Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations

A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM

EDITED BY SCOTT LECKIE

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For more than sixty years, the blue helmets of United Nations Peacekeeping missions around the world have come to symbolize both the promise and the fragility of the UN. Beset with unresolved conflicts and underfunding, and invariably burdened with sentiments of overexpectation, more times than not UN missions to keep the peace have made a difference. In recent years, frequent allegations of corruption, fraud, and abuse have tarnished the image of the UN as not only overly ineffectual, but as something to be skeptical of, rather than the obvious place to turn for help in resolving contentious challenges that affect many nations.

While the ups and downs of UN operations, and what is now referred to as peacebuilding, have been extensively analyzed and critiqued, one policy sphere has largely been ignored by analysts: the track record of the UN following conflict in the area of housing, land, and property rights. This volume seeks to fill this void by examining the UN's experience in grappling (or, as the cases examined convincingly show – more often than not, consciously not grappling) with the immense and inevitable housing, land, and property rights crises that emerge in all countries during and after conflict. Chapters exploring UN post-conflict involvement and peace operations in places as diverse as Cambodia, Kosovo, Sudan, East Timor, Rwanda, and Iraq, among others, reveal not only that much more can and should be done to address the massive housing, land, and property crises that often dominate nations emerging from war, but that failing to address these inevitable and complex challenges can leave countries and their citizenry in far worse living conditions than would have otherwise been the case.

Beyond the country studies, a series of detailed and constructive policy prescriptions on how to improve international responses to these challenges are offered to policymakers intent on ensuring that the housing, land, or property spoils of war so commonly accepted in the past are no longer bargaining chips around a negotiating table, but rather rights that should not and cannot be sacrificed for a larger peace.

Scott Leckie is the director of Displacement Solutions and the founder of the Centre on Housing Rights and Evictions (COHRE). He is an international human rights lawyer, advocate, and researcher with some twenty years of experience in the international protection and promotion of human rights. He has carried out human rights work in more than sixty countries and has worked in expert and advisory capacities with many United Nations and other international agencies, including the Office of the UN High Commissioner for Refugees (UNHCR), the UN Office of the High Commissioner for Human Rights (OHCHR), the UN Habitat Programme, the UN Development Programme (UNDP), and the UN Office for the Coordination of Humanitarian Affairs (OCHA). He has worked in both the UN Mission in Kosovo (UNMIK) and UN Transitional Authority in East Timor (UNTAET). He has written extensively on various human rights issues and lectures regularly at law schools in Switzerland, Thailand, and the United States.

ALSO BY SCOTT LECKIE

The Housing, Land and Property Legal Code of Burma (2009)
Returning Home: Housing and Property Restitution Rights of Refugees and Internally Displaced Persons, Vol. 2 (ed., 2008)
Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials (ed., 2007)
Legal Resource Guide on Economic, Social and Cultural Rights (ed., with Anne Gallagher, 2006)
Returning Home: Housing and Property Restitution Rights of Refugees and Internally Displaced Persons (ed., 2003)
National Perspectives on Housing Rights (ed., 2003)
When Push Comes to Shove: Forced Evictions and Human Rights (1995)
Destruction by Design: Housing Rights Violations in Tibet (1994)
From Housing Needs to Housing Rights (1992)

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For Pali
Your smile, your joy, your spark, your life
Gifts like no other

Contents

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Knut Rosandhaug received his LLM degree in law from the University of Bergen (Norway). In March 2006 he was appointed as the executive director of the Kosovo Property Agency (KPA) and the Kosovo Property Claims Commission (KPCC) after having worked from 2000 with the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) in Kosovo, from 2004 as their joint Executive

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Special thanks to my friend and colleague Dan ("HST") Lewis for his wise words in the Foreword and for a number of great years working together on various HLP issues. Here's to many more. Further special thanks to John Berger of Cambridge University Press for his patience

and support for this project, and for an amazing story that only he can tell. Finally, as always, Harling and Pali provided the light and the way.

Scott Leckie
Bangkok, Thailand

Foreword

The years leading up to the preparation of this volume were some of history's most intriguing and beguiling as far as the following topics are concerned. While still far from the center of most policy- and law-makers' minds, there can be no doubt that housing-, land-, and property-related deficiencies now occupy a place on the international agendas of many agencies and governments involved in helping to bring peace, stability, and reconciliation to countries emerging from conflict. The agonizingly slow recognition that the resolution of land- and property-related disputes following war is one of the cornerstones of any sustainable peace operation has proven frustrating for those charged with unraveling the chaos of displacement and restoring the rights of survivors.

Yet, even with this small but growing recognition that displaced families and survivors of war should not remain perpetually vanquished, and that rights over property usurped through conflict demand some form of restitution, it is not sufficiently embedded in the understanding that any land or property "solution" requires a measured, integrated, and broad-scale engagement. To produce sustainable property restitution, the machinery driving the justice system, the land administration system, land-use planning, and institutional coherence across all three sectors must function, and in many cases requires complete rebuilding.

The case studies presented here describe a vast body of experience in some of the most challenging environs on the planet. The authors describe the successes and failures, the weaknesses and impenetrable bureaucracy characterizing this field. Each of the individual events that made the past decade so unique – including the large-scale return of

refugees and internally displaced persons in Bosnia-Herzegovina, the initial hope and then exasperation on land and justice issues in Afghanistan, and the grappling with customary and formal systems facing the housing, land, and property rights sector throughout Africa – came about not through any spontaneous epiphany from the peace-makers.

Rather, it was through the creative efforts of what was initially a small group of people – which included the editor of this volume, Scott Leckie – who rightly felt (and who have now surely been more than vindicated) that peace without justice, or peace agreements that enshrined a sense of victor's justice, were no longer adequate responses to the horrors and carnage of war.

Since the early 1990s the voices in support of reversing the abuses of war, in particular forced displacement and "ethnic cleansing" through an increasing embrace of broader concepts of the rule of law and more specific notions of housing, land, and property rights, often in the form of restitution rights, have grown steadily louder and more influential. This collection of case studies and the conclusions drawn from them in the last chapter of the book reflect the growing body of knowledge and, simultaneously, the need to strengthen and formalize systemic resources within the international community of peace-makers, and those that follow to build the foundations upon which stability, equity, and prosperity for all are raised.

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PART

I

INTRODUCTION

1

United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings*

From Neglect to Tentative Embrace

Scott Leckie

The rather imperfect track record of United Nations peace operations in post-conflict peacekeeping and peacebuilding initiatives, combined with the emergence in recent years of several new institutional arrangements within the UN, such as the new Peacebuilding Commission, have led various observers to suggest the need for improved policies on how to best address the many complex challenges that confront the UN and other institutions in keeping and building a sustained peace in countries emerging from conflict.[1] Some have called for the development of policies to address the restoration of the rule of law, the judiciary and transitional codes of criminal procedure, while others have sought to improve UN peace operation performance by addressing the unintended consequences of these operations.[2]

* This chapter draws from an earlier paper prepared by the author at the request of the UNHCR entitled Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework, published in the Legal and Protection Policy Research Series by the Department of International Protection of the UNHCR in March 2005 (PPLA/2005/1).

1 See, for instance, Honoring Human Rights – From Peace to Justice: Recommendations to the International Community (2000) (Alice H. Henkin, ed.), Aspen Institute Justice and Society Program, Queenstown, MD; Brahami Report – Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects (A/55/305–S/2000/809) 21 August 2000, United Nations, New York; Inter-Agency Standing Committee (2002), Growing the Sheltering Tree: Protecting Rights Through Humanitarian Action – Programmes & Practices Gathered from the Field, IASC, Geneva.

2 Hansjörg Strohmeyer (2001) "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" in *American Journal of International Law*, vol. 95, p. 46. See also *Unintended Consequences of Peacekeeping Operations* (2007) (C. Aoi, C. de Coning, and R. Thakur, eds.), UNU Press, Tokyo.

This book, by contrast, explores a series of challenges found within all conflict and post-conflict settings, but which have only recently begun to receive the structural attention they deserve. Namely, this volume examines how and the extent to which various UN and selected other peace operations have (or have not) incorporated housing, land, and property (HLP) rights competencies within the design of the operations concerned, and in the implementation of the relevant peace agreements involved. In so doing, it provides an overview of some eleven (mostly, but not exclusively, UN-led) peace operations carried out from 1990 onward, including operations in Cambodia, Kosovo, East Timor, Solomon Islands, Bougainville, Afghanistan, Burundi, Rwanda, DR Congo, Iraq, and Sudan. An additional chapter addresses the local housing impacts of UN peace operations and what could be done to reduce these in future UN peace operations. The concluding chapter lays out a series of proposed policy reform measures designated to promote consistent and comprehensive approaches to HLP policy-making in the design and implementation of all future UN peacebuilding and peacekeeping operations.

To achieve this latter aim will neither be easy nor necessarily straightforward. Historically, HLP issues – though clearly apparent in every conflict – have not figured prominently in the post-conflict activities of the UN or in the peace processes that invariably precede them.[3] Of the seventeen UN peace operations currently underway (which includes missions led by the Department of Peacekeeping Operations [DPKO], the Department of Political Affairs [DPA], and the Peacebuilding Commission), none were designed to ensure systematic attention to HLP issues and have the human and financial resources in place to effectively address HLP concerns in a comprehensive manner. While *some* past UN missions (including those rare cases when the UN exercised transitional governing functions, such as those in Kosovo and East Timor) developed capacities for addressing *some* HLP challenges, most such missions either did not address these issues at all, or did so in an ad hoc, partial, and short-term manner. While there is now growing momentum from many UN agencies, civil society groups, and national governments to change course and begin to more systematically enshrine HLP competencies in these

[3] See Scott Leckie and Deborah Isser (2008), *Peace Processes and Housing, Land and Property Rights: Tips for Peace Mediators*, U.S. Institute for Peace, Washington, DC.

operations,[4] the traditional failures to address questions of housing, land, and property have left an indelible mark in many countries that could arguably have been far better served following their respective conflicts if the difficult HLP challenges facing the international community had been treated without such trepidation.

The recognition by the international community that HLP rights are critical elements in post-conflict peacebuilding is, at the same time, steadily on the rise.[5] And yet, although sporadic attempts have been made to address these issues within post-conflict settings, HLP questions are still generally excluded from the central planning objectives of peacebuilding, most publications on post-conflict peacebuilding still ignore questions relating to HLP rights, and of the nearly twenty UN peace operations currently in place, employing more than 90,000 soldiers, police, and civilian personnel, no more than a small handful of staff are involved in any HLP activity. All of this is despite the fact that HLP issues arise in every conflict and constitute challenges facing all countries engaged in post-conflict recovery. Bridging this gap will be a major challenge in the years to come.

The Ubiquity of HLP Issues in Conflict and Post-Conflict Environments

No conflict, notwithstanding its nature, or how small or short in duration it may be, is without some degree of crisis within the housing, land, and

[4] See, for instance, USAID – Office of Conflict Management and Mitigation (2004), *Land and Conflict – A Toolkit for Intervention*, USAID, Washington, DC. "People have fought over land since the beginning of recorded history. Population growth and environmental stresses have exacerbated the perception of land as a dwindling resource, tightening the connection between land and violent conflict. Land is often a significant factor in widespread violence and is also a critical element in peace-building and economic reconstruction in post-conflict situations" (p. 2).

[5] It is interesting to note that while official UN responses to HLP concerns in post-conflict settings are relatively new, the 1991 civil society initiative resulting in the *York Charter for Reconstruction After War* was ahead of its time in advocating for the HLP rights of those affected by conflict. The charter outlines nine entitlements of the civilian noncombatants suffering from war damage to their physical environment: (1) The restitution of his/her property or the equivalent. (2) The right to recover his/her personal possessions from an abandoned home. (3) The right to an appropriate temporary shelter. (4) The right to be consulted over the form of reconstruction. (5) The right to draw on skilled help in reconstruction where needed. (6) The repair and reconstruction of his/her dwelling in an ethnically sympathetic manner to standards no less than previously and with appropriate hygienic facilities. (7) The re-establishment of the local community in a manner no less adequate than before. (8) The provision of a means of livelihood and workplace. (9) The provision of essential community facilities in terms of medical support, water and fuel supplies, and drainage and waste disposal.

property spheres. Indeed, HLP rights issues are present in all conflicts and post-conflict settings, and their management by those engaged in peace efforts can often be decisive in determining the extent to which peace is sustained, and the degree to which measures of remedial and restorative justice are enshrined within post-conflict political and legal frameworks. In all conflicts, housing becomes scarce as homes are destroyed; available housing is often occupied by persons with no legal rights to do so; ownership and tenancy disputes between competing parties often emerge and turn violent; and, generally, the housing, land, and property sectors become a source of tension and instability. With habitable housing and land as two of very few assets available to people in post-conflict settings, problems of illegal occupations, squatting, and exploitative rent increases are common to all post-conflict settings. A brief sampling of some of the more prominent HLP challenges that emerge in countries enduring or emerging from conflict reveals the extent to which these concerns are indelibly linked to conflict and post-conflict recovery, including:

The return of refugees and internally displaced persons – Returning refugees and internally displaced persons (IDPs) are increasingly recognized as possessing housing, land, and property restitution rights to recover and repossess their original homes,[6] but which are routinely

[6] See, for instance, the 2005 *"Pinheiro" Principles on Housing and Property Restitution for Refugees and Displaced Persons*, which expand and clarify further the restitution rights of all refugees and displaced persons. See, in particular, principles 2 and 10: *Principle 2. The right to housing and property restitution*: 2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal; 2.2 States shall demonstrably prioritise the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution . . . *Principle 10. The right to voluntary return in safety and dignity*: 10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin; 10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations; 10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue

infringed, resulting in refugees and IDPs being unable to repossess and re-inhabit their habitual homes and lands in the aftermath of conflict.[7]

Secondary occupation of housing, land and property – The secondary occupation of housing, land, and property by persons without official rights to do so is common to all post-conflict situations, and can cause considerable tension in the aftermath of conflict.

Residential HLP destruction and damage – All conflict results in massive property and asset losses, and the large-scale damage and destruction of housing and land resources.

HLP disputes – As refugees and IDPs seek to reclaim their original homes, as lower income groups seek to find places to live, and as well-connected or otherwise powerful opportunists attempt to take advantage of the breakdown in law and order, serious HLP disputes can emerge, many of which can result in violence and greater insecurity.

The absence of impartial housing dispute resolution mechanisms – Post-conflict peace operations generally face a nonexistent, malfunctioning, or seriously overburdened judicial or dispute resolution system, leaving victims of HLP abuse without recourse to HLP remedies.

Pre-conflict ownership and tenancy disputes – Longstanding, pre-conflict HLP ownership and tenancy disputes can re-emerge in the post-conflict period and require resolution. In some instances, no clear title may have ever existed to the land or dwelling in question, while in others several people may place competing claims on the same piece of land or house.

