division of labour on income within the household and women's traditional knowledge.

The Convention on the Elimination of All Forms of Discrimination against Women states that there shall be no discrimination against women in rural development and that they shall benefit equally with men (article 14). In particular, women are to:

- Receive equal treatment in land and agrarian reform, land settlement and housing;
- Participate in development planning;
- Have equal access to employment;
- Have access to agricultural credit and loans;
- Enjoy adequate living conditions, for example in housing.

Women shall have equal rights to men to conclude contracts and administer property and that all contracts and other instruments that restrict the legal capacity of women shall be deemed null and void (article 15). This would imply equality in inheritance rights. They are to have the same rights in marriage as their spouses with respect to the ownership, management, enjoyment and disposal of property (article 16). The Protocol to the African Charter on Human and People's Rights on the Rights of

Women in Africa goes further than CEAFDW about the rights of women to have an equitable share of joint property in marriage if the marriage ends in divorce, separation or annulment (article 7) and for the widow to have the right to an equitable share in inheritance on the death of her husband (article 21). These are supported by the Habitat Agenda (paragraph 79).

2.10 Racial discrimination in access to land

States should take steps to legislate or maintain existing laws against racial discrimination in access to land. This includes discrimination in ownership of land, the occupancy of land, and the use of land, and in land transactions. The laws should outlaw discrimination in land administration, including land registration, spatial planning decisions, real estate taxation, and compulsory purchase, in credit markets for secured loans, and in land services supplied by the private sector, such as estate agency. There should be equality before the law for everybody irrespective of ethnic group or background.

The UDHR makes it clear that the human rights and fundamental freedoms it contains are entitled to be enjoyed by everyone without discrimination (article 2). The ICCPR provides for the rights to be enjoyed without discrimination according to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or gender, or whether the individual belongs to a minority (articles 2, 3 and 27). The Convention on the Rights of the Child states that if children are to enjoy the rights set out in it, they must be protected from discrimination or punishment resulting from the status, activities or beliefs of their parents, guardians or other family members (article 2).

The International Convention on the Elimination of All Forms of Racial Discrimination identified amongst the rights to be guaranteed are the right to own property alone and in association with others, the right to inherit and the right to housing. Also included were the free choice of employment and freedom of movement and residence. These cannot be satisfied if there is discrimination in ownership of land or in land occupancy or use rights. The International Labour Organisation has defined occupations as including subsistence farming, handicrafts, production, and hunting. Unless there is fair and non-discriminatory access to land, there is liable to be discrimination in certain employments and occupations.

Racial discrimination in access to land cannot be ended unless governments are willing to outlaw racial discrimination in services related to land offered by the private sector as well as by the public sector. Laws to outlaw racial discrimination in access to land will be ineffective, for example, if estate agents involved in the sale of land on behalf of its owners or letting agents working to secure tenants are permitted to practice discrimination. Similarly, access to land on a non-discriminatory basis cannot be achieved if there is racial discrimination in the finance and credit markets, for example, in access to mortgage finance for land and house purchase or in the way that credit scores are produced.

Discriminatory behaviour needs to be eliminated from land administration, for example, in tax assessments, compulsory purchase, land registration, building control consents, and spatial planning consents. This is likely to involve the use not just of

legislation but also the education and training of officials, the use of codes of practice, and ethnic monitoring of service recipients.

Eliminating racial discrimination in the land market can play an important role in promoting racial equality in society at large. Legislation on racial discrimination can outlaw racial restrictions on the right of access to places used by the general public. These can include places from which private services are supplied, including restaurants, theatres and hotels as well as public spaces like parks and places for transport. Preventing access to particular places by ethnic groups is an effective way of discriminating against these groups in the supply of public or private services.

2.11 Discrimination against indigenous and tribal peoples

States should take steps to legislate or maintain existing laws against discrimination in access to land by indigenous and tribal peoples. They must be able to enjoy the same fundamental human rights as other groups, including owning land individually and collectively, and that their land rights are protected, including rights over land that they do not use intensively. They should be able to determine the priorities for the development of the land they use. Projects that involve the relocation of indigenous peoples should comply with World Bank requirements even if the World Bank is not involved in the funding of these projects. States should establish procedures, if they have not already done so, to restore lands traditionally owned or occupied by indigenous peoples that have been wrongly taken from them, or to provide fair compensation for past losses.

Indigenous and tribal peoples tend to be unable to enjoy their fundamental human rights to the same degree as the rest of the population because of discrimination. This can include being denied the rights other citizens are entitled to. They face a further issue because their laws, values and customs, including land rights, tend to be different from those of the wider society. For example, land rights are often collective rather than being held individually. They may face a variety of barriers when dealing with the wider society, including physical remoteness from centres of government, lack of political connections, lack of education, and language barriers. In addition, their land rights may be customary rather than legal, especially their access to any land which they may use for more extensive subsistence activities than are normal for the country to which they belong, such as hunting and gathering activities.

The International Labour Organisation Conventions on indigenous peoples require governments to develop co-ordinated and systematic actions to protect the rights of indigenous peoples, as does the UN Declaration on the Rights on Indigenous Peoples (C169 article 2, UN Declaration articles 1, 2 and 7). Indigenous peoples should have the right to determine priorities for the development of the land they occupy or use (C169 article 7, UN Declaration article 23) and governments should take measures to protect the environment of these territories (UN Declaration article 29). Protection of the lands of indigenous peoples is difficult if they are not incorporated into the national legal system and if these rights are not recorded in land registers and cadastres and states should take steps to protect these (UN Declaration article 26). States should establish fair means by which disputes over lands forcibly taken from indigenous peoples in the past can be resolved and so that indigenous peoples can

have lost lands restored to them or fair compensation paid for past losses (UN Declaration articles 27 and 28).

Penalties for unauthorised intrusion or use of the lands of indigenous peoples are needed (C169 article 18). A particular issue is likely to arise if the State has appropriated the freehold rights of lands occupied and used by indigenous peoples or has allocated sub-surface rights to itself. The right of indigenous peoples to participate in the use, management and conservation of these lands needs to be safeguarded and they should be consulted about the use (C169 article 15). They should also receive fair compensation for damages resulting from the exploitation of sub-surface rights.

The relocation of indigenous peoples should be the result of free and informed consent or after procedures that provide for effective representation and result in full compensation (C169 article 16, UN Declaration article 10). The compensation can be in cash or kind, such as land of equivalent quality and legal status. The World Bank has set out certain principles for projects that involve the displacement of indigenous peoples.

- The resettlement element, and not just the project as a whole, must directly benefit the indigenous people being displaced. This means that the resettlement programme must be treated as a part of the costs of the project and that indigenous people do not subsidise the wider population that benefits from the project.
- Customary rights, intangible assets and cultural property of indigenous peoples are recognised and fully compensated. This implies that the land rights of indigenous peoples are identified and protected through devices like titling.
- Compensation should include land.
- Indigenous peoples should give their informed consent. This is unlikely unless they share in the benefits from the project and receive full compensation for any losses.
- Projects must respect the right of uncontacted peoples to remain in isolation.

2.12 Sustainability

The development of land and natural resources must recognise our obligations to future generations. This means maintaining, and where possible improving, the capacity of the earth to produce renewable resources and to safeguard non-renewable ones from exhaustion. No State shall permit activities undertaken within its jurisdiction to cause damage to the environments of other States. Central to sustainable development is efficient and effective land use policies

Development is not an unrestricted right but comes with obligations. There is an obligation to future generations to maintain an environment that will permit them a life of dignity and well-being (Stockholm Declaration Principle 2). The Stockholm Declaration laid down the following principles.

- The capacity of the earth to produce renewable resources must be maintained (Principle 3).
- Non-renewable resources shall be safeguarded from exhaustion (Principle 5).
- States should not permit activities within their jurisdictions to cause damage to the environments of other States (Principle 21).

Whilst States have a right to exploit their own resources, this must be done in a way that does not harm those who live in other States or future generations. The Stockholm Declaration wanted to see the development of international law so that those living in one jurisdiction could have redress against perpetrators of pollution in other jurisdictions (Principle 22). The Vancouver Declaration similarly affirmed that nations must avoid polluting the biosphere and oceans (paragraph II.11).

There are a number of approaches that can be used to limit environmental damage. The Stockholm Declaration in 1972 tended to favour planning and management. By the time of the Rio Declaration in 1992 opinion had begun to swing away from the exclusive use of planning approaches towards the use of economic instruments designed to internalise environmental costs that were based upon the principle of the polluter paying (Principle 16).

A major cause of degradation is inappropriate and uncontrolled land uses (Agenda 21, paragraph 14.34). Present land use often disregards the actual potential and limitations on exploitation. Therefore information about actual and sustainable land uses is an important aspect of developing sustainable policies. Agenda 21 recommended that countries should undertake a national inventory of their land resources and establish a land information system (paragraph 7.29) supported by improved training in sustainable land resources management (paragraph 7.34). Management and decision-making needs to be more integrated rather than being separate for economic, social and environmental policies (paragraph 8.2). The proposals for improvement put forward in Agenda 21 (paragraph 7.30) include:

- Legislation to guide the implementation of policies for environmentally sound urban development and land utilisation.
- Fiscal incentives for sustainability and land-use control measures.
- Partnerships among the public, private and community sectors in managing land resources and strengthening community-based land-resource protection practices in existing urban and rural settlements.
- Developing improved land-management practices that deal with competing land requirements.
- Promoting understanding among policy makers of the adverse consequences of unplanned settlements in environmentally vulnerable areas.

Many of these measures are also supported by the Habitat Agenda (paragraphs 109-114).

2.13 Land administration

Land is a unique resource. Its use by an individual usually has repercussions on others, sometimes harmful though they can also be beneficial. Access to land gives a degree of monopoly power by virtue of the uniqueness of each location. This leads governments to regulate land use rather than allowing the unfettered pursuit of private interests. Governments need to provide a regulatory framework within which land and credit markets can function effectively, for example, by ensuring clear ownership rights and means of transferring these and the stability of the banking system.

Land administration can contribute to improving welfare where it is seen as part of an overall development strategy that includes other aspects of policy, such as industrialisation, agricultural development, social welfare and environmental and cultural preservation (Vancouver Declaration paragraph III.2). Sustainable settlements require land administration policies that relate to social, economic, cultural and environmental objectives (Habitat Agenda paragraph 41). Land administration should not be seen as a top-down function. Rather it should be devolved and decentralised with participation by the public and civil society (Vancouver Declaration paragraph II.13; Vancouver Agenda section E; Habitat Declaration paragraphs 45, 180 and 181).

Between the 1970s and the 1990s there was a change in approach to various land problems. In the 1970s the solutions were seen as involving state planning, often accompanied by public ownership of assets. By the 1990s the solutions often incorporated more market-orientated approaches, with the state playing the role of facilitator. This change in approach can be seen by comparing the Vancouver Declaration and Action Plan on Human Settlements (1976), which was strongly in favour of state planning, with the Habitat Agenda Goals and Global Plan of Action (1996), in which the role of government as a supporter of markets and of private secure initiatives is more prominent. It was noted under sustainability (12) that a parallel shift in approaches occurred between the Stockholm Declaration (1972) and the Rio Declaration (1992).

The implication of this change of approach is that land administration is not just about public officials managing land but is also about the state regulating and providing an environment in which markets in land, natural resources, housing, and credit can flourish, whilst avoiding actions that stifle supply and distort demand (Habitat Agenda paragraphs 48, 71 and 72). States should improve the functioning of agricultural and food markets, encourage the mobilisation of savings, develop appropriate credit policies, and increase human capacity (*VG Adequate Food* Guideline 4.1) and promote local and regional markets to ensure that the widest number of individuals and communities benefit from the opportunities from agricultural trade (*VG Adequate Food* Guideline 4.5).

This requires economic and regulatory policies that provide for fair competition, transparent access to market intelligence and market signals, and the removal of perverse and distorting incentives (*VG Planted Forests* Principle 5). Governments must prevent uncompetitive and fraudulent market practices (*VG Adequate Food* Guidelines 4.2 and 4.4). This includes curbing the powers of monopolies, monopsonies (sole purchasers) and cartels. There should be steps to prevent market failure because of the existence of externalities, like pollution, and support for public goods that markets cannot provide (*VG Adequate Food* Guideline 4.10). Markets may not necessarily reflect all the values of society (*VG Planted Forests* Principle 6). It means recognising that markets do not automatically result in everyone receiving sufficient income at all times to meet basic needs so that governments should provide adequate safety nets in such cases (*VG Adequate Food* Guideline 4.9; Habitat Agenda paragraph 71).