Discriminatory HLP laws – Pre-conflict legal frameworks may discriminate against certain ethnic groups, women, and others and will require reform to ensure equal access to HLP resources and rights.

Abandonment laws – UN and other peace operations will also often face the consequences of arbitrarily applied or otherwise unfair housing abandonment laws that may lead to the arbitrary and illegal loss of rights over

durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property; and 10.4 States should, when necessary, request from other States or international organisations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons.

[7] See Scott Leckie (ed.) (2003), Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons, Transnational Publishers, New York.

homes and lands and which will often require formal reversal through the enforcement of restitution decisions.

The destruction of ownership and tenancy rights records – The confiscation or outright destruction of housing, land, and property titles; local housing and property cadastres; property registries; and other official records giving proof of ownership, occupancy, tenancy, and other residential rights accompanies most conflicts and complicates the implementation of restitution and other remedial measures.

Mid-conflict housing privatization – What were previously public/social housing resources are sometimes privatized during conflicts while occupied by secondary unauthorized occupants, often complicating restitution and other post-conflict HLP initiatives.

Homelessness and landlessness – The combination of conflict, displacement, destroyed housing, the absence of the rule of law, a dysfunctional economy, and other factors often lead to considerable levels of homelessness and landlessness within post-conflict environments.

Insecure housing and land tenure – In many conflict settings, within the private rental sector the legal position of tenants can be tenuous, and leave them open to harassment and threats of arbitrary eviction. In other instances, lower income neighborhoods, in particular informal settlements, may not possess recognized legal security of tenure rights despite having adverse possession rights based on long-term habitation.

Abandoned housing, land, and property – As people flee conflict and related human rights abuses, they are forced to abandon their housing, land, and property. Consequently, depending on the timeframe that peace operations arrive in post-conflict situations, they are likely to encounter a considerable number of abandoned properties that may require management and regulation by peace operations.

Unadministered public/social housing units – Public or social housing resources in post-conflict countries are often unadministered in the aftermath of conflict, given the absence of government and official bodies holding such responsibilities. In some post-conflict settings, the amount of social housing will be negligible, but in others it can be considerable and may require proper administration and management.

The lack of appropriate land administration frameworks and policies – Many countries emerging from conflict do not have effective land administration frameworks and policies in place that provide security to land

users and clear regulatory arrangements that are both fair and equitable. UN peace operations can play a major role in improving and restoring the land administration framework.

Land grabbing – The arbitrary acquisition of housing, land, and property through land-grabbing is commonplace in post-conflict environments and requires the attention of UN peace operations;

Parallel HLP systems within a single legal jurisdiction – In many conflict countries in recent years, particularly in Africa, customary land arrangements govern some of the territory concerned, while statutory laws are in place elsewhere. Balancing customary and statutory HLP laws, within a rights-based context, is increasingly seen as another vital ingredient in building long-term peace.

As even this rudimentary elaboration of some of the key HLP issues arising in post-conflict environments clearly reveals, housing, land, and property challenges will arise in all such settings, and invariably involve much more than the most common peace operation response to HLP concerns – the emergency shelter provided by a tent or plastic sheet. The HLP challenges facing all post-conflict societies, in fact, are so extensive and so important in facilitating the emergence of sustainable peace that it remains remarkable that these issues have still yet to find a structural place within all UN peace operations.

HLP rights, *as rights*, are widely recognized throughout international human rights and humanitarian law, and provide a clear and consistent legal normative framework for developing better approaches to the HLP challenges that will invariably face the UN and others seeking to build long-term peace. The Universal Declaration on Human Rights; the Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; and many others all recognize formulations of HLP rights. Taking fully into account the manner by which international human rights laws treat housing, land, and property rights and incorporating these into the post-conflict policies of the UN is a fundamental challenge facing the international community in post-conflict peace operations.[8]

[8] See, for instance, how housing rights norms are elaborated under international human rights law as set out in "General Comment No. 4 on the Right to Adequate Housing" (1991), adopted by the UN Committee on Economic, Social and Cultural Rights.

To date, however, most attention to and perceptions of how and in which conditions people live in post-conflict settings – their housing, land, and property rights – have been reduced to the construction of refugee or IDP camps, the distribution of tarpaulins, or programs to restore refugee property rights – in other words, *shelter* approaches, rather than more comprehensive HLP approaches as evidenced by the various HLP manifestations of the conflicts listed above.[9] While these and other contributions are key aspects of the broader HLP rights equation, they address only a small portion of the numerous HLP *rights* concerns that can occur during complex emergencies, post-conflict reconstruction, and nation-building.[10] While a variety of reasons may explain this approach,[11] there remains a pressing need to ensure that whatever policies are pursued by UN peace operations within a given post-conflict operation are – at a minimum – not outwardly inconsistent with human rights laws (in particular the existing treaty obligations or national laws relevant to the country concerned), and that such polices

[9] A great variety of reports outline what the international community should be doing to better address the needs of people mired in acute emergencies or post-conflict circumstances, however, few address housing issues in anything other than a peripheral way. *Growing the Sheltering Tree* provides one of the better prescriptions by addressing both "shelter and site planning" as well as the need for "preventing and responding to arbitrary expropriation of property or discriminatory property laws" (Inter-Agency Standing Committee (2002) *Growing the Sheltering Tree: Protecting Rights Through Humanitarian Action – Programmes & Practices Gathered from the Field*, IASC, Geneva). Most documents fail to go as far as this, and none adequately address housing *rights* concerns in an integral manner.

[10] That the international community rarely even uses the term "housing," let alone "housing rights," and instead uses the terms "shelter" or "property" to describe responses to the daily living conditions and housing issues confronting affected groups does not help. While apt in many ways, the term "shelter" itself assists in maintaining a reductionist view of HLP rights where all housing issues are reduced to either the provision of plastic sheeting or the restoration of property rights to returning refugees. HLP rights concerns are far broader than this.

[11] It appears that a combination of factors have inhibited the development of such policies in the past. Some of the key factors include a lack of understanding of the issues by the UN administrations involved; the reluctance of local political actors with vested interests in housing or land to support such initiatives; the perception by the UN that the HLP rights challenges facing them are simply too large to address; the complexities, scale, and historical nature of the problems involved; the financial costs associated with systematically addressing these problems; the perception that addressing these rights could potentially reignite the recently ended conflict; the lack of major donor support for encompassing approaches to housing, land, and property rights; and many others.

are implemented in a consistent manner throughout all post-conflict operations undertaken by or supported by the United Nations.[12] The track record in this regard is far from perfect, but nonetheless more substantial than is commonly known.

Since 1990, UN and other major peacebuilding operations have been active in a range of countries including Western Sahara (MINURSO), Cambodia (UNTAC),[13] Guatemala (MINUGUA), El Salvador (ONUSAL),[14] Haiti (MICIVIH),[15] Georgia (UNOMIG), Mozambique

[12] Indeed, housing, land, and property issues are extremely complex and often difficult to resolve, let alone grasp, by UN and other peace operations. For instance, one author outlines the complexities in Bosnia-Herzegovina in the following terms: "The dilemma is extensive because of the massive scale of displacement, and because of the amount of land and assets involved. Secondly, it is complex because of the legal uncertainty which resulted, not only from the unlawful occupation of many homes by people without legal title; but also from the fracturing of a formerly socialist legal system created as part of a much larger state; as well as from the widespread destruction or dispersal of many pre-war land title records. Thirdly, the property question is sensitive for several reasons. From a personal perspective, displaced people forced to leave homes, villages, jobs and people which were central to their lives, were also traumatized by the loss of all of the physical and psychological security which a 'home' entails. Economically, property issues are sensitive because land is one of the few valuable assets left in a country whose infrastructure, industry, agriculture and other income sources were shattered. Moreover, questions of return and repossession of property were politically charged, because control of territory was a major part of the rationale for which the war was fought. By seeking to restore people to their homes, and thus reverse the effects of 'ethnic cleansing', the peace process could threaten the interests of those who had brought about the violence in the first place, and might foreseeably do so again" (Garlick, M. (2000) "Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina" in *Refugee Survey Quarterly*, vol. 19, no. 3, pp. 66–67).

[13] See Chapter 2.

[14] ONUSAL's activities were limited to monitoring some land issues and labour rights. See Brody, R. (1995) "The United Nations and Human Rights in El Salvador's Negotiated Revolution," *Harvard Human Rights Journal*, vol. 8, p. 153.

[15] "The [mandate] intentionally omitted economic, social and cultural rights. In a country as poor as Haiti, the choice had a serious impact on the daily work of the Mission's human rights observers and frequently was a source of their frustration. The embargo impoverished already desperately poor Haitians. While human rights observers sought information about civil and political rights, the Haitians providing the information often had no money, food or medicine" (O'Neill, W. (1995) "Human Rights Monitoring and Political Expediency: The Experience of the OAS/UN Mission in Haiti," *Harvard Human Rights Journal*, vol. 8, p. 111). In Haiti, one field team piloted a conflict resolution project addressing land conflicts and devoted one observer to monitoring land-related cases before the land courts, however, this was far from systematic. See also C. Granderson (1996) "Institutionalizing Peace: The Haiti Experience," in *Honouring Human Rights – From Peace to Justice* (Alice Henkin, ed.), Aspen Institute, Queenstown, MD, p. 227.

(ONUMOZ), Rwanda (HRFOR),[16] Bosnia and Herzegovina (OHR/UNMIBH), Kosovo (UNMIK),[17] East Timor (UNTAET),[18] Democratic Republic of the Congo (MONUC),[19] Eritrea and Ethiopia (UNMEE), Sierra Leone (UNAMSIL), Afghanistan (UNAMA),[20] Iraq (SRSG/CPA),[21] and elsewhere.[22]

And yet, in no two post-conflict peace operations during the past two decades have consistent policies on these complex HLP concerns been put in place. Some peace operations consciously (or by pure oversight) chose to downplay HLP rights issues, while others addressed at least some of the major challenges head-on. Most operations choose piecemeal approaches to these issues, enthusiastically embracing some concerns and overlooking others. In some settings (Bosnia and Herzegovina, East Timor, Kosovo, etc.) a concerted attempt was made by the UN to address *some* HLP rights issues, while in other operations (Cambodia, Afghanistan,[23] etc.) HLP rights matters were treated generally as

[16] After initial extensive discussion on whether or not to cover economic, social, and cultural rights, the HRFOR chose to prioritize civil and political rights. A field manual distributed to staff stated: "The necessity of setting priorities in Rwanda is such that Field Officers will work principally within the framework of promoting specific civil and political rights, as opposed to economic, social and cultural rights. However, these two categories of rights are inextricably related. In Rwanda, because of a lack of education and poverty, which can be argued to have contributed to the genocide, any human rights solution needs to take these factors into account . . ." (HRFOR, *Field Guidance Manual* [1996], Kigali, Rwanda). See T. Howland (1999) "Mirage, Magic, or Mixed Bag? The United Nations High Commissioner for Human Rights' Field Operation in Rwanda," *Human Rights Quarterly*, Vol. 21, pp. 1–55.

[17] Scott Leckie (1999) "Kosovo's Next Challenge: Fixing the Housing Mess," *Human Rights Tribune*, vol. 6, no. 4.

[18] See Chapter 4.

[19] See Chapter 6.

[20] See Chapter 5.

[21] See Chapter 7.

[22] See, for instance, Strohmeyer (supra note 2); Ian Martin (1998) "A New Frontier: The Early Experience and Future of International Human Rights Field Operations," *Netherlands Quarterly of Human Rights*, vol. 16 no. 2, p. 121; A. Clapham and F. Martin (1996) "Smaller Missions Bigger Problems," in *Honoring Human Rights – From Peace to Justice* (Alice H. Henkin, ed.), Aspen Institute Justice and Society Program, Queenstown, MD, p. 133.

[23] Pursuing what it has called a "light footprint approach" in Afghanistan, the UN only belatedly addressed some elements of the HLP rights challenge, which in this country manifest mainly as questions of land. Outright landlessness, inadequacy of land in areas of origin, the current occupation of land by commanders and returnee desires for more land, difficulties in recovering property, weak dispute resolution mechanisms, illegal occupation of government land, and others are key problems facing Afghanistan. "UNHCR recognises the land related problems are often one of the most serious issues threatening the stability of Afghanistan, and that the reorganisation of the land tenure system in Afghanistan is a priority that merits the

peripheral issues, without policy, resources, or the staffing and expertise required to do so effectively.

If we examine solely the common post-conflict issue of HLP disputes where two or more parties hold competing claims for a particular dwelling or parcel of land, we can observe entirely different approaches depending on the peace operation concerned. In Cambodia, UNTAC completely refused to address these issues, even though UNTAC had major governance powers during the time of its mandate.[24] In Kosovo, UNMIK, on the other hand, did address a cross-section of HLP themes, and established a Housing and Property Directorate to help restore the housing rights of victims of ethnic cleansing, assisted in restoring the national HLP cadastre, and provided a range of other measures, but equally failed to adequately address a range of other housing rights issues. While UNTAET in East Timor acted admirably on the issue of the temporary allocation of abandoned housing, it persistently declined to tackle the issue of resolving housing and land disputes or conferring housing and land rights.[25] The structures of UNTAET lacked a housing department, allocated no funds for the construction of public housing, and had no staff appointed to deal with housing issues, even though up to 80 percent of East Timor's housing

attention of the authorities, international community, and donor governments" (see UNHCR (2003) *Land Issues within the Repatriation Process of Afghan Refugees*; see also UN Habitat (March 2003) *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan with Special Reference to Kabul City*; Center on Economic and Social Rights (May 2002) *Human Rights and Reconstruction in Afghanistan*, CESR, New York; and Liz Alden Wiley (2002) *Land Rights in Crisis*, Afghan Research and Evaluation Unit, Kabul).

[24] "Although the Supreme National Council, on behalf of Cambodia, acceded at UNTAC's request to ratify the International Covenant on Economic, Social and Cultural Rights, little subsequent attention was paid to this area by UNTAC. As far as the human rights component was concerned, this was a conscious decision, given the scarce resources, the lack of time, and the extent of violations of civil and political rights that the UNTAC was required to address" (see Dennis McNamara (2000) "UN Human Rights Activities in Cambodia: An Evaluation," *Honoring Human Rights* (A. H. Henkin, ed.), Kluwer Law International, Netherlands, pp. 47–72).

[25] Importantly, in no such operation, however, has a policy and legal framework been pursued that addresses all of the numerous housing, land, and property challenges that invariably face post-conflict societies. As one author has correctly noted in respect to land: "[I]t is fair to say that land policy, as an element of peace-building missions, tends to be under-rated and has received little attention in the literature" (Daniel Fitzpatrick (2002) *Land Policy in Post-Conflict Circumstances: Some Lessons From East Timor – New Issues in Refugee Research Working Paper No. 58*, UNHCR).

lay in ruins.[26] A comprehensive plan presented by the Land and Property Unit (LPU) to establish a land claims commission was eventually rejected by officials fearful of addressing the complexities of the land issue.[27]

As even this simple analysis of how three peace operations addressed one of the many HLP themes, as is commonplace, in none of the three peace operations just noted (or any others), therefore, was a comprehensive approach to HLP rights taken that was sufficiently responsive, remedial, and responsible for building the conditions necessary for the society-wide enjoyment of these rights for everyone. The chapters that follow provide further evidence of the highly inconsistent approach taken by peace operations to a very similar set of HLP challenges.

Sustained, comprehensive, and effective involvement by UN peace operations in the sphere of HLP rights will come down to improving overall UN competence, capacity, and political will to deal constructively with the severe problems that face often millions of victims of war. Consciously ignoring these fundamental challenges, as has so often been the case

[26] A Land and Property Unit (LPU) was established during the first months of the arrival of the UN in 2000. The LPU made one of the most comprehensive *attempts* at addressing a wide spectrum of housing rights concerns. However, many of these efforts were thwarted by a combination of official resistance and the prevailing complexities of the economic and social situations in the country. The LPU, for instance, commissioned a series of papers seeking to develop a far-reaching series of policies designed to address the key issues facing the island nation. See, for instance, Michael Brown (14 March 2001) *Land and Property Administration in East Timor: Summary of Consultants' Reports Prepared by the Land and Property Administration Project* (FS/TIM/OO/S01), UN Habitat, Nairobi. Between May and August 2000 the following policy papers were prepared: "Land Registration in East Timor: Plan for Rehabilitation of the Land Registration System"; "Cadastral Survey and Mapping for Land Administration in East Timor"; "Housing, Property and Land Rights in East Timor: Proposal for an Effective Dispute Resolution and Claim Verification Mechanism"; "Housing, Property and Land Rights in East Timor: Improved Proposals for an Effective Dispute Resolution and Claim Verification Mechanism"; "Housing and Human Settlements Development in East Timor: Proposals for Institutional Arrangements and Programme Development"; "Land Law in East Timor: Review of Existing Land laws for the Purpose of Creating an Equitable Land Administration System"; and "Land and Property Planning and Administration in East Timor: Consultant's Report."

[27] On this issue, see Daniel Fitzpatrick (2002) *Land Claims in East Timor*, Asia Pacific Press, Canberra. He provides the following cogent analysis: "UNTAET failed to provide: formal mechanisms to resolve housing conflict, other than a nascent court system desperately overburdened by criminal cases; any public housing other than attempts in March 2000 to secure pre-fabricated 'Kobe' houses for international staff (but not for East Timorese); any form of effective inter-agency body to manage housing conflict caused by the delivery of returnees to Dili; any administrative regime to govern transactions concerning private land as foreigners entered into dealings with those occupying habitable housing; and any systematic incentives for refugees and IDPs to return to their original areas."

in the past, is no longer an adequate response by the UN in seeking to build long-term peace and economic vitality. When the UN has decided to engage in these matters, as it has in countries as diverse as Bosnia, Sudan, and Kosovo, notable successes are readily identifiable, and these contributions by the UN are widely seen as at least partially responsible for the emergence of stronger and more effective peace operations that actually address day-to-day concerns affecting very often large numbers of people.

When considering the areas of the world in 2008 where peace processes, peace agreements, and peace implementation actions will be needed – Darfur, Iraq, Palestine, and beyond – all of these conflicts have at their core severe disputes, conflicts, and inequities within the broader housing, land, and property rights domains. Failing to address these issues within the context of peacebuilding is truly no longer an option, for such failures will themselves only ever lead to peace plans and peace missions that bring results in some sectors, but which will be virtually assured of neglecting HLP concerns, and in turn bring highly undesirable results, including even a return to violence.

The chapters that follow each provide unique insights into the nearly two-decade track record of the UN in engaging the ubiquitous HLP challenges that affect all countries that have undergone conflict and violence. No war ever takes place without displacement, the (attempted) theft of land, the decimation of people's homes, and sordid efforts to alter access to resources. All of these and other side effects of conflict are essentially matters falling under the category of housing, land, and property rights. If these issues, then, are indeed basic human rights, concerns grounded in law and practice, then the UN Charter and all subsequent global standards must be taken fully into account in determining the scope of UN peace operation activities. As the chapters in this volume clearly show, the UN has been willing – to a degree – to address HLP crises and to devote a limited amount of human and financial resources toward their amelioration. However, if any message emerges from all the analyses that follow, it is simply that far too often too little has been done to address these vital concerns.

This is not to say, of course, that conspiracies of inaction or other nefarious forces are at work in keeping HLP issues so frequently off the agendas of the DPKO, DPA, the Peacebuilding Commission, and other

entities intimately involved in the design and implementation of peace operations. Rather, it is far more likely that questions of capacity and fears of complexity may be the primary reasons lying behind the long-term reluctance of the UN to grapple head-on with the HLP challenges that face each and every country emerging from conflict.

This book provides the analysis and recommendations required to improve UN post-conflict HLP policy in such a way that all future peace operations will routinely and without question maintain competencies, expertise, and a willingness to seek constructive ways to use their time in post-conflict countries as a means of improving the housing, land, and property rights situations in countries that for so long have endured so much hardship. Placing HLP rights on the UN peacekeeping and peacebuilding agendas will serve both the UN and those in whose interests it is designed to act.

PART

II

CASE STUDIES

2

Stability, Justice, and Rights in the Wake of the Cold War

The Housing, Land, and Property Rights Legacy of the UN Transitional Authority in Cambodia

Rhodri C. Williams

Introduction

Cambodia has made important progress in terms of political stability and economic growth since the devastation wrought by the Khmer Rouge regime in the early 1970s and the many subsequent years of civil war and economic stagnation. This has come about largely due to a "threefold transition," beginning in the early 1990s, which led Cambodia "from civil war to peace, from one-party rule to multiparty politics, and from an isolated and subsistence-oriented economy to one based on the market and open to international trade."[1] Nevertheless, the depth of Cambodia's political transition has been questioned. Despite periodic elections, the Cambodian People's Party (CPP), which controlled Cambodia prior to 1991, has yet to peacefully relinquish meaningful power and continues to rely on both intimidation of its opponents and the exercise of its authority through an unaccountable and intrinsically corrupt political patronage system.[2]

Cambodia's current transition began with the 1991 Paris Peace Agreement, which formally ended decades of conflict in Cambodia and paved

[1] World Bank, "Cambodia: Halving Poverty by 2015?" in *Poverty Assessment 2006* (February 2006), i.

[2] See, for instance, "Report of the Special Representative of the Secretary-General for Human Rights in Cambodia," Yash Ghai, Commission on Human Rights, U.N. Doc. E/CN.4/2006/110 (24 January 2006) on impunity, lack of judicial independence, and suppression of dissent and public debate.

the way for multiparty elections and a new constitution. Under the terms of the agreement, a large international civil and military peace mission, the UN Transitional Administration in Cambodia (UNTAC), was created in order to oversee Cambodia's transition. UNTAC wielded significant formal and real power during its short tenure (1992–1993) and is often described as the midwife of the largely stable and nominally pluralist constitutional monarchy that exists today in Cambodia. Tasked with overseeing the demobilization of the parties to the Cambodian conflict, facilitating the repatriation of over 300,000 refugees from Thailand, and implementing national elections, UNTAC was armed with correspondingly broad powers, at least on paper. The mission's civil administration exercised nominally direct control over Cambodia's foreign affairs, national defense, finance, public security, and information sectors as well as any other areas that "could directly influence the outcome of elections."[3] In the area of human rights, UNTAC was mandated with direct oversight of the human rights situation during the transitional period, including investigation of complaints and "[w]here appropriate, corrective action."[4]

The allocation and administration of housing, land, and property (HLP) in Cambodia have been and remain of central importance to the country's political development as well as the human rights of its citizens. From a political perspective, housing, land, and property are not only a crucial safety net for the largely rural population, but also one of the few domestic productive assets that have been available to political power-brokers, investors, and speculators in the wake of decades of war. As in all countries, from a human rights perspective, access to HLP resources and secure tenure constitutes a precondition for the exercise of many other fundamental human rights. In a country traditionally dependent on subsistence agriculture carried out on generally small family plots, access to land and natural resources continues to be crucial to the enjoyment of rights as basic as life, health, and livelihood.

During its administration of Cambodia, however, UNTAC did not prioritize the protection of HLP rights. Although many HLP disputes

[3] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Annex 1, Section B.

[4] Id, Section E.

existed, they were handled on a largely ad hoc basis and appear to have been viewed as a tactical rather than a strategic factor in the stabilization of Cambodia's post-conflict society. On the other hand, UNTAC was one of the very first in a long series of post–Cold War UN peace missions and had few precedents and still less prior knowledge of the long-isolated Cambodian society to draw on in developing effective approaches to these HLP challenges. Indeed, the UN system continues to struggle to come to grips with the importance of HLP rights fifteen years after the arrival of UNTAC. Nevertheless, UNTAC did little to address the cavalier approach to HLP rights by the Cambodian authorities that has spawned a destructive pattern of disputes and violations that continue to this day. Although the post-UNTAC international presence in Cambodia has struggled to address these problems, it has done so from a largely reactive posture and with a limited impact to date. In the words of a leading national nongovernmental organization (NGO), HLP violations have come to represent the "human rights and social problem number one" in much of Cambodia.[5]

The key question to be addressed in this chapter is what – taking into account the circumstances at the time – UNTAC could and should have done in order to instill greater respect for HLP rights. In addressing this question, this chapter begins with a description of the UNTAC mission in its historical context, followed by a historical overview of the role of housing, land, and property in Cambodian society and politics, beginning with customary Cambodian land law and its relationship to the country's persistent tradition of patronage politics, and moving on to describe the forced collectivization of land under the Khmer Rouge and the corrupt and haphazard redistribution and privatization programs carried out by succeeding regimes. The section concludes by reviewing UNTAC's role in addressing the resulting thicket of unresolved HLP questions during the period leading up to the 1993 elections and the implications this has had for Cambodian society in the post-UNTAC period. The next section of this chapter analyzes specifically what UNTAC might have done to address HLP rights violations both retrospectively and prospectively. In summary, the chapter notes that UNTAC's failure to adopt a systematic,

[5] Cambodian Center for Human Rights, "Public Forum," in *Quarterly Report for March 29–June 17, 2006* (2006), 2.

human rights–based approach to HLP rights may have been understandable in the context of the times, but it set the stage for further deterioration in the protection of these rights; this constituting a major lesson learned with implications for other subsequent UN peace operations. Moreover, in the area of HLP rights and beyond, UNTAC has been criticized for establishing a pattern for international engagement in Cambodia that privileges the maintenance of basic political stability over improvements in democracy, accountability, and human rights.

The Role of UNTAC in Historical Perspective

Considering Cambodia's previous misery and misrule, UNTAC is typically credited with having achieved a qualified success.[6] However, it began badly, with a very public failure in the first of its three goals, disarmament of the parties, largely due to the bad faith refusal of the remnants of the Khmer Rouge to end the insurgency they had pursued since being driven out of power in the 1979 Vietnamese invasion.[7] More progress was made in the second key mandate area of repatriation. Over the course of 1992 and 1993, UNTAC supported the UN High Commissioner for Refugees (UNHCR) in the successful repatriation of some 360,000 refugees, many of whom had been living in closed camps in Thailand for twelve years or longer.[8] Although the refugees had little choice but to return (those who refused were later deported from Thailand without protest from UNHCR), their reintroduction into the general population did not result in violent social unrest, as had widely been feared.[9]

The 1993 elections represented a more complicated success story. The fact that they took place successfully in an atmosphere of ongoing unrest represented both a logistical coup for UNTAC and a tribute to the courage of ordinary Cambodians, who turned out in overwhelming numbers to vote. However, implementation of the election results was fudged, with the defeated party of the old regime, the Cambodian Peoples' Party (CPP),

[6] Sorpong Peou, "Implementing Cambodia's Peace Agreement," in *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, London (2002), p. 499.
[7] Id., 509.
[8] Brian Williams, "Returning Home: The Repatriation of Cambodian Refugees," *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador*, Cambridge University Press, Cambridge (1997), p. 165.
[9] Id., 174–175.

refusing to concede and its leader, Hun Sen, allowed to retain *de jure* power through the negotiation of a "Second Prime Minister" position.[10] Although the Khmer Rouge was comprehensively defeated at the ballot box, the ongoing military threat it posed was exploited by the CPP to consolidate its grip on power after UNTAC's departure. In effect, the CPP was able to co-opt large portions of the Khmer Rouge military and political structures through the offer of amnesty, and then engaged in a pre-emptive military assault on its other political opponents in 1997, accusing them of treason for having also engaged in negotiations with the Khmer Rouge.[11]

As a result of the events culminating in the 1997 "coup de force," the Khmer Rouge effectively ceased to exist, other political opponents were neutralized, and the CPP was left in undisputed control, handily – if not uncontroversially – winning the subsequent 1998 (and 2003 and 2008) national elections.[12] For many observers, Cambodian elections now represent little more than a new tool to provide legitimacy for a government that has, in various ideological manifestations, enjoyed unbroken rule over Cambodians for nearly three decades since its installation following the 1979 Vietnamese victory over the Khmer Rouge. The CPP continues to be accused of violating human rights on a "systemic scale" by means of policies deemed "integral to the political and economic systems through which the Government rules, which has manipulated democratic processes, undermined legitimate political opposition, and used the state for the accumulation of private wealth."[13] In this context, the violation of HLP rights and the misappropriation of natural resources have been described as some of "the most pressing issues facing Cambodia today."[14]

A great deal has been written on the lessons to be learned from UNTAC's legacy, and not without justification. The UNTAC mission was one of the first of several large multidimensional peace missions mandated by a newly assertive UN Security Council in the wake of the

[10] Peter Maguire, *Facing Death in Cambodia*, Columbia University Press, New York, (2005), p. 82.
[11] Id., 134–139.
[12] David Chandler, *A History of Cambodia*, Westview Press, Boulder, CO (2000), pp. 243–244.
[13] Special Representative of the Secretary General for Human Rights in Cambodia, Mr. Yash Ghai, "Statement to the Human Rights Council" (26 September 2006).
[14] Supra, note 2, para. 30.