The need for accurate data about land and property rights, which underpin land administration, is recognised by a number of authorities. The Pinheiro Principles require states to establish or re-establish cadastre and registration systems so that

pronouncements about ownership and property rights can ensure security of tenure (Principle 15). Agenda 21 argues that efficient and accessible land markets need land registry systems and streamlined land transactions (paragraph 7.30). The Habitat Agenda also points to the need to employ mechanisms such as laws, cadastres and rules for property valuation to ensure that markets function effectively (paragraphs 72 and 76). Secure property rights and security of tenure can be regarded as being a public good that if provided for one, all benefit from. Security encourages investment and counters tendencies to pursue policies that are only of short term benefit. A variety of land management tools are acknowledged as being available to pursue the objective of securing an adequate supply of land, including inventories of public land, fiscal incentives, the development of land information systems, integrated land use and land mapping systems, measures to capture private gains in land value made as a result of public decisions, regularising informal settlements, recognising the diversity of land delivery systems, supporting mortgage markets and community-based financing initiatives, and to enhance local tax revenues (Habitat Agenda paragraph 76, 80, 82, 114, and 189). Governments will need to determine which are appropriate in which circumstances. These measures are likely to require steps to be taken in capacity building in land administration (Habitat Agenda paragraphs 76, 177, 178 and 184).

2.14 Ethical standards in land administration

Corruption and unethical behaviour by those working in land administration undermines its efficiency and effectiveness. Action needs to be taken against those working in the private sector as well as the public sector and those from abroad who might wish to suborn public officials. Legislation is needed to define criminal behaviour so that it can be punished. This can be supported by a range of other initiatives designed to discourage unethical behaviour, such as codes of practice.

An efficient and effective land administration system can only exist if those responsible for its operation behave in an ethical fashion. This includes those working for the private sector in areas like estate agency, estate management and finance as well those working for the public sector (UN Convention against Corruption, article 12). There needs to be effective laws that criminalise activities such as bribery, embezzlement, false accounting, misappropriation of public property, trading in influence, abuse of functions, and illicit enrichment (UN Convention against Corruption, articles 15 – 20). These need to be enforced through the courts, which implies a judiciary that acts with integrity and is independent (UN Convention against Corruption, article 11). There need to be effective laws to prevent persons or companies in one country corrupting officials in others (OECD Convention on Combating Bribery of Foreign Officials).

Measures which can encourage higher ethical standards include:

- Codes of conduct (UN Convention against Corruption, article 8; OECD Guidelines for Managing Conflict of Interests in the Public Service; OECD Recommendation on Enhancing Integrity Public Procurement);
- Better training of officials;
- Better accounting and auditing standards (OECD Recommendation on Enhancing Integrity Public Procurement);

- Greater transparency in accounting and the use of resources (UN Convention against Corruption, article 9);
- Greater involvement of civil society (UN Convention against Corruption, article 13; OECD Recommendation on Enhancing Integrity Public Procurement);
- Having effective complaints procedures (OECD Recommendation on Enhancing Integrity Public Procurement).

Where officials are poorly paid so that work in land administration does not support an adequate living – in other words, conditions which are in conflict with ICESCR article 6 – corruption is likely. This can occur if, for example, remuneration is adequate but paid irregularly or if public offices have to be purchased by officials. Officials should have careers that provide for equal opportunity for promotion based upon seniority and competence rather than origins and connections (ICESCR article 7). If there is to be government with the consent of those being governed, the officials working in land administration are likely to need reflect the composition of the wider society in areas such as gender and ethnicity. This cannot happen if there is discrimination in employment and occupation, which is contrary to the International Labour Organisation's Convention on Discrimination in Respect of Employment and Occupation (C111) as well as UDHR (article 23), ICESCR (article 7), CEAFDW, article 11), and the International Convention on the Elimination of All Forms of Racism (article 5).

Membership of self-regulating professional bodies can assist those working in land administration to maintain ethical standards if such bodies have appropriate codes of conduct and can enforce these. The principles behind these include (FIG, *Statement of Ethical Principles and Model Code of Professional Conduct*; International Valuation Standards Committee, *Code of Conduct*):

- Integrity and avoiding conflicts of interest;
- Behaving with independence, objectivity and impartiality;
- Maintaining confidentiality; and
- Acting with competence.

3. FAO's Voluntary Guidelines

Since 1985 FAO has produced five voluntary guidelines or codes of conduct, four of them, including the revised code of conduct on the distribution and use of pesticides, since 2002. These are concerned with responsible fisheries (1995), the progressive realisation of the right to adequate food (2004), the distribution and use of pesticides (1985, revised 2002), fire management (2006), and planted forests (2006). The voluntary guidelines contain statements about the governance of land and natural resources and imply standards of governance that enable the principles they set out to be achieved. Some of them, notably the voluntary guidelines on the progressive realisation of the right to adequate food and on planted forests, also contain principles to govern land tenure. As the voluntary guidelines represent a consensus of the views of FAO member States, and have been formally approved by them, what they have to say about the governance of land and natural resources tenure is significant and authoritative. They must therefore inform the development of voluntary guidelines in this area. The guidelines themselves are derived from principles set out in FAO's Constitution and in the World Food Summit Plan of Action.

3.1 World Food Summit Plan of Action (1996)

When FAO was set up in 1945, its member States committed themselves to raise nutrition and standards of living, improve efficiency in the production and distribution of agricultural products, better the living conditions of the rural population, and ensure freedom from hunger (FAO Constitution, 1945, Preamble). The World Food Summit (WFS) Plan of Action (1996) - reaffirmed in its Five Year Review (2002) - was designed to lay the foundations for food security. The Plan contains seven commitments, including ones concerned with securing an enabling environment for food security, and policies to eradicate poverty, promote sustainability, encourage participation in policies, stimulate trade, and encourage investment. In particular there are commitments on governance, to land reform and the economic and social environment in which agricultural production will take place. The Plan provides a mandate for voluntary guidelines on land and natural resource tenure.

The Plan sets out the enabling political, social and economic environment for the eradication of poverty that governments in partnership with civil society will achieve. This involves respect for human rights and fundamental freedoms, democracy, a transparent and effective legal framework, accountable governance, and the equal participation of all in decisions affecting their food security (Objective 1.1). The commitment to governance includes strengthening government institutions in rural areas (Objective 3.5b).

The governments undertook to establish legal and other mechanisms that advance land reform, recognise and protect property and user rights, and enhance equitable access to productive resources. They undertook to pursue sound economic, agricultural and land reform policies that would permit farmers and other food producers to earn a fair return from their labour, capital and management (Objective 2.1). They agreed to promote conservation and the sustainable use of natural resources (Objective 1.2b). There were undertakings to strengthen the rights of farmers and other producers, to develop rural markets, to develop rural banking, credit and savings, and insurance schemes (Objective 3.5), and to promote the optimal allocation

and use of public and private investments in agricultural systems and rural development (Objective 6).

An important aspect of the Plan was to provide equal opportunities for disadvantaged groups. The governments pledged to ensure gender equality and the empowerment of women (Objective 1.3) and to combat discrimination against members of socially vulnerable and disadvantaged groups and minorities, particularly with respect to rights to land and property and access to credit, markets and food security programmes (Objective 1.4).

3.2 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security

These Voluntary Guidelines (hereafter referred to as *VG Adequate Food*) were adopted by the FAO Council in 2004. They attempt to interpret an economic, social and cultural right and to develop plans for its realisation. The International Covenant on Economic, Social and Cultural Rights includes the right of everyone to an adequate standard of living for himself or herself and his or her family, including adequate food (Article 11).

VG Adequate Food sets out the conditions for an enabling environment in which the progressive realisation of the right to adequate food can take place. The strategy is human-rights based (Introduction paragraphs 9, 16, 19, Guideline 3.1) and rests on the principle of non-discrimination (Guidelines 2.5, 3.5, 13.3), with protection for the vulnerable (Introduction paragraph 19, Guidelines 3.3, 7.4, 8.3, 13). Central to the strategy is that states should promote a free, democratic and just society so that a peaceful, stable and enabling environment is provided in which individuals can feed themselves and their families (Guideline 1.1). The argument in *VG Adequate Food* is that good governance should be promoted as an essential factor enabling sustained economic growth, sustainable development, and the eradication of poverty and hunger (Guideline 1.3).

The aspects of good governance that *VG Adequate Food* calls on states to promote include the following.

- Accountability of governments (Guideline 1.2).
- Transparency of governments and state decision-making processes (Guideline 1.2).
- Certainty and predictability supported by law (Guideline 7.1).
- Transparency and accountability in the use of resources (Guideline 12.2).
- Participatory policy making with governments consulting with stakeholders, including the private sector and civil society (Guidelines 2.2, 3.1, 3.8, 3.9, 6.1, 9.9, 10.3).
- Inclusive, non-discriminatory and fair policies (Guidelines 3.9, 4.6, 7.4, 8.1, 8.6, 8.9, 8.10, 10.8, 10.10), with transparent criteria for assistance (Guideline 13.3).
- Freedom from corruption (Guideline 5.5).
- Ecologically sustainable policies (Guidelines 2.5, 3.7, 8.1, 8.8, 8.10 8.13).
- Respect for cultural diversity (Guideline 10.9).

VG Adequate Food puts forward a number of policies that have direct implications for land and natural resource tenure. It advocates the adoption of a holistic and

comprehensive approach to hunger and poverty reduction, including investment in productive activities, facilitating access to productive resources, supporting markets, and developing conducive legal and regulatory frameworks (Guideline 2.4). States should pursue sound agriculture, fisheries, forestry, land use and land reform policies that enable farmers, fishers, foresters and other food producers to earn a fair return from their labour, capital and management (Guideline 2.5).

It is quite feasible for a government to develop policies that provide for the right to adequate food without most citizens having the right of access to land and natural resources. For example, in a society that is urbanised and in which most families earn their living through employment in industry or the service sector, the right to adequate food can be met by ensuring that those in work have sufficient income to buy food and that there are adequate safety nets for those who are unable to work. The government also needs to ensure security of food supplies, including that markets functioned efficiently. However where poverty and hunger are predominantly rural, policy should focus on agricultural and rural development through measures such as access to land and water and the promotion of policies to increase productivity (Guideline 2.6).

Governments should protect assets that are important to people's livelihoods (Guideline 8.1) and take measures to promote and protect the security of land tenure and the right to inherit (Guideline 8.10). States should carry out land reforms consistent with human rights obligations and in accordance with the rule of law (Guideline 8.1). They should address local constraints such as shortages of land and water (Guideline 8.14). Policies to increase access to land and improve productivity should be targeted particularly at small-scale producers and include measures to develop human capacity (Guideline 3.7). Special attention needs to be paid to pastoralists and indigenous peoples (Guideline 8.1) as their interests are particularly likely to be overlooked. Measures should be taken to protect the security of tenure of women and the poor and disadvantaged (Guideline 8.10) and so that vulnerable groups can access economic resources (Guidelines 8.2, 8.3). States should promote women's full and equal participation in the economy, including the right to inherit, to possess land and other property, and to secure access to and control land and water (Guideline 8.6).

VG Adequate Food encourages states to promote and mobilise domestic savings and attract external investment (Guideline 12.4). Whilst not explicitly making the connection, the encouragement of investment requires security of tenure so that investors are able to recoup their investments without fear of dispossession. The mobilisation of savings is likely to require measures to enable those who own landed wealth to be able to turn it into a fungible form, for example, through mortgages and borrowings secured against assets.

VG Adequate Food is supportive of the use of competitive trade and markets to help realise the right to adequate food. States should improve the functioning of markets, particularly agriculture and food markets, mobilise savings, develop appropriate credit policies and increase human capacity (Guideline 4.1). They should prevent uncompetitive and fraudulent market practices (Guidelines 4.2, 4.4). As markets do not automatically result in everybody receiving sufficient income at all times to meet basic needs, *VG Adequate Food* argues that states should provide adequate safety nets

(Guideline 4.9). There is recognition that market failure can occur, for example because of externalities, and that states should take steps to protect the environment and public goods (Guideline 4.10). Development policies should encourage conservation and the sustainable management of natural resources (Guideline 2.5).

In summary, *VG Adequate Food* calls on states to undertake policies with respect to land and natural resources tenure that:

- Improve access to land and resources.
- Enable producers to obtain a fair return from their labour, capital and management.
- Promote improvements in productivity, including by small-scale producers.
- Protect individual's property rights.
- Promote security of tenure.
- Improve the functioning of markets.
- Improve the mobilisation of savings and investment.
- Conserve and sustain the environment.
- Are pro-poor and protect the security of tenure of the poor and disadvantaged.
- Pay regard to the needs of marginal groups, such as pastoralists and indigenous peoples.
- Promote women's equal rights to property.

3.3 Responsible management of planted forests: Voluntary guidelines

These Voluntary Guidelines (hereafter referred to as *VG Planted Forests*) were created in response to concerns that planted forests were not always achieving their potential. They are the only FAO voluntary guidelines to deal with a specific land use. Therefore they have to be concerned with issues like land rights, land tenure, and security of tenure and investments. They recognise that there are different users of forests and often more than one interested party or claimant of land rights in a given area. They have to acknowledge that there may be conflicts between different parties requiring the need to balance the interests of different groups of stakeholders. In other words that governance of land tenure is an important issue.

VG Planted Forests contains principles to support the formulation of policies, laws and strategic and management plans aimed at the sustainable management and use of planted forests. It touches on some important issues that are central to land tenure, which it recognises are not unique to planted forests (p27). It is supportive of market mechanisms to improve the probability of achieving acceptable returns from planted forests with their establishment and management being market-driven rather than production-driven and not as the result of perverse incentives (Principles 5 and 6). There is a trade-off between returns to the investor in planted forests and the costs and benefits to society in the form of sustainable livelihoods, land use and forest management (Principle 4). Planted forests have an impact on ecosystems. A recurring theme is there should be measures to enhance conservation and support biodiversity (Principles 9, 10).