Cold War. As such, it was a testing ground for questionable policies such as the "neutrality" pursued by the Special Representative to the Secretary General (SRSG) to Cambodia, Yasushi Akashi, to the point of barely responding to obvious breaches of the agreement and even direct attacks on peacekeepers.[15] UNTAC was also capable of what seems, after a decade of peacebuilding experience, to constitute breathtaking naivety. For instance, in response to a burgeoning HIV epidemic inflamed by peacekeepers' involvement in the sex trade, Akashi is initially reported to have observed that "[e]verybody has the right, even the soldiers, to enjoy the young ladies, and we cannot discriminate [against] the HIV positive soldiers."[16] High UNTAC officials continued to condone promiscuity despite the fact that this led to thousands of Cambodian deaths and ultimately may have taken a higher toll on the peacekeepers themselves than combat operations.[17]

Any analysis of UNTAC's performance in protecting human rights, including HLP rights, must also take into account the mission's highly pragmatic *raison d'etre*. Coming in the immediate wake of the Cold War, UNTAC was a political mission with a political goal, namely, to end the protracted fighting in Cambodia and foster "a stable central government which could be recognized internationally."[18] According to many observers, other objectives such as economic reform, democratization, and rule of law took a backseat to the central goal of stability.[19] As a result, the achievement of a visible end to the conflict through the administration of free and fair elections came to drive all the other goals set for UNTAC. For instance, ceasefire and demobilization were clearly important preconditions for free and fair elections, but when UNTAC failed to secure peace,

[15] Supra, note 10, 78–79. During Mr. Akashi's second assignment as SRSG, in wartime Bosnia, this approach was repudiated and peace was ultimately achieved through a more robust combination of negotiation and military force.

[16] Id., 79.

[17] Elisabeth Uphoff Kato, "Quick Impacts, Slow Rehabilitation in Cambodia," in *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador*, Cambridge University Press, Cambridge (1997), p. 202.

[18] David Ashley, "The end justifies the means?" *Phnom Penh Post* (2 June 1995).

[19] Id. The nature of the process was reflected by the fact that the terms of the Paris Agreement were conceived largely outside Cambodia, without significant consultation of the Cambodian people, in foreign capitals that viewed the ongoing conflict there as an obstacle to their increasingly friendly, post–Cold War relationships. See Evan Gottesman, *Cambodia After the Khmer Rouge*, Yale University Press, New Haven, CT (2002), pp. 337, 343, and 350.

the elections went forward anyway.[20] Likewise, the speed of the repatriation program – and the fact that refugees were not given any other option than to return – was in part dictated by the fact that the former rebel factions seeking political power in the 1993 elections "felt that they needed to get 'their' refugees back in the country so that they could win regional seats in the national assembly."[21]

Finally, UNTAC's willingness to accept the CPP's interference with the implementation of the 1993 election results has been seen in the context of an overall willingness to accept "hegemonic politics" as a means to political stability in the absence of an equilibrium of power between the various Cambodian factions.[22] Despite the fact that the elections had been definitively ruled free and fair, the UNTAC leadership barely objected as the defeated CPP threatened violence in order to retain a democratically unmerited share of power. In the words of one observer, "the largest U.N. effort of its kind . . . took a decided backseat to traditional Cambodian power politics, leaving diplomats and U.N. technocrats confused and muttering half-hearted protests as it became all too clear that the principles of democracy had hardly taken root in this fractured country."[23]

The political priorities of the UNTAC leadership were also felt in the area of human rights. The human rights mandate in the Paris Peace Agreement referred to oversight, investigation, and corrective action, leaving room for assertive interpretations. However, in elaborating on the UNTAC mandate, the UN Secretary General emphasized the relatively toothless education component of the mandate early on.[24] Observers were quick to conclude from this that UNTAC's Human Rights Component would be discouraged from such potentially destabilizing activities as investigating past or ongoing human rights violations by the parties to

[20] Prior to the May 1993 elections, the UN Secretary General conceded that UNTAC had failed to create the disarmed and politically neutral environment foreseen in the Paris Peace Agreements, but recommended that the elections go forward anyway so as not to give the defiant Khmer Rouge an effective right of veto over the peace process. Kevin Barrington, "Boutros Ghali Says UNTAC Aimed Too High," *Phnom Penh Post* (21 May 1993).

[21] Supra, note 8, 182.

[22] Supra, note 6, 520.

[23] Nate Thayer, "Sihanouk Back at the Helm," *Phnom Penh Post* (18 June 1993).

[24] Dennis McNamara, "UN Human Rights Activities in Cambodia: An Evaluation," in *Honoring Human Rights and Keeping the Peace: Lessons from El Salvador, Cambodia and Haiti*, The Aspen Institute, Queenstown, MD (1995), p. 61.

the Peace Agreement.[25] In practice, UNTAC's human rights staff was initially treated as superfluous, sent in small numbers without adequate briefing or guidance, refused priority in the allocation of the mission's notoriously large fleet of vehicles, and expected to take a passive, non-operational role.[26] Despite these obstacles, the UNTAC Human Rights Component was able to take significant steps in addressing prison conditions and political violence as well as training of police and judges.[27] However, as with other components of the UNTAC mission, the Human Rights Component's role was ultimately subordinated to the overall goal of elections. Despite the fact that widespread political violence was observed by UNTAC, the political actors responsible for these acts were not significantly penalized and the elections went forward as planned:

> There is clearly a delicate balance to be struck between broader political interests and the human rights responsibilities of such operations [as UNTAC]. In Cambodia it was clear that despite overt and prolonged political intimidation and violence, the international community was determined to hold an election if possible. While this may have been the correct political choice, the key question – what level of violations are necessary for the United Nations to call off such elections – remained unanswered.[28]

Within this overall context, addressing HLP rights violations never rose particularly high on the UNTAC agenda despite their centrality to the housing, health, and livelihoods of most of Cambodia's population. The indivisibility of human rights was recognized in theory, with the then-head of the UNTAC Human Rights Component writing that the "most fundamental rights" in need of realization in Cambodia included not only life and security but also a basic standard of living.[29] The right to an adequate standard of living – including the right to adequate housing – is one of the central protections set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Cambodia acceded in

[25] Id., 61.
[26] Id., 62.
[27] Id., 64–70.
[28] Id., 78.
[29] Dennis McNamara and Thant Myint-U, "Human Rights in Cambodia: What it Means?" in *Phnom Penh Post* (21 May 1993).

1991. However, in the context of "the scarce resources, the lack of time, and the extent of violations of civil and political rights which UNTAC was required to address[,]" the Human Rights Component made a conscious decision not to focus its energies on violations of economic and social rights.[30]

Even had the Human Rights Component devoted greater attention to economic and social rights, however, it is not clear that housing and land rights would have necessarily been included. The little work in this area carried out by the Component focused on health, education, and labor laws.[31] HLP issues, while taken seriously, tended to be conceptualized primarily as political rather than human rights concerns. For instance, property issues were generally assigned to the Civil Administration Component of UNTAC, which focused on individual disputes referred to it rather than prioritizing political or legislative measures to provide for the systematic clarification and protection of property rights.[32] Finally, UNTAC made few efforts to follow up on the parties' commitment to take steps to prevent a return to the "policies and practices of the past," a euphemism for the mass murder and other crimes carried out by the Khmer Rouge.[33] As will be discussed at more length below, HLP restitution processes akin to those developed in many other post-conflict settings never captured a great deal of attention despite their potential significance for tens of thousands of displaced Cambodians, and discussions leading to the creation of the current mixed tribunal for trying the leaders of the Khmer Rouge did not get seriously underway until after UNTAC's mandate.

Although UNTAC's decision not to systematically address HLP rights was based on its good faith assessment of what mandate issues were most pressing at the time, its failure to do so either retrospectively or prospectively has arguably had significant repercussions. At the very least, it encouraged socially destructive practices – land-grabbing, speculation, unchecked exploitation of natural resources, neglect of the growing slums in the capital and other urban areas, and forced evictions – that had deep roots in the pre-UNTAC period but would become more prevalent and

[30] Supra, note 24, 71.
[31] Id.
[32] Author interview with David Ashley, 24 August 2006.
[33] Supra, note 24, 70.

destabilizing with both time and the country's economic recovery, which increased competition for land. In fact, it would not be overstating the case to argue that these issues may currently constitute a greater threat to Cambodia's political stability than many of the other legacies of the country's ruinous recent decades.

The significance of HLP rights has now been recognized by the international community in Cambodia, which no longer has the formal executive powers UNTAC enjoyed but retains considerable influence through the aid and foreign investment that perennially comprise half or more of the country's gross domestic product (GDP).[34] However, just as the international community has been taken to task for its broad willingness to accept Cambodia's democratic credentials at face value, it has also been accused of being satisfied with superficial approaches to human rights protection. Thus, while international actors have supported the drafting and adoption of new, human rights–compliant legislation on land and forest management, it has done less to demand accountability for the systematic violations of the letter and spirit of these laws that continue with monotonous regularity. Human rights observers have criticized the failure of international donors to move beyond technical assistance and capacity building to conditioning further assistance on demonstrable implementation of Cambodia's human rights obligations.[35] Whether or not it is fair to blame UNTAC, under the circumstances, for having subsumed other concerns – including HLP rights – to the imperative of political stability, is debatable. However, UNTAC does appear to have established an unfortunate pattern of international deference to Cambodia's often illiberal leadership in this crucial area of human rights and the rule of law.

Land and Conflict in Cambodia

As the Paris Peace Agreement was being negotiated in the early 1990s, Cambodia was a country that continued to suffer from unprecedented

[34] Indira Simbolon, "Access to Land of Highland Indigenous Minorities: The Case of Plural Property Rights in Cambodia," *Max Planck Institute for Social Anthropology Working Paper No. 42* (2002), 2. The author notes that "the development of Cambodia has been directed and funded, either in the form of grant or loan, almost entirely by the international communities."

[35] Supra note 2. See also Human Rights Watch, "Cambodia: Time for Tangible Progress instead of Empty Promises" (press release, 4 October 2006).

levels of displacement and dispossession. Over the previous two decades, virtually all productive land in Cambodia had, in turn, been nationalized, collectivized, haphazardly redistributed, privatized, and, finally, subjected to increasingly corrupt waves of land-grabbing, official confiscation, concession, and speculation. Cambodia's towns and cities had been evacuated by the Khmer Rouge in 1975, many of their inhabitants had been worked to death or forced into exile, and their subsequent repopulation achieved through official appropriation and squatters' rights. Mountains and wilderness areas, home to Cambodia's indigenous minority populations, had come under the control of local military authorities, who ruthlessly exploited them for natural resources. As a result of past and ongoing conflicts, some 370,000 refugees had taken shelter abroad and a further 200,000 Cambodians were internally displaced.[36]

Prior to the Cold War, Cambodia had been seen as a primeval kingdom with a traditional, almost unchanging way of life.[37] This stereotype made the radical violence and dislocation of the Khmer Rouge period and the subsequent years of civil war and political isolation all the more shocking and unfathomable. From this perspective, the victory of the Khmer Rouge in 1975 appears to represent a fundamental turning point in Cambodian history. However, the persistence of traditional patronage-based approaches to the exercise of power throughout the post–Khmer Rouge period demonstrates a strong continuity with Cambodia's past, for better or for worse. Patronage networks have typically operated as a de facto source of power behind the façade of imported political ideologies, whether the French colonial *mission civilisatrice* (1863–1953), Vietnamese-sponsored bureaucratic communism 1979–1989), or the Western liberal democracy currently enshrined in the Cambodian constitution as the country's official policy.[38]

The durability of patronage politics in Cambodia allowed for the rapid reimposition of basic order and stability even after the devastation visited on Cambodia by the radically destructive Khmer Rouge regime (1975–1979). However, over the longer term, patronage politics have undermined the rule of law, obscuring accountability and replacing public service with

[36] Supra, note 2, 70.
[37] Supra, note 12, 2.
[38] Constitution of Cambodia (adopted on 21 September 1993), Article 51: "The Kingdom of Cambodia Adopts a Policy of Liberal Democracy and Pluralism."

profit-seeking and the acquisition of growing power and influence. The treatment of HLP rights through Cambodia's modern history presents a revealing microcosm of this dynamic, as it highlights competition over limited HLP resources that are at once indispensable to the day-to-day subsistence of the bulk of Cambodia's population and irresistible sources of patronage profit for its leaders. The resulting tensions have sharpened as the population has grown, land values have increased, and Western title-based conceptions of land tenure have begun crowding out traditional Cambodian norms based on use and local attribution.

The Pre–Khmer Rouge Period

The Cambodian patronage system has its roots in the feudal monarchy that predated French colonization. During its early history, Cambodia was a nominally autonomous kingdom. However, its political fate often hung on the rivalry between its larger neighbors, Vietnam and Siam (Thailand), which exercised their power by demanding tribute and periodically invading and occupying parts of the country.[39] The king personified the nation and sat at the top of a hierarchy of Buddhist religious authorities, court officials, and powerful regional administrators who in turn oversaw village officials and ordinary villagers. The patronage system created vertical linkages within this hierarchy based on a fundamental *quid pro quo*:

> If a person's place was relatively secure, people in weaker positions sought him out and offered homage in exchange for protection. The society, in a sense, was fuelled by the exchange of protection and service implied in these "lopsided friendships[.]"[40]

Acquiring protection from patrons tended to involve incurring debts that sometimes took a lifetime to pay off. This led to a pattern of official corruption and rapaciousness in which those who attained official positions by obliging themselves to a patron were then required to exploit their status, "consuming" those subject to their authority in order to pay their debts.[41] Numerous observers have remarked on the persistence of

[39] Supra, note 12, 113–116.
[40] Id., 105.
[41] Id., 105–106.

patronage in Cambodian political life, as well as its deleterious effects. For instance, a recent study notes that chronically low official salaries combined with the necessity of purchasing official positions and promotions mean that virtually all public services, from education and health care to law enforcement and access to courts, are available subject only to bribes.[42] The plight of the poor, in particular, is compounded when the most basic assistance is made contingent on unaffordable illicit payments. As a result of the patronage system, poor Cambodians commonly cannot afford to educate their children and die of preventable diseases after being turned away from public hospitals.[43]

At a broader level, patronage is inimical to the rule of law and democratic accountability. The current regime in Cambodia arguably survived the transition to democracy and has retained power to this day precisely because it never accepted the principle of accountability to the electorate.[44] Instead, real power is often still exercised through the fealty of local officials to their higher level patrons within the ruling Cambodian Peoples' Party (CPP). With virtually the entire state bureaucracy, from local functionaries to the highest administrators, so heavily invested in what is effectively a political pyramid scheme, there is precious little space for concepts such as respect for individual rights to take hold, let alone a democratic transfer of power. The contemporary patronage system in Cambodia can be described in much the same terms as that which prevailed in the early nineteenth century, namely:

> [A] system in which local positions were valued according to their revenue-generating potential, while higher-level officials wielded power and wealth in accordance with their ability to distribute those positions. Authority was handed down; money was passed upward.[45]

Control of land traditionally played a central role in Cambodian patronage practices. According to traditional law, the title to all land in Cambodia was held by the king, but ordinary Cambodians were accorded the

[42] Christine J. Nissen, Living under the Rule of Corruption: An Analysis of Everyday Forms of Corrupt Practices in Cambodia, Center for Social Development, Phnom Penh (2005), pp. 18–34.
[43] Id., 33 and 37.
[44] Supra Gottesman, note 19, 356.
[45] Id., 329.