Good governance in planted forests includes the following.

- Respect for the rule of law and adherence to national and international laws, commitments, treaties and agreements (Principle 1).

- The formulation of clear and consistent policies, laws, regulations and plans (Principles 1 and 5).
- Responsiveness to the needs, aspirations, and priorities of stakeholder groups and being accountable to them (Principle 2).
- Transparency in decision-making (Principle 1) and the sharing of knowledge and data (Principle 3).
- The participation without coercion of non-governmental stakeholders in decision-making, including corporate and smallholder investors, indigenous peoples, local community groups, women, and marginal groups (Principles 1 and 2).
- Finding levels of engagement, dialogue, and approval that reflect the complexities, scale and impact, and the need for timely decisions (Principle 2).
- The use of scientific evidence in making choices (Principle 1).
- Rewarding sustainable management (Principle 1).
- Equity in the distribution of benefits to all stakeholders (Principles 1, 4).
- Resolving conflicts promptly through mutually agreed mechanisms (Principles 2 and 8).
- Encouraging decentralisation to local levels and devolution of responsibility (Principle 3).

VG Planted Forests argues that clarity of land tenure is important for sustainable development. Private investors require the security of legal tenure to protect their investments, including assurance about the duration of their rights, their robustness, and the degree of excludability they confer (section 4.5.9). The development of secure land tenure for planted forests requires consultation, conflict resolution and shared decision-making.

Land selected for planted forests may be subject to rights held by indigenous and local communities, who may use it for a variety of activities, including grazing, collecting traditional foods, medicines and firewood, and fodder. The land may also contain significant and sacred sites. Their rights should be recognised, respected and safeguarded (section 4.5.8). They should have the right to participate in the use, management and development of their traditional lands and waters. Relocation should be an exceptional measure and take place only with their free and informed consent. Conflict resolution mechanisms should be established for settling disputed rights and to determine compensation where rights are temporarily or permanently extinguished.

VG Planted Forests sets out the following principles for land tenure.

- “Just” land ownerships, both public and private, should be recognised together with the rights and obligations of land and crop tenure (Principle 1).
- There should be access to land for investors, traditional owners, indigenous peoples, local communities, and ethnic minorities (Principle 1).
- Respect for international law should ensure that local communities and indigenous peoples retain control over their lands unless they freely delegate control on the basis of prior informed consent (Principle 2).
- The rights of smallholder investors should be recognised (Principle 2).
- Equity amongst competing land uses should be promoted (Principle 5).
- There should be recognition of the customary rights and tenure of indigenous peoples and ethnic minorities in areas targeted for planted forest investments (Principle 7).

- The opportunities and capacity of indigenous peoples, ethnic minorities, local communities, women, marginal groups and smallholder investors to benefit from rights in the use of planted forests should be increased (Principle 7).
- The contributions of smallholder investors and their needs for support in terms of tenurial rights and sharing in the benefits from planted forests should be recognised (Principle 7).
- Community ancestral rights, including hunting and gathering non-wood forest products should be respected (Principle 8) whilst illegal practices, such as poaching, are controlled (Principle 10).
- The displacement or resettlement of communities without free, prior and informed consent should be prevented (Principle 8).

3.4 Conclusions

The World Food Summit is not a statement of international law. It is consensus view of governments as to how food security should be realised. It identifies the areas for action and the principles to be applied. It provides a mandate for voluntary guidelines on land and natural resource tenure. *VG Adequate Food* and *VG Planted Forests* set out principles on governance and land tenure. Both are voluntary guidelines, so although adopted by FAO they are not binding on member States. The principles they contain are important. Voluntary guidelines on land and natural resource tenure should be compatible and consistent with them, partly because they reflect the views of FAO member States and partly because of their intrinsic merit.

4. International human rights and fundamental freedoms

Voluntary guidelines are human-rights based documents. This section examines the human rights and fundamental freedoms that are particularly relevant to land and natural resources tenure. It discusses the Universal Declaration of Human Rights, the International Covenants that stem from it, and the regional human rights conventions derived from it. These statements of fundamental freedoms have received recent support in the United Nations Millennium Declaration (2000) which stated that men and women have the right to live their lives and raise their children in dignity, free from hunger and of violence. It argues that democratic and participatory governance was the best way of assuring these rights (paragraph 6). It should be recognised however that in United Nations terminology declarations do not have the same status as treaties. They are not legally usually binding but tend to declare certain aspirations. The Universal Declaration of Human Rights has gained binding status over time as customary international law (UN 2008).

4.1 The Universal Declaration of Human Rights (1948)

The starting point for any human-rights based guidelines is the Universal Declaration of Human Rights (UDHR). The UDHR affirms a number of fundamental rights such as the right to life, liberty and security (article 3). It supports a number of rights that provide for good governance including freedom of thought, conscience and religion (article 18), freedom of opinion and expression (article 19), freedom of peaceful assembly and association (article 20), and to participate in government and free elections (article 21). The rights and freedoms in the UDHR are entitled to be enjoyed by everyone without discrimination (article 2) and all are entitled to equal protection of the law (article 7).

UDHR has implications for property rights and land and natural resources tenure. In article 25 it states that all have the right to an adequate standard of living for themselves and their families, including food and housing. The right to food does not of itself imply a right of access to land. This can be met in other ways, such as providing opportunities to earn sufficient income to buy food and social security nets for those unable to earn an adequate living. The American Declaration of the Rights and Duties of Man (1948) goes further and states that every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home (article 23).

In article 17, UDHR states that everyone has the right to own property alone as well as in association with others. Article 16 affirms that men and women are entitled to equal rights during marriage and at its dissolution, which suggests protection for married partners, particularly women, of their rights over property held through marriage. Article 17 goes on to state that no-one shall be arbitrarily deprived of his property. As article 10 affirms that all are entitled to fair and public hearings by an independent and impartial tribunal in the determination of their rights, this would appear to indicate there are certain obligations on the state in situations in which persons are to be deprived of their property, such as compulsory purchase. The procedures in such cases ought to provide for impartial public hearings.

There are implications from some of the articles as to the permissible forms land tenure can take. Article 4 prohibits slavery and servitude. This would seem to outlaw those tenures that impose servitude on the tenants, such as serfdom or debt bondage. A feature of tenures like serfdom is that serfs are not free to leave their land, something that article 13, which states that all have the right to freedom of movement and residence within the borders of their own state, also outlaws. Article 23 reaffirms the right to free choice of employment.

4.2 The International Covenant on Civil and Political Rights (1966)

The aim behind the International Covenants on Civil and Political and Economic, Social and Cultural Rights of 1966 was to improve the enforceability of the principles contained in the UDHR. They reaffirm the rights that appear in UDHR. The International Covenant on Civil and Political Rights (ICCPR) came into force in 1976. It reaffirms a number of fundamental civil and political rights including the right to self-determination (article 1), to life (article 6), to liberty and the security of the person (article 9), to recognition before the law (articles 14, 16 and 26), freedom of thought, conscience and religion (article 18), freedom of opinions and expression (article 19), freedom of peaceful assembly and association (articles 21 and 22), to take part in government, and to vote in free and fair elections held by universal and equal suffrage (article 25). The Covenant provides for the rights to be enjoyed without discrimination according to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or gender, or whether individuals belong to a minority (articles 2, 3 and 27). It provides for family life and children to be protected (articles 23 and 24).

Under the right of self-determination, all peoples can freely pursue their economic, social and cultural development (article 1). This also appears in the International Covenant on Economic, Social and Cultural Rights. To this end, all peoples may freely dispose of their natural wealth and resources on the basis of mutual benefit. However, a people may not be deprived of its own means of subsistence. This article would seem to support the notion that peoples who own natural wealth and resources can sell these, lease them, or license their exploitation on the basis of transactions between willing buyers and willing sellers in which each of the parties, in their own estimation, considers the transaction to be personally beneficial. Other articles address the issue of who within a people has the right to make collective decisions on the alienation of resources. For example, article 25 is concerned with the right to take part in public affairs and to vote in free and fair elections. The implication behind this is that governments which are representative of the people could do so. Article 17 of the UDHR affirms the protection of private property. This implies the right of private owners of natural wealth and resources voluntarily and without coercion to alienate their property.

The Covenant reaffirms the prohibition on slavery (article 8). Article 11 states that no-one shall be imprisoned as a result of the inability to fulfil a contractual obligation and article 12 reaffirms the right to freedom of movement and choice of residence. These provisions would appear to outlaw tenures like debt bondage.

There are important protections of property rights and of security of tenure in the Covenant. Article 17 provides that no-one shall be subjected to arbitrary or unlawful

interference with his or her privacy, family, home or correspondence. This should provide protection against forced or unlawful eviction. In the determination of rights and obligations everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14).

4.3 The International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESR) also came into force in 1976. It is derived from the UDHR. Article 22 of the UDHR states that everyone is entitled to the economic, social and cultural rights indispensable for dignity and the free development of his or her personality. Article 25 affirms that all have the right to a standard of living adequate for the health and well-being of themselves and their families and article 27 states that everyone has the right to participate in the cultural life of the community.

Article 11 of ICESR recognises the right of all to an adequate standard of living for themselves and their families, including adequate food and housing. It states that there is a fundamental right of everyone to be free from hunger. The measures to realise this are stated to include improving methods of producing food and developing or reforming agrarian systems. In article 2 each state undertakes to take steps to achieve progressively the full realisation of the rights contained in the Covenant to the maximum of the available resources, individually and through international assistance. In other words, there is recognition that at least some of the rights may only be achievable progressively.

Article 6 recognises the right to work and to earn a living by work that is freely chosen. This is supported by article 7 which recognises the right of everyone to just and favourable conditions of work that include fair wages that provide a decent living. Discriminatory access to land would appear to contravene article 6 if members of certain groups are blocked from working as farmers. A reoccurring theme in the analysis of corruption by government employees in areas such as land administration is that bribes are sought by officials who are unable to support their families on low or irregular wages, something that should be unnecessary if fair wages are paid. Article 7 also provides for equal opportunity for promotion based upon seniority and competence rather than origins and connections. Articles 6 and 7 therefore have important implications for the governance of land administration and land tenure as well as access to land.

The ICESR makes it clear that men and women have equal rights to enjoy the economic, social and cultural rights (article 3) and have equal rights in employment (article 7).

4.4 Convention on the Rights of the Child (1989)

The Convention on the Rights of the Child (1989) recognises the vulnerability of children. It starts from the presumption that the family is the fundamental group in society as well as being the natural environment for the growth and well-being of children (Preamble). The Convention reaffirms that human rights and fundamental freedoms, other than participation in government, are to be enjoyed by children. The Convention also provides for protections against particular abuses to which children

are exposed, including economic exploitation (article 32), drugs (article 33), sexual exploitation (article 34), and serving as child soldiers (article 38). It also deals with issues such as adoption (article 21), child protection (article 20), and refugee children (article 22).

The interest in this Convention for land and natural resource tenure stems from the implication of article 2. Article 2 recognises that if children are to enjoy their rights, they must be protected against discrimination or punishment based on the status, activities or beliefs of their parents, guardians or other family members. Children shall not be subjected to arbitrary or unlawful interference with their privacy, family or home (article 16), for example, unlawful or arbitrary eviction. Because as article 2 recognises, children cannot be protected against discrimination if there is discrimination against their parents, guardians or family members, the Convention has the effect of extending the protections for children to their families. Public and private social welfare bodies, the courts, administrative authorities and legislative bodies are required to have the best interests of the child as a primary consideration (article 3).

4.5 Regional Human Rights Conventions

UDHR is supported by regional human rights conventions. These provide for, or have the potential to provide for, the enforceability of the human rights they contain through supranational courts and commissions to which individuals and governments have access. Thus, the principles set out in the UDHR have the potential to become enforceable human rights law through regional conventions. The European Convention on Human Rights (ECHR) was approved in 1950, the American Convention on Human Rights (ACHR) was adopted in 1969, and the African Charter on Human and People's Rights (ACHPR) in 1981. All reaffirm many of the rights set out in UDHR such as freedom of thought, conscience and religion, freedom of expression, and the right to peaceful assembly and association, and provide for free elections and participation in government.

ECHR contains some important statements about property rights. Article 1 of Protocol 1 (1952) states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his or her possessions except in the public interest as provided for by law and in accordance with the principles of international law. The second part of the article qualifies this right by saying that it does not impair the right of a state to enforce such laws as it deems necessary to control the use of property in the general interest or to secure the payment of taxes. Although at first sight the article appears to give states relatively unrestricted powers over property, the European Court of Human Rights through case law has constrained these (Allen 2005). There must be a proportionate balance between the general benefit and the losses to an individual. Losses to individuals, such as through compulsory purchase, should be fairly compensated. ECHR provides substantial protection for property for both individuals and legal persons. The article has been used, for example, to challenge discriminatory real estate taxation, land registration rules, restitution policies, valuations and compensation, and expulsions from property.