right to occupy such land as they could clear and cultivate.[46] Possession was tied closely to productive use, and any land abandoned by its possessor was deemed available to other users after three years.[47] Consistent with this approach, there was no formal registration of land rights, and although villagers were required to declare their landholdings, this was solely for the purpose of collecting annual royalties on their harvests.[48] The extent to which this system lay at the heart of traditional patronage networks was revealed early to the French, who colonized Cambodia in 1863. The first major revolt against the French authorities came in reaction to reforms proposed in 1884, including the institutionalization of private ownership of land. This measure represented a threat to traditional political relations, "which were built up out of entourages, exploitation of labor, and the taxation of harvests (rather than land) for the benefit of the elite, who were now expected to become paid civil servants of the French, administering rather than 'consuming' the people under their control."[49]

As a result, the French tended to limit their property-titling interventions primarily to the areas where money was to be made, such as real-estate speculation in Phnom Penh, large rice plantations in the northwest, and rubber plantations in the northeast.[50] The relative political stability of Cambodia under the French is in part attributed to the fact that colonial administrators tended to accommodate themselves to the patronage system wherever possible and left the bulk of the rural population to continue cultivating rice on small family plots.[51] Although a Civil Code introduced in the 1920s formally introduced private ownership, the cadastral registration process meant to give effect to these new rights was not implemented throughout the country.[52] As a result, traditional land-use practices continued in the countryside, and the main issue under colonialism was the heavy tax burden imposed by the French on the rural population rather than the nature of their tenure.[53] Despite Cambodia's subsequent

[46] East-West Management Institute, Inc. (EWMI), *Land Law of Cambodia: A Study and Research Manual*, Phnom Penh (November 2003), p. 20.
[47] Id.
[48] Id.
[49] Supra, note 12, 144.
[50] Supra, note 34, 10.
[51] Supra, note 12, 138.
[52] Supra, note 46, 21–22.
[53] Supra, note 12, 153–159.

upheavals, the bulk of rural land possession and use could still be described as late as 2001 as "more usufructuary than formal."[54]

The Khmer Rouge and the People's Republic of Kampuchea (PRK) Periods (1975–1989)

The Khmer Rouge came to power in 1975 after having steadily harried the forces of the corrupt and beleaguered Lon Nol regime into a shrinking zone around the capital. When Phnom Penh fell on 19 April 1975, many of its residents – including hundreds of thousands of refugees from the surrounding countryside – welcomed the Khmer Rouge forces in the expectation of being able to accommodate themselves to the new regime. What came next has often been compared to a natural disaster, a "forest fire or typhoon" that swept everything before it.[55] The Khmer Rouge regime, once in power, cut off contact with the outside world and implemented a plan to effectively start Cambodian history over, destroying the urban elite and traditional institutions that had exploited the rural poor, collectivizing all property, and marshalling the entire population into producing surplus rice harvests meant to eventually fund industrialization.[56] The Khmer Rouge's policies were influenced by the Cultural Revolution in China, which supported the Khmer Rouge, rather than the bureaucratic communism of Vietnam, which quickly became its rival.[57]

The Khmer Rouge revolution began with the forced evacuation of some 2 million people from Cambodia's cities to the countryside, where military officers from the former regime as well as educated civilians – teachers, lawyers, civil servants, and doctors – faced systematic execution. The rest were put to work under increasingly inhumane conditions in the rice fields. By 1977, famine was sweeping the countryside and a split in the Khmer Rouge leadership led to an increasingly murderous series of purges. During the same year, border tensions with Vietnam escalated into open conflict, and a large number of eastern Khmer Rouge officers were blamed for the resulting defeat and purged or forced into exile in

[54] Cambodia Development Resource Institute (CDRI), "Social Assessment of Land in Cambodia," *Working Paper No. 20* (November 2001), p. 6.
[55] Id., 209.
[56] Id., 210–211.
[57] Id., 202, and Supra, note 19, 27.

Vietnam. The population of the border region was also punished, with tens of thousands massacred or forced to move to other parts of Cambodia.[58] At the end of 1978, Vietnam invaded and occupied Cambodia, driving the remnants of the Khmer Rouge across the western border into Thailand and installing many of the eastern Khmer Rouge defectors from the previous year as the government of a new Cambodian state, the Peoples' Republic of Kampuchea (PRK).

The Vietnamese found a devastated country in the Khmer Rouge's wake, with much of the infrastructure destroyed and the population traumatized. As many as 2 million Cambodians, or one in five, had died between 1975 and 1979 as a result of political violence, overwork, malnutrition, and disease.[59] Educated Cambodians had been virtually wiped out, complicating later reconstruction efforts. For instance, of at least 400 legal professionals in Cambodia in 1975, no more than 10 are known to have survived.[60] Cambodia's cities were uninhabited ruins, as many as half of its villages were abandoned, and nearly one-third of the countryside lay fallow.[61] Much of the surviving population had been uprooted, and throughout 1979 and 1980 Cambodia's roads were filled with thousands of exhausted foot-travelers who "crisscrossed the country looking for relatives, returning to their homes, trading, or seeking refuge overseas."[62]

Almost immediately upon its installation, the PRK regime announced a policy of inclusiveness and rights, with those displaced offered "the right to return to their old native land" as well as freedom of residence.[63] However, the new regime was as avowedly communist as its Vietnamese backers and saw its primary role as reformers of the basic ideological policies imposed by the Khmer Rouge, rather than abandonment. As a result, the PRK did not renounce the comprehensive nationalizations undertaken by the Khmer Rouge, opting to "inherit" control of the land and continue a policy of collective farming, albeit voluntary rather than forced.[64] The emphasis placed on agriculture resulted not only from the immediate

[58] Id., note 19, 31.
[59] Supra, note 12, 212.
[60] Siphana Sok and Denora Sarin, *Legal System of Cambodia*, Cambodian Legal Resources Development Center, Phnom Penh (1998), p. 20.
[61] Supra, note 19, 11, 39 and 79.
[62] Supra, note 12, 229.
[63] Supra, note 19, 8.
[64] Id., 90–95.

need to address food shortages but also on the PRK regime's mistrust of urban life. Again, like the Khmer Rouge before it, the PRK associated cities with bourgeois behavior, uncontrolled contact between people and private enterprise.[65]

In practice, the PRK's policies were not compatible with its ostensible support for return and freedom of movement. As surviving city-dwellers sought to return to their homes in provincial towns and the capital, they found them cordoned off and accessible only to officials of the new regime, who appropriated and reallocated the housing there at will. Control over urban access tightened as food shortages gave rise to waves of migration from the countryside. Some former urban residents were drafted into the new administration, but more opted to flee to Thailand rather than take their chances in the slums developing at the perimeter of Cambodia's cities.[66] By the early 1980s, the results of the PRK's policies included failing rural collectives whose residents turned to subsistence farming or fled to the cities, clandestine urban repopulation by squatters, and an exodus of refugees – including many of the sorely needed surviving educated Cambodians – who would take their place next to the remnants of the Khmer Rouge regime in camps across the Thai border.

Facing the need to rebuild a functioning state in the wake of the Khmer Rouge's despoliation of Cambodia, the PRK regime was forced to repeatedly sacrifice socialist principles in favor of pragmatism. Due to the lack of central capacity, authority tended to be delegated to regional and local authorities who in many cases had few communist credentials. Chronic economic difficulties also meant that the PRK state had few incentives to offer such officials to keep them from profiting informally from their control over local allocation and distribution of resources. Over time, habitual skimming of revenues by local officials went from being tolerated to being tacitly encouraged as a means of securing their loyalty without having to raise official salaries.[67] This became the basis for a reinvigorated patronage system that handily survived the withering away of communism and which arguably still functions as a central political motor behind the veneer of Cambodia's contemporary democratic system.

[65] Id., 77.
[66] Id., 39–41.
[67] Id., 281.

The administration of housing, land, and natural resources in the PRK quickly came to be mediated by the tendency of the regime to delegate power to the local level. The first such developments came with regard to agricultural land. During the early 1980s, continued reliance on collective farming failed to yield significantly increased rice production, resulting in persistent food shortages and continued rural-urban flight.[68] The PRK authorities responded by backing away from collectivization, if not nationalization. Although all land would formally remain state property, local authorities were delegated the power to allocate parcels for use by individual families.[69] By the mid-1980s, the agricultural sector was largely de facto privatized, with collective farming existing in name only in many regions.[70] The balance of evidence indicates that this initial allocation of land to rural families was largely equitable, with larger families receiving more land and female-headed households fully included.[71] However, rice yields remained poor amid rumors that many local authorities had abused their discretion in order to take possession of available land and distribute it "not to the people, through formal distribution systems, but to each other."[72] In other words, even at a time when land still had no formal market value, a precedent for siphoning off attractive parcels into local patronage networks had already been established.

Continued urban migration throughout the 1980s eventually overcame the PRK authorities' ability to suppress squatting. As a result, by 1983, the country's leaders were forced to take belated steps to regulate distinctly market-based urban economies.[73] As with the debate over land and collectivization, high socialist principle quickly fell to expedience.[74] Urban real estate, like rural land, was generally treated as there for the taking,

[68] Id., 93.
[69] Id., 94-5.
[70] Id., 273.
[71] See, for instance, John C. Brown, "Evolution of a Farming Village over 35 years," *Phnom Penh Post* (23 September 1994).
[72] Supra, note 19, 273. See also Supra note 34, 13: "[W]hilst the area of land to be provided to each family was prescribed, the possibility for bias, in favour of the families and neighbors of village chiefs, was provided by variations in quality and locations."
[73] Supra, note 19, 189.
[74] Id., 190. Specifically, the regime felt itself obligated, first, to tax rather than suppress the private sector, and second, to delegate tax collection to local officials who had the capacity to undertake this task but quickly became accustomed to keeping much of the take for themselves.

without regard for the claims of owners and users displaced during the prior years of turbulence. Houses and apartments were allocated by hierarchy, with civil and military authorities taking the best housing for themselves and leaving families to subdivide and squat in whatever else was available:

> Even if possession was tolerated, the lack of recognition of private property precluded the financial incentives – the right to rent, to sell, or to use property as collateral – that would have encouraged people to take more than was necessary. The only motivation for occupying an entire house, then, was the immodesty of living well, an indulgence that few but the most powerful and secure cadres were willing to risk.[75]

Finally, natural resources and particularly timber quickly came under the de facto control of local officials whose overexploitation met few obstacles from the under-resourced state authorities. By 1984, responsibility for timber cutting was formally decentralized.[76] As such, it fell largely under the control of the military, which functioned as a patronage system in its own right – with soldiers "in effect, acting as tax collectors for their commanding officers or local authorities."[77] Because local military units had exclusive access to remote and insecure parts of the country, they were well positioned to exploit their discretion to log Cambodia's forests.[78]

The State of Cambodia (SOC) Period (1990–1991)

By 1989, Cambodia was coming under increased pressure to facilitate regional détente by negotiating an end to its long-running conflict with both the Khmer Rouge remnants and noncommunist rebel groups based across the border in Thailand. The PRK formally abandoned socialism in 1988, and 1989 saw the withdrawal of Vietnamese troops and advisors as well as liberal constitutional reforms, including the change of the PRK's name to the less ideologically laden "State of Cambodia" (SOC).[79]

[75] Id., 76.
[76] Id., 156.
[77] Id., 229.
[78] Id., 230.
[79] Id., 303.

Around the same time, the ruling communist party re-dubbed itself the Cambodian Peoples' Party (CPP). Facing the necessity of negotiations and, ultimately, political engagement with the rebel factions, the CPP authorities engaged in pre-emptive reforms meant to burnish their own brand new democratic credentials. Although these reforms tended to be couched in the language of human rights and liberal economic reform, they were often quite clearly calculated to consolidate the CPP's control over the disposition and allocation of resources. These motives were particularly evident in the CPP's ostensible privatization of land and residential property.

Land privatization began in April 1989 with a government decree that confirmed the collective ownership of residential land but allowed for private acquisition and transfer of title to houses.[80] A subsequent instruction appeared to extend private ownership to land, and constitutional amendments undertaken later in 1989 formalized the recognition of private ownership interests in land and property without entirely clarifying how extensive they were to be.[81] These reforms appeared to constitute both an accommodation to a de facto situation in which provincial party officials were exploiting (rather than suppressing) local markets in land, and an incentive to raise agricultural output and stem rural migration to cities.

Coming on the heels of earlier land distribution programs, the privatization policies could be seen as something of a throwback to Cambodia's indigenous legal traditions, in that they "reaffirmed the principle that possession is essentially linked to use of the land."[82] However, the CPP was not acting in a historical vacuum. In granting new title to land that had originally been forcibly collectivized by the Khmer Rouge, the CPP was consciously attempting to pre-empt claims by pre-1979 owners and users before they could be raised in the context of the impending peace negotiations.[83] In principle, those who had survived the Khmer

[80] Sub-Decree on the granting of house ownership to the citizens of Kampuchea, No. 25, dated 22 April 1989, cited in Supra, note 46, 23.

[81] Id., 23: Instruction on Implementation of Land Use and Management Policy, No. 03, SNN of 03 June 1989. This instruction recognized ownership rights in residential land, as well as agricultural land parcels smaller than 5 hectares.

[82] Supra, note 46, 23. See also Supra note 54, 15.

[83] Supra, note 19, 320. The author notes, at 318, that enterprise privatization was also considered as a means of blocking historical claims to factories in light of the prospect of future power-sharing with the Cambodian resistance factions then in exile.

Rouge regime and remained in the PRK, rather than fleeing to Thailand or beyond, would be rewarded, in time-honored tradition, with recognition of their rights to land they had occupied and used. Also implicit in this arrangement was the corollary traditional rule that those who had fled the PRK had abandoned their land, thereby relinquishing any rights to it.

In practice, land privatization under the SOC was less equitable than the prior allocation of land under the PRK. The conversion of relatively flexible communist-era user rights into less ambiguous ownership rights, including the right to exclude others, added a new, zero-sum dynamic to land relations. Competition over land rights was particularly fierce in the capital, where the prospect of peace and an end to decades of international isolation had led to a property boom.[84] The result was a chaotic free-for-all, described by one CPP official as "a war of houses and a war of land" in which the rich and powerful locked in their gains and many small landholders went into debt or lost everything:[85]

> In the countryside, a new bureaucracy – the district cadastre offices – emerged to grant land titles and generate revenues. The offices, which had no resources, rarely conducted investigations into claims. Instead, they distributed papers and levied taxes on registration papers and official seals. The program was plagued by corruption, military land grabs, distribution to local officials, the use of false names, nepotism, and incompetence. Cadastre officials frequently issued land titles to people with competing claims. Bribes were necessary to secure land titles, pay off officials in cases of disputed claims, or pay neighbors to collaborate claims.
>
> The most urgent privatization and the biggest problems occurred in Phnom Penh, where property was most valuable. Encouraged by the regime to seek income in the private market, residents transformed their houses into hotels and guesthouses or rented them to international organizations, foreign companies, and individuals. Those who shared housing with other families now saw the financial incentives of sole possession. Disputes arose constantly. Many houses

[84] Supra, note 12, 236.

[85] Supra, note 19, 320. The author cites a study by Viviane Frings, according to which "the cost of the land-titling program forced peasants to borrow money at an average interest rate of 15–20 percent a month and, at times, to sell their land."

were sold multiple times to multiple buyers. When subsequent buyers were more powerful, intimidation usually resulted in the voiding of the first agreement.[86]

By 2001, only an estimated 15 percent of some 4 million applications submitted for land tenure certificates had been processed.[87] Because of its incomplete and corrupt implementation, the SOC privatization undermined precisely the legal certainty in Cambodian property relations that it was notionally meant to facilitate. Because privatization and registration of property remained confusing and unaffordable for most poor rural Cambodians, private property rights existed in an ambiguous parallel relationship with the traditional Cambodian tenure forms based on use and local attribution that they were meant to supplant.[88] This lack of legal clarity has become one of the main contributing factors to an ongoing pattern of rural land-grabbing and speculation, in which rich or well-connected individuals are awarded formal title to land despite its longstanding occupation and use by poor farmers.[89]

Although privatization may have been a disaster in its own terms, undoing much of the tenure security introduced through the earlier land allocation program, it appears to have been more successful in its implicit goal of pre-empting serious consideration of property restitution to Cambodian refugees and IDPs. Meanwhile, the CPP attempted to further isolate its future political opposition – the rebel groups still operating from Thai border camps – through diplomatic overtures to the government of Thailand. These included concessions for Thai business concerns to harvest timber along Cambodia's western border, further accelerating the country's deforestation. According to estimates at the time, Cambodia's forested land fell from 11 million hectares to 7 million in the decade between the fall of the Khmer Rouge and the initiation of peace talks.[90]

[86] Id., 320.
[87] Supra, note 34, 14.
[88] Supra, note 54, 16.
[89] Id., 16–17. For a detailed description of a recent case of alleged land-grabbing in which five villagers resisting eviction were killed, see Cambodian Human Rights Action Committee (CHRAC), "High Price of Land: the Deadly Eviction of Kbal Spean" (August 2005).
[90] Supra, note 19, 293.

The UNTAC Period and Beyond

By the time of the Paris Peace Agreement and the arrival of the first UNTAC officials in early 1992, the CPP's land policies had gone a long way toward creating facts on the ground that would help to secure its political future even after its failure to win a majority in the 1993 multiparty elections. Although land distribution had begun as a derogation from collectivization policies justified in terms of food security, it took on additional utility in the context of political transition. In this context, privatization of previously distributed land served to eliminate the threat presented by pre-1979 claims to HLP resources that had become important factors in retaining the loyalty of a countrywide CPP patronage network.

The terms of the Paris Peace Agreement did little to address this situation, providing no clear textual support for either redressing HLP violations dating back to the Khmer Rouge period or treating prospective tenure security as a human rights priority. In practice, UNTAC tended to view HLP issues in the context of political affairs or economic development, rather than in terms of transitional justice and prospective human rights protection. HLP issues were of potentially direct significance to only one core area of UNTAC's mandate, namely, repatriation. However, although many of the 360,000 refugees UNTAC and UNHCR ultimately repatriated from Thai border camps had previously left behind homes and land in Cambodia, neither restitution nor return of refugees to their homes of origin was mentioned in the Paris Peace Agreement. Annex 4 of the Agreement, which regulated the repatriation process, stressed individual choice of destination and voluntary assisted return of Cambodian refugees and displaced persons, but only "to their homeland."[91]

Although property restitution was not seriously discussed, UNHCR did initially seek to facilitate repatriation of refugees, 60 percent of whom were from agricultural backgrounds, by offering them land as well as other material assistance upon their return.[92] Even taking into account the high

[91] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Annex 4, Part II, para. 3. The guaranteed rights of repatriates included "freedom of movement within Cambodia, the choice of domicile and employment, and the right to property," but these undertakings were only clearly applicable on a prospective basis. Id., Annex 4, Part II, para. 4.

[92] Supra, note 8, 173–174, 177.

number of people involved, UNHCR's initial offer of 2 hectares per individual returnee appeared reasonable in light of studies showing that up to 240,000 hectares of land were available at the time in Cambodia.[93] In fact, initial projections of land availability were so optimistic that free choice of destination was guaranteed – in theory, wherever repatriates chose to settle, land would be found.[94] However, the land option and choice of destination were quickly downplayed in response to concerns seen in implementation. First, much of the refugee population in Thailand initially registered to repatriate to nearby northwestern Cambodia, even though many did not originally live there and the area was "heavily mined and desperately short of good agricultural land."[95] A related concern was that the refugees' professed choices were being or could be improperly influenced by the political factions' desires to maintain captive, geographically concentrated political constituencies.[96]

However, a fundamental problem was that far less land was generally available than had initially been thought.[97] It quickly became evident that "the local level authorities were not cooperating with UNHCR in distributing the land."[98] While a great deal of land was mined, other ostensibly available plots had become subject to competing claims, leaving only inaccessible and low-quality land available to returnees.[99] As with prior domestic land distribution and privatization programs, dependence on local authorities for the distribution of available land left returnees subject to local political priorities. In the end, UNHCR had little option but to climb down, supplementing the offer of land with an alternative cash grant option, which most repatriates ultimately took. In order to augment the sustainability of such landless repatriations, the UNHCR also

[93] Id., 179.
[94] Iain Guest, "UNHCR Tries to be Flexible in Repatriating Border Camp Refugees," in *Phnom Penh Post* (4 December 1992).
[95] Id.
[96] Sara Colm, "U.N. Repatriation Program Passes Halfway Point," in *Phnom Penh Post* (4 December 1992).
[97] UNHCR, "Repatriation and Peacebuilding in the Early 1990s," in *State of the World's Refugees 2000* (2000), 146.
[98] Supra, note 8, 179.
[99] Supra, note 97. A UNHCR protection officer based in Battambang, Cambodia, is quoted as saying: "We'd have a piece of paper guaranteeing UNHCR 500 hectares of land but by the time we got to some areas, other factions had taken the land. There was all sorts of political maneuvering."

departed from the principle of free choice, prioritizing the repatriation of those willing to return to their villages of origin where, in many cases, remaining relatives and friends could provide shelter and access to land.[100]

The focus on returning repatriates to their home villages appears to have been largely successful in terms of dispersing returnees to places where they would have an initial support network. It also reassured the Cambodian authorities, who had been concerned about the possibility of a mass influx of cash grant–bearing returnees into already overcrowded urban areas.[101] In justifying evictions, officials nevertheless tended to indiscriminately label urban squatters as opportunistic repatriates, even in cases of sites occupied since the 1980s.[102] Questions about the ultimate sustainability of repatriation without the provision of land remained, with studies carried out in 1995 indicating that as many as 40 percent of all repatriates were unable to meet their basic daily needs, primarily due to lack of arable land.[103] However, even had repatriates been able to receive land as initially anticipated, it is worth noting that the program was never framed as a legal remedy for homes and lands previously lost, but rather as a form of humanitarian repatriation assistance, available upon application rather than as a right.

Repatriation appears to represent the only area in which UNTAC adopted a systematic (if unsuccessful) policy on HLP issues. In all other areas, HLP policy was left primarily to the domestic authorities. The most notable example of this came early in UNTAC's mandate, with the mission's acceptance, by default, of the passage of a law regulating land relations. One of the signal features of this 1992 Land Law was the fact that it explicitly extinguished all pre-1979 rights in land, effectively codifying the effects of the CPP's privatization program.[104] However, the law also

[100] Supra, note 95.

[101] Supra, note 98, 147. While some repatriates – particularly those who had developed the language skills in the border camps – did move to Phnom Penh to seek jobs with the international community, they were generally unable to find housing and many ended up settling in squatter camps under constant threat of eviction. See, for example, Jon Ogden, "Tears, Looting as Forces Move on Boeng Kak," in *Phnom Penh Post* (March 11, 1994).

[102] See, e.g., Sara Colm, "Sides Dig in for B'bang Squat Battle," in *Phnom Penh Post* (25 March 1994).

[103] Maja Wallengren, "Many Returnees Still Looking for a Better Life," in *Phnom Penh Post* (15 December 1995).

[104] Law Dated 13 October 1992 on the Land (unofficial translation), Article 1: "All the land in Cambodia belongs to the State and shall be governed and protected in agreement by the State. The State does not recognize the land property right existing before 1979. The property right and any other rights related to the land shall be governed by this law."

included extensive provisions on land management, including rules on the prospective acquisition of land rights through lawful occupation. The legitimacy of the 1992 Land Law was open to question in light of the fact that it was enacted by the SOC regime at a time when the Supreme National Council (SNC), a transitional body comprising all the parties to the Peace Agreement, had technically assumed sovereignty in Cambodia.[105] However, despite its dubious provenance, the 1992 Land Law was treated as operational by UNTAC and the post-UNTAC international presence in Cambodia for nearly a decade, until it was replaced with new legislation in 2001.[106]

Although the 1992 Land Law represented the culmination of the CPP's efforts to cut off prior land claims without redress, this fairly severe provision was balanced, in theory, by rules permitting any citizen prospective access to land in accordance with the Cambodian tradition of acquisitive possession. The law stipulated that peaceable occupation of land would give rise to title within five years, but the effectiveness of this provision appears to have been severely limited by lack of awareness the procedures for benefiting from it.[107] However, even had the law been widely understood, it is not clear that it would have been implemented. As previously evidenced by the SOC-era privatization program, the underfunded state administration lacked the capacity to ensure that the law was applied even-handedly. In many cases, the prevalent logic of patronage politics made local land administration more responsive to bribes or political influence than the text of any legal provisions. Meanwhile, the stakes were set to increase dramatically in the post-UNTAC period, as relative political stability, the return of refugees, and the opening up of the economy led to increased demand for land and housing. As land was reclaimed in former frontline areas and job opportunities appeared in the cities, new migration flows appeared, creating localized disputes over HLP resources.

[105] Supra, note 46, 34.

[106] Both UNTAC and its international successors were operating in an environment where fundamental legislation in numerous areas was either badly in need of amendment or altogether nonexistent. For instance, UNTAC was required to devote considerable energy to the drafting of transitional criminal law codes.

[107] Supra, note 46, 25. In particular, beneficiaries were required to officially apply for recognition of title at the time that they began occupying the land in question, a rule that remained unknown to most of the population of potential beneficiaries.

The most visible manifestation of Cambodia's looming land and housing crisis was the growth of squatter communities in Phnom Penh, with demobilized soldiers, rural migrants, and repatriates attracted by the possibility of jobs and willing to pay significant sums to live in central areas despite a lack of services and utilities and the threat of eviction. In many respects, this influx represented the intensification of a trend that had begun prior to UNTAC's arrival and intensified during its tenure.[108] However, a rash of violent forced evictions of urban squatters that began during the UNTAC period and continued through the mid-1990s shifted HLP issues squarely onto the post-UNTAC human rights agenda. In the wake of UNTAC, a Cambodian office of the UN Human Rights Centre (later the Office of the High Commissioner for Human Rights, or OHCHR) was set up in Phnom Penh and a Special Representative of the UN Secretary General (SRSG) for Human Rights in Cambodia appointed.[109] Both institutions have continued to monitor the human rights situation in Cambodia, alongside domestic human rights NGOs, and have consistently identified HLP issues as some of the most pressing in the country.

In 1995, the SRSG noted that the situation of squatters and the homeless in Phnom Penh raised issues in terms of Cambodia's housing obligations under the ICESCR, reflecting a general shift to viewing HLP issues in terms of their human rights consequences as well as their political implications.[110] The SRSG also noted that many squatters in Phnom Penh had fulfilled the five-year statutory period for acquisition of ownership rights required under the Land Law to be entitled to seek ownership rights, highlighting the fact that domestic laws were not being implemented in the spirit of Cambodia's international obligations.[111]

In fact, the response of the Cambodian authorities to squatting in the capital was characterized by a complete failure to respect the right to adequate housing. From the beginning, the authorities refused to

[108] Paul Rabe, "Report on Housing Rights and Forced Evictions in Phnom Penh: An Overall View of Historical Trends in Housing" (unpublished draft, 30 July 2004), 12–13.

[109] Michael Hayes, "Post-UNTAC HR Presence Assured," in *Phnom Penh Post* (12 March 1993).

[110] Recommendations made by the Special Representative of the Secretary General for Human Rights in Cambodia on matters within his mandate, General Assembly, U.N. Doc. A/50/681 (26 October 1995), para. 29.

[111] Id., para. 24.

meaningfully consult with slum residents, and engaged in violent and sometimes deadly police actions in order to evict them.[112] Although many squatters had paid local authorities to use the land they occupied and built permanent structures, they often saw their property destroyed and looted during evictions and received no compensation.[113] Perhaps most damaging, the city authorities fixated on resolving the problem through relocation to distant peripheral sites, despite clear evidence that insufficient land and resources existed for sustainable resettlement of the estimated 150,000 squatters – some 15 percent of Phnom Penh's total population at the time.[114] One early attempt at planned relocation was not only paid for largely by foreign donors, but – predictably – failed to take root because it was located too far from the wage labor jobs that had drawn its beneficiaries to Phnom Penh in the first place.[115]

Outside of Phnom Penh, squatting, land disputes, and forced evictions also spread in the provinces. Land disputes were particularly fierce in areas earmarked for economic development, such as the tourist sites around the Angkor Wat temple complex, and former frontline areas where prior displacement left land open to settlement and disputes.[116] Rural tenure security was further compromised by a nearly unregulated program of "economic concessions" of land for commercial exploitation by private enterprises that came to take up as much as one-third of Cambodia's most

[112] Supra, note 109, 15. See also, e.g., Mark Dodd and Ker Munthit, "Squatting Soldiers Fire at Police," in *Phnom Penh Post* (28 January 1994); "Homes Burnt as Soldiers Battle Rebels," in *Phnom Penh Post* (25 February 1994).

[113] See, e.g., Jon Ogden, "Tears, Looting as Forces Move on Boeng Kak," in *Phnom Penh Post* (11 March 1994); Mang Channo, "Squatters See Their Homes Destroyed," in *Phnom Penh Post* (16 June 1995).

[114] Bronwyn Curran, "Curbs Urged on Land Speculators," in *Phnom Penh Post* (11 March 1994). Just as demands to evict squatters resulted from the rising value of land in central Phnom Penh to speculators, plans to resettle them were stymied by the urge to promote private development. For instance, in one case, an anticipated relocation site was reserved instead for private development as a golf course. Mang Channo, "Squatters Housing Plans Hooked into the Rough," in *Phnom Penh Post* (27 January 1995).

[115] Jason Barber, "Squatters: In Search of the Elusive Answer," in *Phnom Penh Post* (5 May 1995). Attempts to develop a model village at Trapeng Reang, 15 kilometers outside Phnom Penh, were also beset by official corruption, the allocation of inappropriate (flood-prone) land, and lack of involvement of the beneficiaries in planning. Asked how squatters should be expected to make a living far outside Phnom Penh, one city official suggested that "international organizations . . . can create some occupations for them."