ACHR similarly contains the right to use and enjoy property, though this can be subordinated in the interests of society (article 21). It states that no-one shall be deprived of his or her property except for reasons of public utility or social interest

and explicitly provides for compensation in such cases. ACHPR (article 14) also guarantees the right to property and states that it may be encroached upon only in the interests of public needs or in the general interest of the community in accordance with law. Article 21 states that all peoples may freely dispose of their wealth and natural resources. In the case of spoilage, the dispossessed people shall have the right to the lawful recovery of property and to adequate compensation. The signatories committed themselves to eliminating all forms of foreign exploitation, particularly where practiced by international monopolies, so as to enable their peoples to benefit fully from their national resources. The Arab Charter on Human Rights (2004) article 31 also states that everyone has a guaranteed right to own private property and that no individuals shall under any circumstances be arbitrarily or unlawfully divested of all or any part of their property.

Like UDHR and ICCPR, the regional conventions outlaw slavery and servitude, as well as forced and compulsory labour (ECHR article 4; ACHR article 6; ACHPR article 5). ECHR Protocol 4 article 1 (1963) outlaws the depriving of a person of his or her liberty merely on the grounds of inability to fulfil a contractual obligation. These strengthen the outlawing of those tenures that deprive individuals of their liberty by including not just serfdom but also those where indebtedness deprives a person of his or her liberty.

4.6 Conclusions

UDHR, the International Covenants, and the regional human rights conventions contain a number of fundamental rights that have an important bearing on governance. They are supportive of democratic, transparent, and accountable governance in which citizens enjoy the protection of the rule of law. They also set out some fundamental principles that determine land and natural resource tenure. There is a right to own property individually or with others. There is protection from being arbitrarily or unlawfully deprived of property. Protection from arbitrary or unlawful interference with the family and home provide protection from arbitrary or unlawful eviction. Whether the taking of property is arbitrary is to be determined by a fair and public hearing by a competent, independent and impartial tribunal. Owners are free to sell, lease or license their resources. Women are entitled to equal property rights with men. Rights, including property rights, are to be enjoyed without discrimination irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or gender, or whether individuals belong to a minority. Tenures that impose slavery or servitude, that tie those with debts to the land, or prevent free mobility, residence or choice of employment are outlawed. Individuals are entitled to freedom of choice in their work and where to reside, which implies that there can be no discriminatory access to land.

5. Displacements and involuntary resettlement

A refugee is someone living outside the country of his or her nationality and is unwilling to avail himself or herself of the protection of that country because of a well-founded fear of being persecuted. In addition there are many displaced persons who have fled to another part of their own country because of similar fears or who have fled from conflict, or as a result of natural disaster or forced eviction. Central to land and natural resource tenure is the notion of security – security for owners of property rights, security of tenure and use, the right not to be dispossessed of one's assets, and the right to enjoy the benefits of one's work and investment. The existence of refugees and displaced persons highlights various issues about the security of property rights and tenure. These concern what rights such people can expect to enjoy in the country or location in which they have sought sanctuary and their rights to recover or receive compensation for any property they have lost when they fled or were expelled from their homes.

5.1 The Convention relating to the Status of Refugees (1951)

The Convention relating to the Status of Refugees aimed at ensuring that refugees have the greatest opportunity to exercise fundamental rights and freedoms. It addressed the issue of how refugees ought to be treated in the countries in which they have sought asylum. In article 13 it stated that refugees should not be treated less favourably than aliens with respect to acquiring, leasing or entering other contracts relating to moveable and immovable property. Article 21 made similar statements with respect to housing. The Convention originally applied only to those who became refugees before 1 January 1951. The Protocol Relating to the Status of Refugees (1967) extended the substantive provisions of the Convention to all refugees without limitation of date.

Because the Convention relating to the Status of Refugees does not address displaced persons or the property they and refugees lost when they fled, it is limited in its effect. Refugees and displaced persons need either to be able to return to their homes to resume their livelihoods, recovering any property they have lost, or to receive compensation for their losses so that they have the means to create new livelihoods for themselves in their places of refuge. As Paulo Sergio Pinheiro, the UN's Special Rapporteur on Housing and Property Restitution, has said

The best solution to the plight of millions of refugees and displaced persons around the world is to ensure they attain the right to return freely to their countries and to have restored to them housing and property of which they were deprived during the course of displacement, or to be compensated for any property that cannot be restored to them. It is the most desired, sustainable, and dignified solution to displacement (Press Release from COHRE 11 August 2005).

5.2 The right to adequate housing (1997)

In its General Comment 7 (1997), the Committee on Economic, Social and Cultural Rights (CESCR) expressed its concern about forced evictions and the violation of article 11.1 of the ICESCR that these represent. Under article 11.1 the State parties recognise the right of everyone to an adequate standard of living for himself or herself and his or her family, including housing. Article 17 of ICCPR provides for protection

from arbitrary and unlawful interference with a person's privacy, family and home. The CESCR has argued that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats, and that forced evictions are incompatible with the ICESCR. It was concerned with the growth of forced evictions. It argued that women, children, older persons, indigenous people, and ethnic and other minorities suffer disproportionately from forced eviction. Women are particularly vulnerable because of discrimination in property rights and the likelihood of abuse when made homeless (paragraph 10). States should have legislation that provides for the greatest possible security of tenure to occupiers of land and houses, that conforms to the ICESCR, and strictly controls the circumstances under which evictions can be carried out (paragraph 9).

Forced evictions were defined by the CESCR as being the permanent or temporary removal of individuals, families and communities from the homes and/or land they occupy without appropriate forms of legal or other protection (paragraph 3). It excludes evictions carried out by force in accordance with the law and in conformity with ICCPR and ICESCR. Although many of the forced evictions that had come to its attention were in urban areas, they included ones resulting from internal displacement, conflicts over land rights, acquisitions resulting from development and infrastructure projects, major sporting and cultural events, urban renewal, agricultural purposes, and "unbridled speculation in land" (paragraphs 5 – 7). The CESCR argued that states must refrain from forced evictions and ensure that the law is enforced against its agents and third parties carrying out forced evictions, for example, those carrying out communal or ethnic violence (paragraph 8).

The CESCR argued that there were circumstances in which forced eviction could be justified, for example, non-payment of rent or damage to rented property without reasonable cause (paragraph 11). However eviction should be undertaken using legal means and be in compliance with international human rights law (paragraph 14). This should include consultation, adequate notice, and access to legal remedies, and not take place at night or in bad weather (paragraph 15). It should not result in homelessness (paragraph 16).

The Right to adequate housing is something of as misnomer. It is concerned with forced evictions from all forms of land and housing and not just housing. Security of tenure is enhanced if forced evictions are outlawed. It sets out important principles governing eviction and the termination of tenure. By identifying the circumstances in which the termination of tenure is justified, it identifies when this is unjustified and enables a distinction to be drawn between forced evictions and evictions that comply with international human rights.

5.3 The Pinheiro Principles (2005)

The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons: The Pinheiro Principles (2005) were produced by the Sub-Commission on the Promotion and Protection of Human Rights. They are intended to provide guidance to states as to how to address housing and property restitution in ways that are grounded in human rights law. The Principles do not just apply to refugees but to any displaced persons who have been arbitrarily or unlawfully deprived of their homes, lands or properties, regardless of the circumstances under

which the displacement occurred (Principle 1.2). This means that the Principles could be applied to a very broad range of situations, including unlawful or arbitrary forced eviction, expropriation and compulsory purchase.

Principle 2 states that all refugees and displaced persons have the right to have restored to them any housing, land or property of which they were arbitrarily or unlawfully deprived or to be compensated for these if it is impossible to restore them. The right to restitution is a distinct right that is not prejudiced by whether or not the refugees or displaced persons actually return. States should incorporate protection against displacement into their domestic legislation. They should prohibit the use of forced eviction, demolition of houses, destruction of agricultural areas, arbitrary confiscations, and expropriations of land as punitive measures or as methods of war. The protection should be applied to prevent displacement resulting from the actions of non-state bodies, including individuals and corporations, as well as state ones (Principle 5).

It can be argued that the Pinheiro Principles are a development of ones contained in the Hague Convention of 1907 on the Laws and Customs of War on Land. This prohibits pillage (articles 28 and 47) and provides for family honour and rights, and for lives and personal property to be respected where military authority is exercised over the territory of a hostile state (article 46). Private property is not to be confiscated or any general penalty, including pecuniary ones, inflicted on the population on account of acts by individuals for which they cannot be regarded as being jointly and severally liable (articles 46, 50). Similarly, the 4th Geneva Convention of 1949 prohibits pillage and collective punishments of civilians in lands under occupying powers, protects their family rights, and prohibits the destruction of real or personal property owned individually or collectively, except where absolutely necessary for military operations (articles 27, 33, and 53). It prohibits individual or mass forcible transfers of civilian populations (article 49).

To help define arbitrary or unlawful displacement, the Pinheiro Principles reaffirm four human rights derived from other authoritative sources and apply them to housing and property restitution.

- The right to privacy and respect for the home (Principle 6).
- The right to peaceful enjoyment of possessions (Principle 7).
- The right to adequate housing (Principle 8).
- The right to freedom of movement and choice of residence (Principle 9).

Central to the Principles is the right to return (Principle 10). *All* refugees and displaced persons have the right to return voluntarily to their former homes and lands in safety and dignity, but without coercion. If they wish, they should be able to pursue an alternative solution without prejudicing their right to the restitution of their housing, land and property. Implicit in this is that states should develop effective restitution policies and procedures that are in accordance with international law (Principles 11 – 14).

Effective restitution policies require data about land and property claims. Principle 15 requires states to establish or re-establish cadastre and registration systems. Pronouncements about ownership and property rights should be accompanied by registration to ensure security of tenure. Registration systems should record the rights

of traditional and indigenous communities to collective lands. Transfers and transactions made under duress should not be recognised as being valid. The rights of tenants and other legitimate occupiers of housing, land and property should be recognised. Subsidiary claimants, including family members, spouses, dependents, and heirs should be entitled to claim on the same basis as the primary claimant (Principle 18).

Housing and land abandoned by refugees or displaced persons does not necessarily stay unoccupied. Secondary occupants may take up occupancy. A feature of many conflicts is that the secondary occupants are themselves refugees or displaced persons, often fleeing in the opposite direction, having been dispossessed of their homes and property. Principle 17 states that states should ensure that secondary occupants are protected from arbitrary or unlawful eviction and are afforded the safeguards of due process, consultation, reasonable notice, and legal redress. However, these safeguards cannot prejudice the rights of legitimate owners, tenants and other right holders to repossess the housing and property in a timely manner. The safeguards can include the provision of alternative housing and providing for compensation to third parties who have bought property in good faith.

Compensation is an integral part of the restitution process (Principle 21) and can be monetary or in kind. However, the Principles state that it is only to be used when the remedy of specific recovery of property is not possible or when the injured party voluntarily accepts it in lieu of restitution. Restitution is deemed not to be possible when property has been destroyed and cannot be replaced.

Like similar human rights documents, the Principles are non-discriminatory (Principle 3) and contain equal rights for males and females (Principles 4, 12, 19). Separated and unaccompanied children should be able to participate in the restitution claims process and that those needing special assistance, including illiterate and disabled persons, should receive it (Principle 13).

The Pinheiro Principles go much further in terms of asserting the right of refugees and displaced persons to return to their homes and the use restitution to enable them to do so than earlier international documents. For example the Cartagena Declaration on Refugees (1984), the Declaration on the Protection of Refugees and Displaced Persons in the Arab World (1992), and the Organization of African Unity's Convention Governing Refugee Problems (1974), which attempted to set standards for particular regions with significant refugee and displaced person populations, do not directly address the issue of how such persons can be helped to return. They reflect the limitations and, dare one say, poverty of imagination, of the 1951 Convention.

5.4 The Right to a Remedy for Victims of Violations of International Human Rights (2005)

The Pinheiro Principles are reinforced by the *Basic Principles and Guidelines on the Right to a Remedy for Victims of Violations of International Human Rights* adopted by the United Nations General Assembly in 2005. This provides for victims of such abuses to have access to justice and adequate, effective and prompt reparation (Principle 11). The reparation can include restorative justice for acts of omission as

well as commission (Principle 15). Victims include those who have suffered economic loss or substantial impairment of their fundamental rights together with their immediate families and dependents (Principle 8). Reparation includes restitution so that the victim is restored to his original situation. This can include the return to the place of residence and return of property (Principle 19). It can involve compensation, including for material damage (Principle 20). However, this document applies only to victims of *international* human rights violations. Whilst the Principles make reference to *Protocol I* (1977), which was added to the 4th Geneva Convention of 1949 and is concerned with the protection of victims of international armed conflicts, they do not apply to *Protocol II* (1997), which is concerned with the protection of victims of non-international armed conflicts. Protocol II applies to conflicts which take place between government forces and those of dissident armed forces that control part of its territory in order to carry out sustained military operations.

The International Criminal Court can order reparations to victims, including restitution, compensation, and rehabilitation (article 75 of the *Rome Statute*, 1998). The Court is able to hear crimes of genocide, crimes against humanity, war crimes, and crimes of aggression (article 5). Crimes against humanity include forced deportations and apartheid and war crimes include acts against property outlawed by the Geneva Convention, the extensive destruction or appropriation of property not justified by military necessity, and the pillaging of towns and places. These crimes may have been committed in non-international and not just in international armed conflicts.