[116] See, for instance, Sara Colm, "Sides Dig in for B'bang Squat Battle," in *Phnom Penh Post* (25 March 1994); Huw Watkin, "Land Ownership 'a Real Mess': Courts Backed Up," in *Phnom Penh Post* (14 June 1996).

productive land.[117] Timber also became a major source of income for all the post-war political factions in Cambodia, with the felling of the country's forests providing as much as 80 percent of Cambodia's official export earnings during the mid-1990s.[118] Although official bans on timber exports were imposed in response to concerns that much of Cambodia could be rendered permanently arid, illegal logging and exports continue to be a problem.[119] Together with the failure of the government to revoke illegal economic concessions granted in highland forested areas, the persistent demand for timber has threatened many of Cambodia's minority indigenous groups with displacement and the destruction of their way of life.[120]

By the mid-1990s, the combined efforts of UN agencies, concerned donors, and domestic NGOs saw some progress achieved. In Phnom Penh, initiatives to upgrade many informal settlements, rather than simply demolishing them and relocating the residents, had received the endorsement of the prime minister by 2003.[121] In the late 1990s, international donors encouraged the drafting of new legislation to better regulate land issues.[122] The resulting Land Law of 2001 created a legal framework that went a long way, on paper, toward prospectively securing rights to land and housing. The 2001 Land Law recognized acquisitive possession by those who had begun their occupation prior to its passage, but stipulated that future land distribution was meant to take place through a more organized system of planned "social land concessions" rather than individual self-help.[123] It also protected existing property rights by conditioning expropriation on public interest grounds, the legal process, and "fair and just compensation" as well as recognizing the collective ownership rights

[117] Peter Leuprecht, SRSG for human right in Cambodia, "Land Concessions for Economic Purposes in Cambodia: A Human Rights Perspective" (November 2004), p. 3.

[118] Angela Gennino and Sara Colm, "Forests Threatened by Logging Free-for-All," in *Phnom Penh Post* (24 July 1992).

[119] Liz Gilliland, "Govt Powerless to Halt Logs," in *Phnom Penh Post* (8 April 1994).

[120] NGO Forum on Cambodia, "Land Alienation from Indigenous Minority Communities in Ratanakiri" (November 2004).

[121] Supra, note 109, 15. The author notes that positive policy changes often appear to have been adopted for "electoral purposes."

[122] The 2001 Land Law came as part of a proliferation of internationally sponsored legal drafting processes, and Cambodian agreement to participate was to some extent leveraged through economic conditionality. See Simbolon, 16 and 20.

[123] Cambodian Land Law of 2001, Title II, Chapter 5. Article 7 of the Law confirms the extinction of pre-1979 land rights originally codified in the 1992 Land Law: "Any regime of ownership of immovable property prior to 1979 shall not be recognized."

of indigenous groups to their traditional lands.[124] Over the long term, property interests are to be protected by a comprehensive titling and demarcation regime in which all of Cambodia's land is to be registered and mapped.[125]

Despite the best efforts of many international actors and Cambodian human rights NGOs, the promises and protections set out in the 2001 Land Law have not been fully realized. Five years after the passage of the law, the Cambodian authorities have yet to authorize a single social land concession despite having sustained numerous economic concessions that exceed the limits set by the law, perpetuating the tenure insecurity of subsistence farmers and indigenous communities. Meanwhile, rights to land acquired through settled possession are often ignored, and expropriation procedures tend to be peremptory and irregular. Moreover, slum clearances and forced evictions in Phnom Penh have continued nearly unabated, without meaningful consultation or compensation and with a continued focus on relocation to distant and inappropriate relocation sites rather than upgrading. As recently as June 2006, some 1,200 families comprising 6,000 people were forcibly evicted from the Bassac settlement in central Phnom Penh and relocated to an unprepared site 20 kilometers away under conditions giving rise to what many observers described as a humanitarian emergency:

> One household occupies less than five by five meters. Most families take shelter under plastic sheets or other makeshift materials, not sufficient to provide privacy and dignity. Only a few families have received tarpaulins. Muddy water standing in pools created by heavy rainfalls is used for washing and cleaning. The municipality provides only two or three trucks of drinkable water a day. There are not enough provisional toilets. Public health service is not available on a regular basis. Medicine is distributed by some NGOs only. Located more than 20 kilometers from their former homes, most people have lost their meager income making opportunities and many are already starving. There is no administration of this site and security is not guaranteed: People do not leave their small huts for fear that others will take their few belongings. The most vulnerable groups,

[124] Cambodian Land Law of 2001, Article 5 and Title I, Chapter 3, Part 2.
[125] Cambodian Land Law of 2001, Title VI.

> including women, infants and children, older people, disabled people and people living with HIV/AIDS, are already affected by this precarious situation and their condition is at high risk of worsening.[126]

Citing ongoing HLP violations as well as corruption, suppression of political dissent, and manipulation of the judiciary, the current SRSG, Yash Ghai, recently concluded that it was no longer sufficient for the international community in Cambodia to focus on "technical assistance and capacity building" activities, such as the promotion of the 2001 Land Law and ongoing efforts to assist in drafting its implementing regulations.[127] Other observers have also called for the focus to shift from codification of Cambodia's human rights obligations to their implementation. For instance, the Asia Director of Human Rights Watch accused the Cambodian government of having "taken donors for a ride" for over a decade by "promising reforms but failing to deliver."[128] On the recent occasion of the fifteenth anniversary of the Paris Peace Agreement, Prime Minister Hun Sen sought to downplay the role of UNTAC, crediting the CPP policy of co-opting other political factions with achieving peace, stability, and reconciliation in Cambodia.[129] However, diplomatic observers noted that the failure to secure HLP rights – an issue not treated as a priority during the UNTAC period – represented one of the greatest current threats to the progress made since 1991.[130]

Lessons from the UNTAC Approach to HLP Rights

It is difficult, in hindsight, to pass judgment with confidence on UNTAC's legacy in promoting respect for HLP rights. The UNTAC

[126] CCHR, "Relocation of Sambok Chab Villagers Threatens a Humanitarian Crisis – Phnom Penh City Hall Must Now Guarantee the Basic Human Rights," Press Release (22 June 2006).

[127] Special Representative of the Secretary General for Human Rights in Cambodia, Mr. Yash Ghai, "Statement to the Human Rights Council" (26 September 2006).

[128] Human Rights Watch, "Cambodia: Time for Tangible Progress Instead of Empty Promises," Press Release (4 October 2006).

[129] Erik Wasson, "Gov't Lauds Its Gains in 15 Years Since Paris," in *The Cambodia Daily* (23 October 2006).

[130] Id. The British Ambassador is quoted as saying that while achieving peace represented a great success, "[w]hat [people] do not want is to have their land grabbed, their forests stolen or their water polluted. The poor as well as the rich expect to be treated with dignity."

mandate was unprecedented in its time, representing one of the first and most ambitious in a series of large, multidimensional peacebuilding efforts authorized by an increasingly assertive post–Cold War UN Security Council. Although many of its failures appear obvious now, this apparent clarity may be in part a factor of our ability to analyze UNTAC's approach in the light of lessons learned in the context of numerous subsequent UN peace missions. It is certainly easier to criticize later efforts that had the benefit of insights gained in Cambodia and other early interventions.

The failure of UNTAC's leadership to anticipate many of the obstacles they would face may also be mitigated by the particular context in which they were operating. Although it appears that few systematic efforts were made to provide UNTAC staff with briefings or guidance, such attempts would have been complicated by the fact that Cambodia had been ruled for the prior generation by two of the most secretive regimes in history. The Khmer Rouge had cut off virtually all links with the outside world and waited for two years after taking power before even formally announcing itself to its domestic subjects.[131] After the fall of the Khmer Rouge in 1979, the PRK/SOC regime had continued to operate in isolation from much of the world and left behind almost no public records of its decision-making processes.[132] As a result, relatively little reliable information was available regarding nearly twenty years of Cambodian history prior to UNTAC deployment.

These caveats must be balanced with the fact that UNTAC did less than it might have to promote respect for HLP rights in Cambodia. Remedies for the land and property lost by refugees, and effectively expropriated through the SOC's privatization initiative, were never seriously discussed, leaving repatriates dependent on the discretion of local authorities and the kindness of friends and relatives in seeking to re-establish homes and livelihoods. Likewise, the prospective resolutions of land and property disputes were treated as a political issue, implying significant discretion, rather than being framed as an integral part of Cambodia's binding human rights obligations. In considering UNTAC's legacy, it is worth examining

[131] Supra, note 12, 221.

[132] Supra, note 19, xi–xii. The author describes coming to Cambodia in 1994 to work on legal reform and haphazardly coming across piles of uncatalogued and unpublished records from the previous PRK/SOC era gathering dust in the corners of ministries.

each of these issues – retrospective remedies and prospective human rights protection – in turn.

Retrospective Remedies

In light of contemporary practice, the failure of the UN to acknowledge pre-1979 property claims in Cambodia may seem almost shocking. It can be assumed that the bulk of the 360,000 Cambodian refugees who sought shelter abroad in the wake of the Khmer Rouge regime and the 1979 Vietnamese invasion had been forced to flee homes, lands, and properties that may have provided their families with shelter and subsistence for years or even generations. Over a decade later, these refugees were expected to return to Cambodia with no guarantees that their rights in these assets would be respected, and, in fact, they had every reason to suspect that they would not be. In the vacuum of centralized authority that existed during the early years of the PRK, homes and land had been appropriated, returned to, or left fallow almost at random, as officials confiscated and allocated properties and ordinary citizens returned to or squatted in whatever was available. With time, these haphazard occupations were transformed into property interests through privatization, giving rise, in effect, to uncompensated expropriations of thousands of properties.

However, from UNTAC's perspective in 1992, the Paris Peace Agreement did little to address either the greater transitional justice issues, such as criminal responsibility, or more prosaic ones, such as restitution of housing and property, beyond setting out a vague commitment to "ensure that the policies and practices of the past shall never be allowed to return." For many observers, this provision amounted to a passing of the buck regarding all transitional justice issues to some future Cambodian government.[133] What became apparent was that the agreement of the parties to a peace deal, however shaky, was more important for the time being than addressing their past acts. Revisiting the grievances generated by Cambodia's years of conflict during the negotiation of the Paris Peace Agreements might have threatened the participation of the parties accused of responsibility for them. The observations of the Documentation Center of

[133] Suzannah Linton, *Reconciliation in Cambodia*, Documentation Center of Cambodia, Phnom Penh (2004), p. 42.

Cambodia on the failure to demand prosecution of perpetrators (which would have precluded the participation of the former Khmer Rouge insurgents in the process) set out a logic that readily applies to the failure to consider property restitution:

> [G]etting the parties to agree to a comprehensive peace settlement was considered more pressing than accountability for the exceptionally serious crimes committed in Cambodia. Thus, despite its human rights mandate, UNTAC was not given the authority to investigate or prosecute the crimes of the past.[134]

However, unlike criminal prosecutions, UNTAC might arguably have sought to pursue remedies for the expropriation of refugees' properties, both in the context of its human rights mandate and as an element of support for the repatriation process it was responsible for overseeing. After all, the rationales of remedying HLP violations and supporting sustainable return have driven subsequent peace processes and inspired a UN standard-setting process that recently culminated in the promulgation of *Principles on Housing and Property Restitution for Refugees and Displaced Persons*.[135] However, with a view to contextual factors at the time, UNTAC's failure to seek a remedy for pre-1979 displacement and dispossession may nevertheless have been justified. First, the international law at the time presented little in the way of standards, norms, or even practice in favor of restitution in cases such as Cambodia. From this perspective, the fact that restitution achieved clear prominence as a peacebuilding tool only four years later in Bosnia may be seen as a sign of progress, albeit one that did little to ease the plight of dispossessed Cambodians. Second, a number of specific local factors would have greatly complicated restitution, perhaps even ruling it out as genuinely impossible or impracticable under the circumstances.

In terms of international law, there was no significant precedent for returning homes and land directly to people displaced from them prior to the end of the Cold War. In fact, forced population exchanges precluding restitution or return had been countenanced under international law

[134] Id., 44.

[135] "Principles on Housing and Property Restitution for Refugees and Displaced Persons" ('The Pinheiro Principles'), UN Sub-Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/17 (28 June 2005).

as recently as the end of World War II.[136] German post-war reparations to Jewish victims of the Holocaust and their heirs had set an international precedent by allowing for reparations to be made directly to victimized individuals rather than solely to the states that claimed entitlement.[137] However, such reparations typically took the form of cash payments or benefits, rather than outright restitution of confiscated assets. Finally, although most multilateral and regional human rights conventions incorporate a right to effective domestic remedies for victims of violations, the Cambodian authorities were arguably not bound by such provisions with regard to events prior to 1992, when they began formally acceding to such treaties.

Restitution is often justified not only as a remedy for dispossession and displacement, but also as a practical means of facilitating the return of the displaced to their homes of origin. However, the notion of a right of return to one's home is a relatively recent assertion that goes beyond the established "right of return" under international law. In the traditional sense, the right to return was a corollary of the right to leave one's country and so, as in the Universal Declaration of Human Rights (UDHR), applied to the right of every person to "to return *to his country*."[138] Subsequent human rights conventions followed this approach.[139] As a result, despite increasingly wide contemporary international acceptance, the concept of a right to return to one's *home* of origin – rather than merely to the frontiers of one's *country* of origin – was not supported by either international law or practice during UNTAC's time.

However, despite the lack of compelling support for restitution and return in international law in the immediate wake of the Cold War, the centrality of addressing displacement in the resolution of ethnic conflict led to significant developments in a number of early 1990s peace processes. For instance, where the UNHCR in Cambodia promised land to

[136] Eric Rosand, "The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?," *Michigan Journal of International Law* 19 (1998), 1115–1117.

[137] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices*, Norton, New York (2000), pp. xxii–xxiv.

[138] Universal Declaration of Human Rights (UDHR), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Article 13 (2), emphasis added.

[139] See, for instance, the International Covenant on Civil and Political Rights (ICCPR), Article 12 (2), the African Charter on Human and Peoples' Rights (ACHPR), Article 12(2); the American Convention on Human Rights (ACHR), Article 22(5); and Article 3(2) of the Fourth Protocol to the European Convention on Human Rights (ECHR).

repatriates as a form of assistance rather than a remedy (and subsequently failed to deliver), a 1992 UNHCR-brokered repatriation agreement for Guatemalan refugees in Mexico provided for the possibility of restitution and resulted in many dispossessed Guatemalan refugees at least receiving land grants, as a matter of rights rather than humanitarian assistance, in practice.[140] However, the clearest breakthrough came in the form of the 1995 Dayton Peace Accords, which not only ended the war in Bosnia but set out strong rights of restitution and return to homes of origin:

> All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.[141]

The unambiguous nature of the rights set out in the Dayton Peace Accords, combined with the fact that they were actually implemented to a significant degree, have led to greater acceptance of the rights of displaced persons to claim and return to their former homes and lands.[142] As early as 1998, the Dayton Accords played a major role in justifying the inclusion of state responsibilities to provide for restitution and return in the drafting of the UN *Guiding Principles on Internal Displacement*.[143] Later, the Bosnia precedent would also come to be one of the main examples of state practice drawn upon in the elaboration of the *Principles on Housing and Property Restitution for Refugees and Displaced Persons*.[144] However, UNTAC's mandate in Cambodia largely preceded these developments, leaving it without the benefit of relevant prior practice in this area.