5.5 Development banks' policies on involuntary resettlement

Involuntary resettlement and forced evictions can result from the actions of well-intentioned bodies that seek to improve human welfare. As was noted in the discussion of *The right to adequate housing*, one of the reasons for forced evictions is development and infrastructure projects. Forced evictions and involuntary resettlements that can result from such projects cause losses of welfare. Infrastructure projects normally involve compulsory purchase in which some property owners are forced to sell their land in order to achieve something for the greater good of the community. However, there is no reason why the losers from such projects should not be fully compensated for their losses. These projects are intended to increase welfare, not to redistribute it from losers to gainers. Those displaced tend to come from the poorest and most vulnerable parts of the community. It therefore raises the question of how donors can provide aid for development and infrastructure projects without causing some parts of the community to suffer loss and, if they cannot, whether they ought to fund such projects.

World Bank policies on involuntary resettlement are set out in Operational Policy OP 4.12 and Background Paper 4.12, which were revised in 2007. However, the philosophy behind the policies is set out more fully in an earlier operational policy and background paper from the Inter-American Development Bank OP-710 (1998). What follows is an attempt to draw out a consensus from the policies of The World Bank, and the Inter-American, African, and Asian Development Banks, but is primarily drawn from the Inter-American Development Bank operational policies.

The objective of the development banks when funding projects is to avoid the physical displacement of people by these projects and to minimise the disruption to their livelihoods. Resettlement plans are part of the full economic cost of projects that borrowers must provide for. When people must be displaced, they are to be treated equitably. Where feasible, they are to share in the benefits from the project that necessitates their resettlement. Any trade off between the costs of the project, including involuntary resettlement, and the expected benefits must also take into account non-monetary costs, such as the cultural and religious significance of the land and the availability of replacement assets, particularly where these produce intangible benefits. If significant numbers of people are subject to relocation and the impacts are difficult to quantify and compensation, then the alternative of not going ahead with the project should be given serious consideration. When displacement is unavoidable, a resettlement plan must be prepared that gives those affected fair and adequate compensation so that they can achieve a minimum standard of living and access to land and services in the shortest possible time, and thereby experience as little disruption as possible. The aim is to minimise disruption to employment, access to public facilities, and to social networks. Compensation should cover all losses caused by transitional hardships. It should not be restricted to owners but include occupiers, those who have customary rights of access for productive and recreational purposes, sharecroppers, seasonal workers, nomads, and labourers. The African Development Bank (2003 paragraph 10) estimates that one-third of those displaced have no recognisable legal claim to the land they occupy but ought to be entitled to resettlement assistance in lieu of compensation for land.

For some projects relocation is the objective, for example to move people away from areas that are unfit for human habitation, or to upgrade urban areas and infrastructure, or to resolve problems of land tenure. In such cases the aim is to minimise the disruption to the affected population and for them to participate in the design of the resettlement plan. The objective is that the population being resettled should be no at least worse off or and preferably to have access to better employment and services. The same considerations also apply to host communities where the resettled population is to be housed. In other words, they should not just have displaced persons dumped on them. Where the numbers affected by a project are small – the African Development Bank uses 200 persons as a cut-off point (2003 paragraph 11) - and the group is not a vulnerable one, has clear title to the assets affected, and the market place offers reasonable opportunities for the replacement of assets or income, a resettlement plan may not be needed as relocation can be addressed through contractual covenants. As resettlement may result in impoverishment, there must be an examination of the losses of housing, land, access to common property and employment, access to the means of production, food insecurity, increased morbidity and mortality, disruption to social networks, and loss of access to education. Displacement is often particularly hard on women and households headed by a woman. It should not be assumed that cash compensation will be distributed equally with the household.

The resettlement plan must include baseline information, including data about the people to be resettled, the eligibility criteria and compensation, and resettlement requirements. This is important if there is not to be an influx of illegal encroachers and squatters trying to take advantage of resettlement benefits. There should be consultation with those affected over the design and execution of the resettlement

plan, both those being resettled and the host communities in which they are to be resettled. Resettlement needs to be carried out contemporaneously with the project. Compensation must be at fair replacement value for the assets lost and restore subsistence and income. It includes land-for-land for those whose livelihoods are based on land and should include training and access to equipment and credit. It must enable the social networks that support production and mutual assistance to be reconstructed and compensate for transitional losses, such as moving costs, crop losses, and income losses. Compensation measures need to be timely and reflect the realistic aspirations of those affected. They must also reflect intangible losses and losses of customary rights to land and natural resources. Housing and services must meet minimum standards, irrespective of what conditions were like prior to resettlement. Resettlement plans must prevent or mitigate any adverse environmental impacts. The resettlement plan is to be subject to monitoring to ensure compliance.

5.6 Conclusions

Lack of security of tenure and of property and use rights has a serious adverse impact upon development. It discourages investment as those making it may fear being deprived of their property before recouping their outlay. It encourages short-termism in which immediate gains are maximised irrespective of long-term costs because of uncertainty about future security. Amongst other consequences may be the use of environmentally unsustainable practices designed to maximise short term returns.

In the immediate post-war period attention tended to be focussed on resettling refugees and displaced persons rather than enabling them to return home. The Pinheiro Principles have changed the emphasis to facilitating those displaced returning to their homes and livelihoods. The displacement of people may be for ideological reasons, such as nationalisms of various types and collectivisation, but can also be motivated by profit. Under the Pinheiro Principles, the perpetrators are obliged to make reparations to their victims and are therefore denied profits made by unfair or unjust means. Security is enhanced if potential perpetrators of displacement know that they will not profit from their misdeeds. People may lawfully be deprived of their property under certain circumstances. The international human rights documents on displacement help to define when the deprivation of property is legitimate and the processes which should be followed when carrying it out. Adhering to these principles, even in situations in which there is no conflict, such as during development projects, would provide for security of tenure and property and use rights.

6. Racial discrimination

UDHR states that everyone is entitled to the rights and freedoms contained in it without discrimination. These include the right to own property, of free movement and choice of place of residence, and in employment, which we have seen are important for land and natural resource tenure. The UDHR outlaws slavery and serfdom and provides for all to be equal before the law and to have public and impartial hearings before courts of matters affecting individual's rights. Yet there is a history of groups being denied these rights on the basis of their ethnic origin. They may, for example, be indigenous to an area but come from a different ethnic group from the one that dominates, or they may be migrants. In extreme cases discrimination may take the form of racial segregation or apartheid, in which groups are denied the right to own property, live or work in certain areas and may be dispossessed of their property in these areas. This section explores the protections in international human rights law of land and natural resource tenure for those from ethnic groups that are marginalised by a society.

6.1 The International Convention on the Elimination of All Forms of Racial Discrimination (1965)

In 1965 the United Nations General Assembly ratified the International Convention on the Elimination of All Forms of Racial Discrimination. It reaffirms that all human beings are equal before the law and are entitled to equal protection against discrimination and incitement to discrimination. The implications of the Convention for land and natural resources tenure are wide-ranging. They include the absence of racial discrimination in access to land, but also in the ways in which land is used by its owners and occupiers.

Racial discrimination is defined as being any distinction, exclusion, restriction or preference based on race or ethnic origin that impairs the enjoyment of human rights and fundamental freedoms (article 1). States undertook to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law for everyone (articles 2, 5). The rights specifically to be guaranteed include:

- The right to own property alone and in association with others.
- Free choice of employment
- The right to inherit.
- The right to freedom of movement and residence within the borders of a state.
- The right to housing.
- The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres, and parks.

Racial segregation and apartheid are condemned (article 3). They rely upon denying access to land, housing, places and services to particular ethnic groups. Free choice of employment implies that occupations, like farmer or forester, cannot be denied to particular ethnic groups by, for example, racial discrimination in the award of tenancies or licenses to occupy land.

6.2 International Labour Organisation Indigenous and Tribal Peoples Conventions (1957 and 1989)

The International Labour Organisation has adopted two conventions, C107 (1957) and C169 (1989), about indigenous and tribal peoples. C169 revises C107. It came into force in 1991 but only 20 countries have ratified it (as of 29 December 2008). There are 17 countries (as at 29 December 2008) that have ratified C107 but not C169. Therefore for them C107 is the convention in force. C169 is more explicit and goes further in certain respects in articulating the rights of tribal and indigenous peoples but essentially adopts the same approach as C107. The language used in C107 is more inclined to see the integration of tribal and indigenous peoples into the wider society as inevitable and desirable, rather than respecting diversity. In this discussion C169 rather than C107 is used.

C107 and C169 should be read in conjunction with Convention C111 (1958). This Convention outlaws discrimination in employment and occupation. Traditional occupations pursued by indigenous peoples, such as subsistence farming, handicraft production and hunting are regarded by ILO as coming within the scope of C111 (ILO 2007, p13).

Access to land and natural resources is generally the basis for indigenous peoples to engage in their traditional occupations. Recognition of the ownership and possession of the lands which they traditionally occupy, access to land which they have used for traditional activities, and measures to protect the environment of the territories they inhabit are therefore crucial with a view to enabling indigenous peoples to pursue their traditional occupations (ILO 2007, p14).

C169 came about because indigenous and tribal peoples are often unable to enjoy their fundamental human rights to the same degree as the rest of the population. They aspire to control their own institutions and ways of life but find that their laws, values, customs and perspectives have been eroded. The definition of who constitutes an indigenous or tribal people is one of self-identification (article 1). However, tribal peoples are recognised as being distinguished from other parts of the national community by social, cultural and economic conditions and their customs and traditions or laws. Indigenous peoples are distinguished by being descended from the populations which inhabited the country or region at the time of conquest or colonisation and who retain some of their own social economic, cultural and political institutions. C169 states that indigenous and tribal peoples, both male and female, shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination (article 3). Governments shall develop co-ordinated and systematic action to protect their rights (article 2) with their participation and not to take actions that are contrary to their freely-expressed wishes (articles 4, 6). The social, cultural, religious and spiritual values and practices of these peoples are to be recognised and respected (article 5). Although an aim of the Convention is to facilitate development for tribal and indigenous peoples, they have the right to decide their own priorities for development and to exercise control over their own economic, social and cultural development (article 7). Amongst other areas, article 7 specifically includes the right to determine priorities for development of the lands the peoples occupy or use. Governments shall take measures to protect and preserve the environment of the territories the peoples inhabit.

Part II of the Convention is of particular importance in the context of voluntary guidelines on land and natural resources tenure as it is concerned with land. As the ILO (2007) notes

The main problem faced by indigenous peoples regarding their traditional occupations is the lack of recognition of their rights to lands, territories and resources. Many communities have been marginalized and alienated due to land grabbing, large-scale development projects, population transfer, establishment of protected areas, etc (p4).

Governments should recognise the relationship tribal and indigenous peoples have with the lands they occupy or use (article 13) and the collective nature of this relationship. Governments should recognise their rights of ownership and possession over their traditional lands and to safeguard their rights over lands not exclusively occupied by them, but to which traditionally they have had access (article 14). These lands are to be identified by governments and land claims procedures established within the national legal system. Convention C111 (1958) outlaws discrimination in employment and article 20 requires governments to do everything possible to prevent discrimination in employment against workers from tribal and indigenous peoples. This should also apply to employment in land administration. The recognition of rights includes respect for the transmission of land rights among members of these peoples (article 17). There should be prevention of outsiders taking advantage of tribal and indigenous peoples' customs or lack of understanding of the national laws in order to secure ownership, possession or use of their land. Adequate penalties should be established by law for unauthorised intrusion upon or use of the lands of the peoples (article 18).

Governments should recognise that handicrafts, rural and community-based industries and subsistence activities, such as fishing, trapping and gathering, are important to the maintenance of indigenous and tribal cultures and economic self-reliance and development, and should strengthen and promote them (article 23). As the ILO (2007) says in its Guide to the Convention on discrimination and employment (C111),

Decision-makers are often unaware of the importance of indigenous peoples' traditional occupations in the pursuit of poverty reduction, food security and sustainable development as well as for the national economy in general. Traditional occupations are often unjustly disregarded as being outdated or unproductive and are even, in some cases, prohibited by law (p5).

The rights of tribal and indigenous peoples to natural resources in their lands are to be safeguarded, including their right to participate in the use management and conservation of these (article 15). Where the state owns mineral or sub-surface rights, the peoples should be consulted about their use, participate in the benefits that come from these, and receive fair compensation for any damages sustained as a result of their exploitation. The peoples shall not be removed from the land that they occupy (article 16). If relocation is necessary as an exceptional measure, it should be with their free and informed consent or after appropriate procedures that provide for their effective representation. There should be a right to return after the grounds for relocation cease with full compensation for any loss or injury, including with lands of equal quality and legal status.

6.3 Development banks' policies on indigenous peoples

Development projects can have the unintended adverse consequence of causing involuntary resettlement and consequential loss of welfare. Indigenous and ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to disruption from relocation and its impoverishing effect. They often lack formal property rights, particularly for the areas they use less intensively. This means that they are often at a disadvantage in pressing claims for compensation and rehabilitation. This is compounded by the remoteness of where they tend to live, lack of education, language barriers, racial prejudice, and the lack of financial resources and political connections to pursue their claims. The World Bank therefore states that it will only support projects that involve their displacement if it can ascertain that the resettlement element – and not just the project as a whole – will directly benefit them, that customary rights, intangible assets and cultural property are recognised and fully compensated, that the compensation includes land, and the people affected give their informed consent.

The Inter-American Development Bank's policies towards indigenous peoples have the objectives of supporting their development, including strengthening capacity for governance, and safeguarding their rights against adverse impacts from the projects it funds (OP-765 and GN-2387-5, 2006). Indigenous governance is concerned with the control of their own economic, social and cultural development and the internal management of their own land and territories. There is a special relationship between the land and ethnic and cultural identity. Indigenous rights need to be recognised within the context of legal norms, and with the strengthening of titling and physical management processes of land traditionally occupied by indigenous peoples.

The Bank states that it will conduct its operations in a way that mitigates adverse direct or indirect impacts on indigenous peoples. It requires those putting forward projects to evaluate the seriousness of potential impacts on food security, lands, resources, and rights. Mitigation of the effects is to be determined through consultation and negotiation. Where projects affect the legal status, possession or management of lands, territories or natural resources occupied or used by indigenous peoples, specific safeguards are required. These include prior consultation, their participation in the utilisation and conservation of the resources, fair compensation for any damage suffered, and, where possible, participation in project benefits. Where legal or administrative protections are insufficient to ensure that the project will not cause the deterioration of the lands or their legal status, the Bank requires the project to include restrictions, corrective or compensatory measures. It states that it will not finance projects that exclude indigenous peoples on the basis of ethnicity. It will also only finance projects that respect the right of uncontacted peoples to remain in isolation, including appropriate measures to respect and protect their lands.

6.4 UN Declarations on the Rights of Indigenous Peoples (2007)

In 2007 the United Nations General Assembly passed the Declaration on the Rights of Indigenous Peoples (UN 2007). The Declaration had been debated for 24 years before finally being approved by the General Assembly. Even then there were a significant number of countries that either abstained or voted against it, including Australia, New Zealand and the USA. Their criticisms of some key provisions in the Declaration will

be discussed below. The motivation for the Declaration was the recognition that indigenous peoples have suffered historical injustices as a result of the colonisation and dispossession of their lands and territories. Only by controlling the developments affecting them and their lands can indigenous peoples be able to maintain their institutions and cultures and determine their development according to their own priorities (Preamble).

The main provisions in the Declaration fall into three main parts. One group of articles reaffirms the rights of indigenous peoples individually and collectively to exercise human rights and fundamental freedoms, to enjoy the full benefits of citizenship of their country, and to be able to exercise self-determination. The second group is concerned with the survival of the distinct cultural identities of indigenous peoples. The third is concerned with the claims of indigenous peoples to their traditional lands, territories and resources and the benefit from the peaceful enjoyment of these.

The Declaration affirms that indigenous peoples and individuals are free and are equal to other peoples, have the right to be free of any kind of discrimination (article 2), and have the right to the full enjoyment of all human rights and fundamental freedoms (article 1). Article 7 reaffirms that these include the right to life, physical and mental integrity, liberty, and security and that indigenous peoples have the collective right to live in freedom and peace as distinctive peoples. In other places the Declaration upholds the right to the cultural distinctiveness of indigenous peoples but that this should not be used to deny them the benefits of full citizenship. For example, article 5 affirms their right to fully participate in the life of the state, whilst article 24 the right to the enjoyment of highest standard of health, and article 14 the right to education at all levels. In essence the argument is that the benefits of citizenship should be able to be enjoyed by indigenous peoples without the requirement for cultural assimilation. The Declaration states that indigenous peoples have the right to autonomy in their internal affairs (article 4), to participate in decision-making that affects them (article 18), and of self determination (article 3), though nothing in the Declaration sanctions the dismemberment of any sovereign state (article 46). Indigenous peoples have long campaigned for the right of self-determination. In the negotiations over the Treaty of Versailles at the end of the First World War, Canadian Indian tribes sent a delegation seeking the same rights of self-determination granted to the Czechs, Poles, Croats, and other Eastern European nationalities. The Declaration provides for indigenous groups divided by international frontiers to have the right to maintain contacts and co-operation (article 31).

Article 8 provides for indigenous peoples not to be subjected to forced assimilation or the destruction of their culture. Article 11 affirms that indigenous peoples have the right to practice their traditions and customs and to protect them including through restitution and the use of intellectual property rights. This includes the repatriation of ceremonial objects and human remains (article 12) and controls over traditional knowledge and its manifestations in science and technology, such as genetic resources and knowledge of properties of flora and fauna (article 31). Central to the protection of culture is control over education and its provision in indigenous languages (article 14) and the ability to establish media in their own languages (article 16). Article 20 states that indigenous peoples have the right to maintain their political, economic and social systems or institutions, though these must be in accordance with justice,

democracy, respect for human rights, equality, non-discrimination, and good governance (articles 34 and 46).

For land and natural resource tenure, the key area is that concerned with the lands and territories claimed by indigenous peoples. Article 26 states that indigenous peoples have the right to the lands, territories and resources which they traditionally owned, occupied, used or acquired and that states should give legal recognition and protection to these. They have the right to maintain their distinctive spiritual relationship their lands (article 25). Indigenous peoples have the right to the conservation of the environment and productive capacity of their lands (article 29). In other words, their lands shall not be destroyed or their productive capacity diminished by being degraded. They have the right to the recognition of treaties concluded with states or their successors and have these honoured (article 37). Various groups of indigenous peoples, such as the Mi'kmaq in Canada and Mapuche in Chile, have argued that treaties concluded with the British and Spanish Empires to end hostilities with them have not been honoured by the independent states that succeeded them, resulting in the loss of lands and rights over their exploitation that the treaties would appear to have granted them (Paul 2000).

Indigenous peoples shall not be forcibly removed from their lands or territories or be relocated without their free prior and informed consent and with fair compensation and, where possible, the option to return (article 10). If deprived of their means of subsistence, they are entitled to just and fair redress (article 20.2). They have the right to redress, including restitution or compensation if this is not possible, of the lands they traditionally owned, occupied or used that have been taken or confiscated or damaged without their freely given informed prior consent (article 28). States shall establish fair, independent and impartial processes to adjudicate on the rights of indigenous peoples concerning lands and territories, including those which were traditionally owned, occupied or used (article 27). Indigenous peoples should have access to just and fair procedures for the resolution of conflicts and disputes with states and with other parties (article 40). This would imply access to fair means of resolving disputes with private individuals or companies who occupy or exploit traditional lands of indigenous peoples.

There are two principal objectives that have been raised to the Declaration. The first is to article 19 which requires states to obtain the free, prior and informed consent of indigenous peoples before adopting and implementing legislation or administrative measures that may affect them. On the face of it, the article is perfectly reasonable in view of the histories of many countries with indigenous peoples of governments disregarding their interests, particularly in the exploitation of natural resources. However, modern governments implement many policies that do not exclusively affect indigenous peoples but the whole of society. Should article 19 be taken to mean that indigenous peoples have a veto over these measures that other people do not? In other words does article 19 not create two classes of citizen – those with a veto over government policy and those bound by decisions of the democratic majority? For example, should indigenous peoples' free and informed prior consent be required before a government proposal to ban smoking in restaurants can be implemented because some indigenous peoples have established restaurants and some indigenous people smoke? Anyone who thinks that these issues are trivial should consider the violence in New Brunswick in Canada in 1999 that erupted between Mi'kmaq and

non-indigenous fishermen when aboriginal fishermen took advantage of favourable court rulings about their entitlements under eighteenth century treaties with the British, which non-aboriginal fisherman interpreted as favouritism (Coates 2000, chapter 6). The choice of this example is because Canada is a generally tolerant and polite society in which violent conflicts between aboriginal and non-aboriginal communities are unusual. At best, article 19 can be regarded as poorly drafted whatever the merits of the intention to prevent governments from taking actions that specifically affect indigenous peoples without their informed consent.

The second concerns articles 26 and 28 which provide for the rights of indigenous peoples to the lands they have traditionally occupied and their right to redress for lands lost. The problem is the lengthy gestation period for the Declaration. During this period a number of countries have engaged in programmes to resolve land disputes with their indigenous peoples. Their fear is that the Declaration will call into question the carefully worked out compromises that these negotiations have involved and re-open matters that all parties had thought were settled. The negotiations are often complex because of the interests of secondary occupiers of the traditional lands, whose interests the Pinheiro Principles recognise should be taken into account and that in a democracy all individuals have equal political rights that public governments responsible for providing services like education must respect. Positive discrimination is also a form of racial discrimination. These agreements potentially could be repudiated on the grounds that they pre-date the Declaration and the argument could be made that what was agreed was different than would now be agreed if the Declaration was ratified.

6.5 The International Covenant on the Protection of Migrant Workers and their Families (1990)

Migrant workers who leave their state or residence of origin and travel to another for work are potentially vulnerable to the abuse of their human rights. They are aliens, who may have a poor command of the local language and understanding of its laws and customs. They are vulnerable to abuse and discrimination by officialdom, by employers, and by those who arranged for their transit. The International Covenant on the Protection of Migrant Workers and their Families (1990) seeks to put migrant workers and their families on the same footing with respect to employment and human rights as nationals from their state of employment. The Convention applies to migrant workers engaged in remunerated activity in a state of which they are not nationals. Certain groups of migrants are therefore excluded, such as investors, refugees (to which separation conventions apply), and students (article 3). It covers the whole migration process from the preparation for migration to return to the state of origin or residence (article 2).

Much of the Covenant is concerned with ensuring that migrant workers retain their human rights and fundamental freedoms in their state of employment, for example, the right to security, freedom of thought, conscience and religion, the right to hold opinions, and freedom from arbitrary arrest and detention (articles 12, 13, 16, 17). They have the right to equality before courts and tribunals (article 18), in employment rights (articles 25, 54), and similar rights as nationals to public services like education and health care (articles 28, 43).

There are certain elements in the Convention that have implications for land and natural resource tenure. Migrant workers are protected from unlawful or arbitrary interference with their privacy, family and home (article 14). They are not to be deprived arbitrarily of their property whether individually or collectively owned and are entitled to fair and adequate compensation if this is expropriated (article 15). Article 18 provides for a fair and public hearing by a competent, independent and impartial tribunal in any determination of their rights and obligations. Migrant workers must not be held in slavery or servitude, or be required to perform forced labour, or be tortured (articles 10 and 11). Certain occupations can be closed to them (article 52). They have the right to liberty of movement and freedom of choice in residence in the state of employment (article 39). They also have the right to transfer their earnings and savings back to their state of origin (article 47).

6.6 Conclusions

Tribal and indigenous peoples encounter discrimination in many countries and their lands are often under threat. ILO's attempts to remedy these through its conventions are clearly desirable. However, an important question does arise, particularly with respect to land rights. Are the land rights of tribal and indigenous peoples to be treated differently from those of the rest of the population? In other words, is there to be some form of positive discrimination that grants tribal and indigenous peoples rights that the rest of the population do not possess? This would seem to run counter to UDHR, which in article 2 states that everyone is entitled to all the rights and freedoms contained in it without distinction. The rights include the right to property contained in article 17. Perhaps an alternative interpretation might be placed upon the ILO Conventions and the UN Declaration on Indigenous Peoples. The rights they contain apply to everyone. Governments should behave towards everyone in the ways they are required to with respect to tribal and indigenous peoples. The Conventions are needed partly because governments are more likely *not* to respect the rights of tribal and indigenous peoples than other members of society and partly because of the tendency for their rights to be collective ones. If this argument is accepted, then the ILO Conventions and the UN Declaration can provide an important source of authority for voluntary guidelines on land and natural resources tenure in general and not just in the specific context of indigenous and tribal peoples. Discrimination against them is an extreme form of what many minorities encounter. It is highlighted because they often occupy lands and forests that are commercially valuable, do not enjoy the formal protections that other owners of property rights possess, and often possess collective rights. If land and natural resource tenure can be protected in such unpromising circumstances for groups who have traditionally been marginalised, then this would suggest that the system as a whole is robust.

7. Discrimination against women

Many of the authorities referred to in this paper specifically identify the requirement that women are also to benefit from the rights affirmed. This was reaffirmed by the United Nations Millennium Declaration, which stated that no individual should be denied the opportunity to benefit from development and, therefore, the equal rights of men and women must be assured (paragraph 6). The reason for the reaffirmation of women's rights in these authorities is that throughout the world there is evidence of discrimination against women so that women receive inferior treatment to men and girls inferior to boys. Therefore gender equality cannot be assumed but it has specifically to be provided for. Women are discriminated against in access to land, in property and use rights, and over inheritance. Discrimination can occur inside and outside of marriage. Households headed by women tend also discriminated against.

7.1 The Convention on the Elimination of All Forms of Discrimination against Women (1979)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) seeks to bring about the end of discrimination against women. The states parties are to take all appropriate measures to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on an equal basis with men (article 3). They are also to take measures to modify social and cultural patterns in order to eliminate prejudice and customary practices based upon the idea of the inferiority or superiority of either gender or stereotyped roles (article 5). Specific areas in which discrimination is to be eliminated include political and public life (article 7), education (article 10) and health care (article 12).

A number of the articles have implications for land and natural resource tenure. Article 11 requires state parties to eliminate discrimination in employment, including the right to work, free choice of profession and employment, and the right to equal remuneration (article 16), and article 13 states that there is to be no discrimination in economic life. As was noted above, the ILO defines occupation and employment broadly so as to include farming and other subsistence activities. In rural areas women are to have equal rights to participate in and benefit from development and to enjoy adequate living conditions (article 14). Women are to have equal rights in contracts and in the administration of property (article 15). This includes equal access to financial credit, including bank loans and mortgages, and agricultural credit (articles 13 and 14). Women are to receive equal treatment in land and agrarian reform and in land resettlement schemes, housing (article 14), of residence and freedom of movement (article 15), and in the ownership, administration and disposal of property in marriage and at its dissolution (article 16). Equality in property and contractual rights are to be protected by equality in procedures before courts and tribunals (article 15). The statements are of particular interest because of the concerns expressed in documents like *VG Adequate Food*, supported by empirical evidence, about the need to protect women from discriminatory behaviour and evidence of discrimination against women, for example in inheritance and in access to land.

In the Beijing Declaration (1995), the governments participating in the 4th World Conference on Women reaffirmed their commitment to the equal rights of women and

men (article 8) and to the full implementation of the human rights of women and girls (article 9). They stated their determination to promote women's economic independence through employment and access to productive resources, including in rural areas (article 26). They also pledged to promote "people-centred sustainable development" (article 27). They restated their determination to ensure women's equal access to economic resources, including land and credit (article 35).

7.2 Organization of African Unity, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003)

The ACHPR in a protocol on the rights of women adopted in 2003 makes a number of statements with respect to the property rights of women. It is a regional approach to the implementation of CEDAW and is more explicit than it in the rights being addressed in a number of key respects. Several of the articles are concerned with the property rights of women during marriage and after a marriage ends. Article 6 states that during her marriage, a woman shall have the right to acquire and manage her own property. Article 7 provides for women to have the right to an equitable share of the joint property deriving from the marriage in the event of separation, divorce or annulment. Article 21 provides for a widow to have the right to an equitable share in the inheritance of the property of her husband, including the right to live in the matrimonial house. The article states that men and women shall have the right to inherit equitable shares of their parents' properties. Under article 15 the right to food security should provide women with access to land and the means of producing nutritious food, clean drinking water and domestic fuel. Article 16 provides for women to have the right to equal access to housing and acceptable living conditions. Article 19 is concerned with the right to sustainable development. This includes promoting women's access to and control over productive resources and guaranteeing their right to property.

7.3 Conclusions

CEDAW provides a basis for the equal treatment of women. It reaffirms rights found in other documents like UDHR, ICCPR and ICESCR. These contain clear statements outlawing discrimination against women. Yet the continuation of discrimination, including in land and property rights, is testimony to the need for further action. Repeatedly in the authorities discussed in this paper the rights of women are identified as needing special protection or support. The discrimination experienced by women also applies to those living in female-headed households. This means that the Convention on the Rights of the Child will be frustrated where CEDAW is not adhered to.

8. Sustainable development

From the 1960s concern about the environment and the potentially damaging consequences of development began to be expressed. Rachel Carson's book, *The Silent Spring* (1962) challenged the notion that degradation of the environment was a necessary and acceptable price to pay for "progress". No state can stand in isolation as elements in the natural environment are linked. What happens in one country has implications for others. The interdependence of countries in ecosystems means that there is an important role for international bodies and international agreements. Agriculture and settlements have potentially significant impacts on the environment. Many of these take the form of externalities which have adverse consequences for others not directly involved in production or consumption. There are common property resources like the atmosphere and sea in which we all share and obligations of restraint on those who wish to use them. The right of others not to be harmed by one's activities imposes constraints. This section examines how activities that are harmful to the environment can be controlled.

8.1 Stockholm Declaration (1972)

In 1972 the United Nations Conference on the Human Environment put forward a series of principles "to inspire and guide the peoples of the world in the preservation and enhancement of the human environment." It started from the proposition that man is both the creature and shaper of his environment and has acquired the power to transform his environment on an unprecedented scale (Preamble). It acknowledged that the protection and improvement of the human environment is a major issue and that there was growing evidence of man-made harm in many regions.

The Stockholm Declaration starts with the statement that man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being (Principle 1). However, man also bears the responsibility to protect and improve the environment for the benefit of present and future generations. There are therefore obligations relating to the environment as well as rights. The obligations are to future generations as yet unborn as well as to those who currently reside on earth. The natural resources of the earth must be safeguarded for the benefit of present and future generations through careful planning and management (Principle 2). The capacity of the earth to produce renewable resources must be maintained and non-renewable resources safeguarded from exhaustion (Principles 3 and 5). Measures include conservation and controlling the discharge of toxic and other harmful substances (Principles 4, 6, 7). States should adopt a co-ordinated approach to their development planning to ensure that development is compatible with the need to protect and improve the environment (Principles 13, 14, 15). Whilst states have the sovereign right to exploit their own resources, they have the responsibility to ensure that activities within their own jurisdictions do not cause damage to the environments of other states.

8.2 Rio Declaration (1992)

The United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 sought to build on the Stockholm Declaration. It reaffirmed that human beings are entitled to a healthy and productive life in harmony with nature.

However, the right to development must be fulfilled so as to meet both the development and environmental needs of present *and* of future generations. Environmental protection is an integral part of the development process (Principles 1, 3 and 4). A precautionary approach should be adopted by states (Principle 15).

The Rio Declaration recognises the importance of good governance to the achievement of environmental objectives. It states that environmental issues are best handled with the participation of all concerned citizens. Individuals shall have access to the information about the environment held by public bodies. States shall facilitate and encourage public awareness and participation and provide effective access to judicial and administrative proceedings, including redress and remedy (Principle 10). These ideas have received support from the United Nations General Assembly in the Programme for the Further Implementation of Agenda 21 (1997). States shall enact effective environmental legislation and develop national law regarding liability and compensation for the victims of pollution and other environmental damage (Principles 11, 13). There is support for market-orientated approaches to environmental problems rather than exclusive reliance on a planning and regulatory approach. States should promote the internalisation of environmental costs and use economic instruments to ensure that the polluter pays (Principle 16).

8.3 Agenda 21 (1992)

The Rio de Janeiro Conference on Environment and Development also produced a Programme of Action for Sustainable Development, generally known as Agenda 21. The Programme is wide-ranging, embracing most areas of consumption and production and their impact on the environment, including aspects that are concerned with land and agricultural production. Governments should promote an open non-discriminatory and equitable multilateral trading system and improve access to markets for exports from developing countries (paragraph 2.9). Good management that fosters effective, honest, equitable and accountable public administration is an essential element for sustainable development, requiring the eradication of mismanagement of public and private affairs and corruption (paragraph 2.32).

Agenda 21's objectives include providing all persons with the opportunity to earn a sustainable livelihood (paragraph 3.4). Governments are encouraged to empower local and community groups. They should consider strengthening legal frameworks for land management, access to land and landownership, particularly for women, and for the protection of tenants (paragraph 3.8). They should protect and formalise women's tenure and use of land, their rights to land, and access to credit (paragraph 32.6). Governments should regularise and upgrade informal settlements (paragraph 7.9). Access to land is an essential component of sustainable low-impact life styles, but is increasingly difficult as a result of the conflicting demands of industry, housing, agriculture and open space and land tenure structures. In rural areas, unsustainable practices, like the exploitation of marginal lands, result in environmental degradation (paragraph 7.27). Appropriate forms of land tenure that provide security of tenure, especially for women, indigenous people, local communities, and the urban and rural poor, should be established to promote access to land, including through credit schemes for the purchase of land (paragraph 7.30). Governments should assign clear titles, rights and responsibilities for land (paragraph 14.18).

Countries should undertake a comprehensive national inventory of their land resources and establish a land information system (paragraph 7.29). They should create accessible land markets that meet community development needs, including improving land registry systems and streamlining land transaction procedures (paragraph 7.30). They should develop fiscal incentives and land-use control and planning systems for more environmentally sound uses of land resources. The capacity of educational institutions should be strengthened so that they can improve the provision of formal training of land management technicians and professionals (paragraph 7.34).

8.4 Conclusions

The Stockholm Declaration set out important principles about the need to limit the harmful effects of development on the environment. The philosophy behind the actions it proposes tends to be based on the assumption that planning controls and regulation are the only appropriate approaches. The Rio Declaration by contrast embraces a wider range of measures including market-orientated ones based upon the principle that the polluter pays. It reflects the debate amongst academics and regulators in the intervening years about how effective planning controls are compared with ones that increase producer costs. Thus the Rio Declaration opens the way to approaches such as carbon trading systems. It also recognises that secrecy is the enemy of environmental protection and that governments may collude with industry in concealing the true environmental impact of development. Agenda 21 is more concerned with how these Declarations can be realised. In the mass of detail it contains are important points about how land administration and land tenure ought to be organised.

9. Land administration

Realising principles through effective policies is a difficult undertaking. Guidance as to how this can be achieved comes from the Habitat declarations and agendas. Their focus is on human settlements but the principles they contain are applicable to wider issues of land management and access to land. The Vancouver Declaration and the Habitat Agenda contain important statements about how land should be managed. Whilst the focus is on human settlements, the principles identified are capable of being applied to other areas of land and natural resource management.

9.1 The Vancouver Declaration and Action Plan on Human Settlements (1976)

The Vancouver Declaration and Plan on Human Settlements (1976) contains a series of 64 recommendations in an action plan for human settlements. The starting point is the view that it is the condition of human settlements that largely determines quality of life and these are unacceptable for vast numbers of people. Improving these is a precondition for the satisfaction of basic needs. Inequitable economic growth condemns millions to a life of poverty, with problems from uncontrolled urban urbanisation, rural backwardness and involuntary migration. It argued that mankind should respond by adopting effective human settlement policies and spatial planning strategies and increasing possibilities for participation in the planning and management of settlements.

The principles that should guide action on human settlement include the following.

- The improvement of the quality of life should be the first and most important objective of human settlement policy, with priority being given to the needs of the most disadvantaged people.
- Human dignity and the exercise of free choice consistent with overall public welfare are basic rights which must be assured. All persons have the right and duty to participate individually and collectively in the development and implementation of policies for their settlements.
- Every state has the right to choose its economic, political, social, and cultural systems in accordance with the will of its people. It has the right to take under public control the use, possession, disposal and reservation of land and the right to plan and regulate the use of land so that the growth of population in urban and rural centres is based on a comprehensive land use plan.
- Nations must avoid the pollution of the biosphere and oceans and should end the “irrational exploitation” of environmental resources as the environment is the common heritage of mankind.

Human settlement policies cannot be divorced from economic development, population movements, and social activities. Therefore settlement policies must be an integral part of any economic and social development policy. Improvements in the condition of human settlements require a more equitable distribution of the benefits from development. The Declaration argues that it is the responsibility of governments to prepare spatial plans as an essential component of an overall development strategy. These should be linked with policies on industrialisation, agriculture, social welfare, and environmental and cultural preservation. The demographic and economic conditions of many countries require, amongst other policies, ones on land tenure.

The limited supply of land means that its use and tenure should be subject to public control. The increase in the value of land as a result of public decisions and investment should be captured for the benefit of society as a whole.

The Vancouver Action Plan has 64 recommendations divided six sections: settlement policies and strategies, settlement planning, shelter, infrastructure and services, land, public participation, and institutions and management. The Plan was compiled in 1976 when government intervention in the economy and society, public ownership of assets, and state planning were more in vogue than today. It regards private landownership as an instrument of accumulation and concentration of wealth and a contributor to social injustice. Land, it argues, should be used in the interests of society as a whole. However, as the needs for shelter, infrastructure and services are nearly always greater than the capacity of public authorities to provide them, people can be expected to provide housing and rudimentary services for themselves. Time as well as space is a resource that must be planned so the issue of the location of activities and their consequential effect on the time spent on travel is important. Design should take into account the efficient use of energy resources and the environment. There should be support for the informal sector and security of tenure for unplanned settlements.

Land cannot be treated as an ordinary asset controlled by individuals and subject to the pressures and inefficiencies of the market. Public control of land use is argued to be indispensable to its protection as an asset and to achieve the long-term objectives of human settlement policies and strategies. This requires public authorities to have detailed knowledge of patterns of land use and land tenure, including data from topographical and cadastral surveys. The tools to be used include zoning and land use planning, compulsory purchase (with compensation!), land registration, boundary controls, building permits, and property taxes. Settlement planning and implementation must not involve acquiring lands through coercion and intimidation. There should be suitable instruments for assessing the value of land and transferring to the community the unearned increment resulting from changes of use, public investment, and the growth of the community. Whilst the public ownership of land cannot be an end in itself, the Plan argues that it is justified in so far as it is exercised for the common good. It argues that the development needs of human settlements are not always met due to speculation, rapid inflation, and a lack of appropriate means. Public ownership should be used wherever appropriate to control areas of urban expansion, to implement land reform, and to supply serviced land at prices to secure socially acceptable patterns of development.

Public participation is desirable in its own right and because the problems are seen to be too great for governments to deal with without mobilising the inhabitants and their ingenuity and skills. The planning process must allow for the maximum public participation and this requires the free flow of information. Public participation is a right that must be accorded to all parts of the population, including the most disadvantaged groups. It requires decentralising administration and management and the public accountability of institutions. In most countries there is a need for capacity building because of a lack of knowledge, skills and professional resources.

9.2 The Habitat Agenda Goals and Global Plan of Action (1996)

In the Istanbul Declaration on Human Settlements (1996) the governments at the Habitat II conference reaffirmed their commitment to the progressive realisation of the right to adequate housing. This included ensuring legal security of tenure. They stated they would work to expand the supply of affordable housing by enabling markets to perform more efficiently in a socially and environmentally responsible manner, improving access to land and credit, and assisting those unable to participate in housing markets.

The ideas contained in the Istanbul Declaration received further support in the United Nations Declaration on Cities and Other Human Settlements in the New Millennium (2001). In this the governments resolved to undertake the reforms needed to support affordable shelter, to adopt proactive planning of land supply, to aid the efficient functioning of land markets, and to eradicate the legal and social barriers to equitable access to land. They resolved to promote increased and equal access to housing finance and to support savings mechanisms in the informal sector. They pledged to continue to promote reforms giving women full and equal access to economic resources, including the ownership of land, security of tenure, access to credit and natural resources, rights of inheritance, and the right to enter into contractual agreements (paragraph 48).

How these ideas are to be implemented is set out in the Habitat Agenda Goals and Global Plan of Action (1996). In some respects this can be viewed as an updating of the Vancouver Declaration of twenty years earlier, reflecting changed circumstances. The pressures from the apparent unstoppable rate of population growth from the perspective of 1976 had been replaced by the need for sustainable development. Following the ending of Communist rule in Central and Eastern Europe, the language of the Agenda indicates a reduced commitment to state planning and the public ownership of land, but greater support for governments to act as facilitators.

Our objective is to achieve adequate shelter for all especially the deprived urban and rural poor, through an enabling approach to the development and improvement of shelter that is environmentally sound (Preamble paragraph 3).

The language is much more supportive of the functioning of markets and the involvement of the private sector in the provision of housing and housing finance. Markets are the primary mechanism through which housing is delivered in many countries. Governments should address the needs of those that are poorly served by markets. The mechanisms for improving markets include cadastres, rules for property valuations, and clear definitions of property rights. The exchange of land and housing should be permitted without undue restriction and procedures developed to make property transactions transparent and to end corrupt practices in areas like land registration and transfers.

The Agenda starts from the need to improve the quality of human settlements. Its twin themes are adequate shelter for all and sustainable human settlement development in an urbanising world. The lack of development and the existence of widespread poverty inhibit the full enjoyment of human rights. Amongst the problems the Agenda addresses are spreading homelessness, the expansion of squatter settlements, increased poverty, improper land use, insecure land tenure, increasing pollution, and

increasing vulnerability to disaster. The principles behind the Agenda include the following.

- Human settlements should be equitable in which all people without discrimination have equal access to housing, food, water, and public services and to economic resources, including the ownership of land.
- Sustainable development is essential for human settlements development. All people have rights but must also accept their responsibility to respect the rights of others, including future generations.
- Quality of life depends on the physical conditions and special characteristics of settlements as well as economic, social, environmental, and cultural factors, with factors like layout, aesthetics, densities, and transportation having a crucial bearing on the liveability of settlements.

The Agenda includes the following commitments.

- *Adequate shelter for all.* Governments have an obligation to enable people to obtain shelter and to protect and improve dwellings. This includes providing legal security of tenure, equal access to land without discrimination, and ensuring that there are transparent and accessible systems for transferring land rights. Non-discriminatory access to housing finance should be promoted.
- *Sustainable human settlements.* Sustainable settlements make efficient use of resources within the carrying capacity of ecosystems. Their creation requires integrated urban planning and management with respect to housing, transport, employment, community facilities, and the environment. The optimal use of productive land in urban and rural areas should be promoted and fragile ecosystems protected from the negative impacts of human settlements.
- *Enablement and participation.* The governments committed themselves to enabling all key actors in the public, private and community sectors to play an effective role in human settlement and shelter development by promoting democratic rule, decentralising authority and resources, promoting equal access to reliable information, institutionalising a participatory approach to sustainable human settlement development and management, and facilitating participation by tenants in public and community-based housing. There should be active engagement of civil society and protection of the human rights to hold and express opinions and receive and impart ideas and information.
- *Gender equality.* This involves formulating and strengthening policies and practices to promote the equal participation of women in human settlement planning and decision-making.
- *Financing shelter and human settlements.* Although housing should be able to generate commercial finance, there is also a need for other sources of funding. Governments need to strengthen regulatory and legal frameworks to enable markets to work, overcome market failure, and to promote equal access to credit. Initiatives include supporting collective organisations able to raise finance on behalf of those who are not credit-worthy, foreclosure laws to facilitate private sector participation in housing finance, and the development of secondary mortgage markets and securitisation. The capacity of local authorities to raise local revenue should be strengthened, including through full cost recovery through user charges.

9.3 Conclusions

There is an important change in language, values, and emphasis between the Vancouver Declaration of 1976 and the Habitat Agenda of 1996. Whereas the former strongly favoured planning approaches by governments, particularly using spatial planning approaches, the latter has a stronger commitment to working through markets with governments facilitating the involvement of the private sector in achieving the objective of improving human settlements. One consequence of this change of emphasis is the attention paid in the Habitat Agenda to the means by which governments can improve the efficiency with which markets function and aid the private sector in contributing towards improving human settlements. Markets are not viewed as things to be left to their own devices but are seen as needing regulation and government intervention to enable them to work effectively. The means by which this can be done include land registration systems, cadastres, property valuation systems, and taxation. A recurring theme in the authorities is that there are groups who are most vulnerable to poor quality of settlements and the poor management of them. Principal amongst these are women and indigenous peoples.

10. Ethical Standards

The United Nations Convention against Corruption recognises the serious problems that corruption causes in a society by undermining the stability of society and democratic values, and jeopardising the rule of law (Preamble). As UN (2006) states corruption diverts state funds away from public services like health and education. Petty corruption imposes additional costs on citizens and undermines the quality of services. Corruption reduces investment by imposing an additional tax on investors, who may choose to invest elsewhere or in ways that are less susceptible to such levies. It is associated with a lack of respect for human rights and with undemocratic practices. International donors may be reluctant to allocate funds to states which lack transparency and accountability. The involvement of the United Nations in what might be regarded as a national issue of criminality is because of the trans-national nature of much corrupt activity, including money laundering, the transfer of corruptly-obtained assets between countries, and bribery by physical and legal persons in one country of persons in another. It is associated with international criminality.

10.1 UN Convention against Corruption (2003)

Under the UN Convention each State party undertook to develop and maintain effective anti-corruption policies (article 5). These include systems for the recruitment and promotion of civil servants based on transparent and objective criteria, such as merit, equity and aptitude (article 7). There should be adequate remuneration and educational and training programmes to enable civil servants to undertake the “correct, honourable and proper” performance of their roles. There should be codes of conduct for public officials (article 8) and transparency and accountability in the management of public finances (article 9). In view of the importance of the independence of the judiciary and its role in combating corruption, measures are needed to strengthen the integrity of and prevent opportunities for corruption amongst the judiciary (article 11). The enhancement of accounting and auditing standards in the private sector, together with appropriate criminal penalties, are seen as ways of preventing corruption involving private bodies (article 12). The promotion of civil society involvement is seen as an effective means of preventing corruption (article 13). Laws are needed to ensure that the bribery of public officials, embezzlement, the misappropriation of public property, trading in influence, abuse of functions, and illicit enrichment are criminalised (articles 15 – 20). Juridical persons as well as physical ones must be capable of being accused of illegal activities (article 26).

The prevention of corruption is particularly important for land and natural resources tenure because the extent to which these resources are concentrated in state hands makes these vulnerable to corrupt practices (Zimmermann 2007). Land administration is susceptible to petty corruption, for example official seeking bribes to register property transfers or to secure favourable tax assessments or property valuations. Land administration is also vulnerable to state capture whereby a group, clan or other body is able to take over the state and use the powers of the state to further its own ends, including pillaging state assets.

10.2 OECD Policies to Prevent Corruption

The OECD has been concerned about companies gaining of unfair advantage through corruption, particularly in public procurement. Under its Convention on Combating Bribery of Foreign Officials (1997) each state is required to pass legislation to make it a criminal offence to bribe foreign public officials, whether directly or through a third party. The Convention recognises that those who engage in bribery are not necessarily present in the country where the improper acts take place and may not be capable of being brought to justice there. The intention is to make bribery a crime in their country of origin and to bring legal persons to justice as well as individuals (articles 1 and 2). The weakness of the OECD is the limited number of countries who are members, though these include most of the richest economies in the world and they have substantial international trading links. What it is able to do is to prevent companies from these countries from behaving with impunity in other parts of the world.

In 2003 OECD produced its Guidelines for Managing Conflict of Interests in the Public Service. Its aim was to increase clarity and evenness in rules. It sought to bring about clear rules in areas such as employment in the private sector after holding a public sector post and the potential in such cases for conflicts of interest and the misuse of confidential information obtained whilst in public employment. It also sought to increase the transparency of lobbying.

The Recommendation on Enhancing Integrity in Public Procurement (2008) seeks to address a variety of risks to integrity in the public procurement cycle, including corruption, fraud, theft, conflicts of interest, abuse of information, and discriminatory treatment. It advocates the ten principles of good governance to enhance integrity in public procurement so that potential suppliers and contractors are treated on an equitable basis. The principles include transparency, ensuring that public funds are used for the purposes intended, that public procurement officials meet high professional standards of knowledge, skills and integrity, the monitoring of procurement to detect misconduct, having effective complaints procedures, and empowering civil society and the media through greater disclosure of information to complement traditional accountability mechanisms.

10.3 Standards of professional ethics

Professional bodies are non-governmental organisations. As private clubs they are entitled to set conditions for membership and to enforce these, including expelling those who breach them. Whilst many governments license those who work in various aspects of land administration, such as surveying and valuation, and regulate their behaviour, the codes of behaviour of professional bodies involve regulation by peers, who may be concerned about rogue elements undermining their professional reputations. Regulation by peers can expose professionals to the scrutiny of those who have a deeper understanding of how abuse can take place than lay investigators. There is also the risk that regulators may go easy and show greater “understanding” of the behaviour of their peers than lay assessors would. For this reason a number of professional bodies have separated their regulatory functions, and introduced greater lay supervision of these, from their promotional work on behalf of their members.

The International Federal of Surveyors (FIG) is a UN-accredited non-governmental organisation which represents the interests of surveyors throughout the world. Most of the leading national professional associations of surveyors are members of FIG. In 1998 it produced a *Statement of Ethical Principles and Model Code of Professional Conduct*. Whilst these are not binding on its member associations, the Code starts from the basis that the surveying profession should adhere to certain fundamental principles.

- *Integrity.* Surveyors should maintain the highest standards of honesty and integrity and accurately and conscientiously measure, record and interpret data and offer impartial advice based upon this.
- *Independence.* Surveyors should be objective and give unbiased advice without prejudice or favour.
- *Care and competence.* Surveyors should maintain their knowledge and skills, take on work they reasonably believe they will be able to carry out in a professional manner, and exercise care in the performance of their duties.
- *Duty.* Surveyors should maintain confidentiality about the affairs of current and former clients unless required by law to make disclosures, avoid conflicts of interest, and conduct their work to the best of their ability. Whilst surveyors' first duty is normally to their clients, they also have a duty to the public. They should take into account environmental concerns and recognise the interests of the public.

The International Valuation Standards Committee developed out of discussions between the leading national professional valuation bodies about standards for asset management. It became an incorporated association in 2003 and produces valuation standards that have come to replace national ones. Its standards are compatible with International Financial Reporting Standards. In its Code of Conduct it argues that valuations should be performed by honest and competent valuers, be free from bias and self-interest, and not be reported in ways which might mislead. Valuers must therefore be persons of good repute and maintain a high standard of honesty and integrity. The key values to be maintained include the following.

- Valuers must behave with integrity and must not act in a manner that is misleading or fraudulent, act illegally, use false or exaggerated claims, or communicate false, inaccurate or biased opinions or analysis.
- Valuers should avoid conflicts of interest.
- Valuers should maintain confidentiality.
- Valuers should behave independently, with objectivity and impartially. This includes not working for a contingent fee or using of unsupported conclusions based on prejudice or bias.

10.4 Conclusions

Unethical behaviour undermines the workings of land administration systems. It prevents citizens from obtaining the services to which they are entitled. The poor, vulnerable and marginalised groups are particularly affected by such behaviour. There are two responses to preventing such behaviour. One is to tackle issues like corruption by seeking to restrain unethical behaviour through external controls. The other is to seek to internalise and reinforce ethical behaviour, which is the approach taken by the

professional codes of conduct. These codes are equally applicable to professionals working on their own account and those who are employees of public or private sector bodies.

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