On the other hand, many local peculiarities of peacebuilding in Cambodia militated against property restitution at the time. Because, as

[140] R. Andrew Painter, "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996), 153–255.

[141] General Framework Agreement for Peace in Bosnia Herzegovina, 35 I.L.M. 75 (1995), Annex 7, Article 1.

[142] Supra, note 137, 1139.

[143] Walter Kälin, "Guiding Principles on Internal Displacement: Annotations," *Studies in Transnational Legal Policy*, no. 32 (2000), 70 and 73; see also The Guiding Principles on Internal Displacement, Commission on Human Rights, UN Doc. E/CN.4/1998/53/Add.2 (1998), Principles 28 and 29.

[144] Pinheiro, Preliminary Report, paras. 21–29.

discussed above, the UN tended to err on the side of accommodating the domestic parties to the Paris Peace Accords, a restitution program would undoubtedly have threatened what was already a fragile and incomplete peace. Given the high degree of hostility between the parties, who had been in open conflict for the past decade and continued to engage in periodic hostilities, restitution proposals would inevitably have been portrayed as a politically motivated land-grab rather than a simple matter of individual rights and remedies.

The passage of time and the emergence of conflicting rights to claimed properties would have been a more relevant factor from a human rights perspective. Despite the irregularities of the SOC privatization program, many of the residents of properties and land abandoned prior to 1979 had been in place for a decade or more by the time of the Peace Agreement, and would have arguably acquired bona fide rights to remain in what they viewed as "their" homes. In the context of traditional Cambodian law, this argument would have been bolstered by the longstanding principle that legitimate possession followed from the actual use of the land and property and could be revoked upon abandonment. The bulk of the dispossessed had lost their property nearly a generation previously, and, to the extent that the intervening occupation of such properties had been based on necessity, they may often have been viewed as legitimate. Moreover, in many cases, there may have been no surviving family members left to lay a claim. In fact, restitution would not come to be a major political issue during the transition to democracy, implying a degree of acceptance of the post-war status quo by those who had been dispossessed before 1979. Past grievances appear to have generally been muted in the immediate wake of the Peace Agreement in Cambodia:

> In practice, UNTAC did not address past [human rights] violations for two principal reasons: lack of adequate resources and time, and (interestingly) the lack of any specific complaint, among the thousands made to the Human Rights Component, relating to past Khmer Rouge actions. The reasons for this can only be guessed, but may well relate to the collective wish of Cambodians to try to rebuild their society and their lives while blocking out the agonies that many of them experienced in past decades.[145]

[145] Supra, note 24, 70.

Although the criminal accountability of the Khmer Rouge leadership would eventually emerge as a major transitional justice issue, claims for pre-1979 property rights have not figured significantly in the development of the recently constituted Extraordinary Chambers in the Courts of Cambodia.[146] Restitution has also failed to play a large part in a lively domestic debate regarding reconciliation and accountability, supporting a conclusion that, for many Cambodians, reclamation of their history has come to be seen as more important than reclamation of property.[147] Although restitution claims have periodically arisen, they have not constituted the predominant contemporary HLP issue in a context of recurrent disputes, evictions, and land-grabbing.[148] Moreover, given the scale of the killing under the Khmer Rouge, it should have come as little surprise that accountability, rather than remedies, would come to dominate the transitional justice debate. Even today, there is little discussion of property restitution in Cambodia – or even acknowledgment that the PRK/SOC's effective confiscation of abandoned land and property may have contributed to the country's current HLP rights crisis. By contrast, a mixed tribunal to try the former Khmer Rouge leadership recently came to fruition, belatedly and problematically, but very much as a function of both domestic and international insistence.[149]

Prospective Respect for HLP Rights

The fact that UNTAC treated property disputes primarily as a political issue set a problematic precedent in terms of securing prospective respect for HLP rights. Even if few resources existed within the UNTAC Human Rights Component for addressing HLP issues in a systematic manner, the mere act of framing housing, land, and property issues within the context

[146] For more information on the Extraordinary Chambers in the Courts of Cambodia, see the Chambers' own website (www.eccc.gov.kh) as well as that of the Yale University Cambodian Genocide Program (www.yale.edu/cgp/index.html).

[147] Supra, note 10, 154–156. The author describes a domestic Cambodian debate surrounding the relationship between truth about the past and national reconciliation.

[148] See, e.g., Jason Barber and Moeun Chhean Nariddh, "Land Disputes Flaring," in *Phnom Penh Post* (10 February 1995). The article describes conflicts over claims for land re-allocated under the PRK government in Kandal Province, Cambodia.

[149] Surveys have repeatedly shown a majority of Cambodians in favor of legal accountability through prosecution of the Khmer Rouge leaders.

of Cambodia's binding international human rights obligations might have shaped expectations early on, discouraging some of the worst abuses that occurred as land and property values rose in the post-UNTAC period.

Implementation of the 1992 Land Law might have been a starting point. Taken at face value, the Land Law held out the possibility of a prospective approach to HLP rights that might provide a durable solution, if not a legal remedy, to dispossessed repatriates as well as other land-poor Cambodians. By cutting off pre-1979 claims but recognizing adverse possession, the law invited repatriates and other Cambodians to obtain new property interests through squatters' rights rather than pursue restitution claims. In its emphasis on the equitable distribution of available land and property, this provision arguably represented a continuation, in spirit, of previous PRK/SOC land allocation and privatization policies. However, as with these earlier policies, the 1992 Land Law envisioned a publicly beneficial use of land and property that was at odds with its de facto control and distribution by unaccountable local party chiefs. As a result, even prospective respect for the HLP rights set out in Cambodian law faced serious obstacles.

In this area, UNTAC might have intervened with both clear legal justification and greater chances of success. In legal terms, Cambodia acceded in 1992 to both the International Covenant on Civil and Political Rights (ICCPR), prospectively guaranteeing freedom of movement, choice of residence, and privacy in the home, and the ICESCR, prospectively guaranteeing the right to adequate housing as a component of the right to an adequate standard of living.[150] Moreover, in applying the right to adequate housing, Cambodia had the benefit of the UN Committee on Economic, Social and Cultural Rights' 1991 General Comment 4 on the scope of its obligations under Article 11(1) of the ICESCR.[151] The committee's comment set out criteria related to security of tenure, availability of services, affordability, habitability, accessibility, location, and cultural adequacy to be taken into account "in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant."[152]

[150] ICCPR, Articles 12 and 17; ICESCR, Article 11.
[151] CESCR General Comment 4 (Sixth Session, 1991).
[152] Id., para. 8.

In defining tenure security, the committee introduced several important concepts, including the prohibition of inherently illegal "forced evictions" and the idea that legal protection of tenure should not be limited to property owners, but rather take in "rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property."[153] In addition to protecting the rights of those with existing access to housing, the committee noted that state obligations under Article 11 also include making housing and land available to poor and socially vulnerable groups without such access. For instance, in discussing affordable housing, the committee required states to "establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs."[154] Likewise, in its discussion of accessibility, the committee called for equitable access to land:

> Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement[.][155]

Read in combination with committee's prior General Comment 3 on states' obligations under the ICESCR, these provisions placed an obligation on the Cambodian government to provide adequate housing and land on equitable terms and to protect its citizens from arbitrary evictions.[156] Although the committee recognized the constraint that poor states' finances placed on the fulfilment of their obligations under the ICESCR, they also pointed out that states were expected to make effective use of "both the resources existing within a State and those available from the international community through international cooperation and assistance."[157] By virtue of its human rights mandate and its role in coordinating much

[153] Id., para. 8 (a).
[154] Id., para. 8 (c).
[155] Id., para. 8 (e).
[156] CESCR General Comment 3 (Fifth Session, 1990).
[157] Id., para. 13.

of the foreign aid that was flowing into Cambodia, UNTAC had a great deal of potential leverage in promoting respect for the right to adequate housing. Arguably, UNTAC's temporary assumption of many of Cambodia's sovereign competences pending elections even gave rise to a degree of responsibility to ensure observation of these norms. Finally, UNTAC had a direct interest in ensuring the equitable distribution of adequate housing and land, if for no other reason than as a means of supporting the sustainable repatriation of 360,000 refugees.

Given its broad human rights mandate, UNTAC might have taken systematic, rights-based approaches to HLP issues, including measures from education for local administrators and community associations to monitoring the application of the 1992 Land Law and intervening in forced evictions. In doing so, UNTAC might have presented a significant, human rights–based challenge to the power of local patronage networks over land and residential resources. However, as discussed above, UNTAC took a good faith decision to focus on civil and political rights and tended, in any case, to frame HLP issues as primarily within the political sphere. In fact, UNTAC's primary effect on the observation of housing rights may inadvertently have been quite negative. The insertion of a large contingent of well-paid foreigners in need of accommodations fueled the real-estate boom in urban areas and especially Phnom Penh.[158] Although some Cambodian landlords benefited, many urban residents are likely to have seen their standard of living impinged upon by increased rents and costs of living.

Conclusions

The UNTAC Mission in Cambodia was one of the very first large, multidimensional peacebuilding missions authorized by the UN Security Council in the wake of the Cold War. Although it was given a strong mandate and considerable resources, neither guidance nor precedent existed for how it should balance its various mandate roles, and particularly for how it should reconcile the need to address past and ongoing human rights violations with its perceived imperative of steering Cambodia's factions toward successful elections and power-sharing. In this light,

[158] Supra, note 10, 77–78.

it is unlikely that UNTAC would have succeeded in seeking retrospective remedies for prior HLP violations even had relevant precedents for such an approach existed at the time. However, UNTAC might have facilitated an earlier awareness of Cambodia's obligations to provide adequate housing and land to the rural poor and urban squatters – including repatriates – had it framed HLP issues as an explicit matter of human rights obligations as well as political urgency.

The Paris Peace Agreement and UNTAC were shaped more by the closing stages of the Cold War than by the surge in human rights–based interventionism that followed it. In Cambodia, more powerful countries acted to cut short a regional proxy conflict that became inconvenient to their rapprochement. By contrast, conflicts such as those in the former Yugoslavia, Rwanda, and East Timor, while exacerbated by geopolitical changes, were not viewed solely as tactical hangovers of the Cold War. Thus, while human rights were something of an afterthought in the Cambodian political settlement that gave rise to UNTAC, they would provide the justification for later international interventions and one of the core mandate priorities for many future UN peace missions.

As a result, the lessons to be learned from UNTAC's approach to HLP rights may be boiled down to a single caveat: HLP issues should be approached systematically and treated explicitly as a human rights priority in post-conflict settings. While specific approaches and emphases (e.g., the balance struck between retrospective remedies and prospective protection of HLP rights) may be calibrated to local contextual factors, failure to establish HLP rights as a matter of international obligations early on may give rise to the perception that they are governed solely by domestic political discretion. Such an outcome may ultimately threaten the stability achieved through negotiated peace settlements. The ongoing failure in Cambodia to address past land disputes or set the stage for future security of tenure was belatedly recognized as not only a human rights issue but also a priority concern in preserving the political stability that represents UNTAC's hardest-won achievement.

3

The Response of the United Nations Interim Administration Mission in Kosovo to Address Property Rights Challenges

Margaret Cordial and Knut Rosandhaug

Introduction

Over the past decade several commentators and UN human rights bodies have stressed the need for United Nations international peace keeping operations to address housing, land, and property (HLP) rights issues arising out of conflicts.[1] It has been widely acknowledged that the resolution of HLP issues is centrally linked to post-conflict peacebuilding, reconciliation, and the sustainable return of refugees and internally displaced persons (IDPs). Further, the right of refugees and IDPs to return to their homes in their country or place of origin following a conflict has evolved significantly as a human rights norm.[2]

[1] Von Carlowitz, L., "Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo," *Leiden Journal of International Law*, 17 (2004), p. 599; Das, H., "Restoring Property Rights in the Aftermath of War," *International and Comparative Law Quarterly*, Vol. 53 (April 2004), pp. 433–435; Leckie, S., *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, Transnational Publishers, New York (2003).

[2] International law protects the right of individuals and legal entities to possess, dispose of, and use property, among other rights; see Article 1, Protocol 1 of the European Convention on Human Rights (ECHR); Article 17 of the Universal Declaration on Human Rights; Article 5(d)(v) of the Convention on the Elimination of all Forms of Racial Discrimination; and Article 16(1)(h) of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The right to adequate housing is also enshrined in international standards, including Article 25(1) of the Universal Declaration on Human Rights; Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, Article 5(e)(iii) of the Convention on the Elimination of all Forms of Racial Discrimination; Article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination Against Women; and Article 27(3) of the International Convention on the Rights of the Child (CRC).

Since the late 1990s, HLP rights issues have featured with increased frequency on the agenda of the UN and have been recognized as a central component of peacekeeping efforts. In this regard, the secretary-general's August 2004 report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies makes express reference to these issues.[3] It explicitly recognizes as an essential component of the rule of law effective legal mechanisms for redressing property disputes that arise out of conflict, together with the need for restoring property rights or compensation where this is no longer possible. More recently, the report of the Sub-Commission on the Promotion and Protection of Human Rights, otherwise known as the "Pinheiro Principles" on Housing and Property Restitution for Refugees and IDPs, has expressly recognized the centrality of HLP rights challenges and restitution issues in post-conflict peacebuilding in the context of the return of refugees and IDPs.[4] These principles put forward proposals designed to increase the consistency of responses to HLP rights challenges in post-conflict settings, and they consolidate existing international human rights and humanitarian standards on HLP restitution into a set of UN Principles. They provide practical guidance to states, UN agencies, and the broader international community on how to address the legal and technical issues surrounding restitution, and propose a consolidated approach to dealing effectively with such challenges.

Practical initiatives taken within the context of international peacekeeping operations have seen the establishment of quasi-judicial mechanisms to address HLP rights issues in some national contexts. However, at the UN institutional level, there has been no policy framework adopted for addressing HLP rights issues in post-conflict settings similar to those adopted to address other human rights violations and rule of law issues.[5] As a result, a number of weaknesses can be identified when considering the response to dealing with HLP rights violations in post-conflict settings to date.

[3] UN Doc. S/2004/616, 3 August 2004.

[4] E/CN.4/Sub.2/2005/17, 28 June 2005. See also COHRE, *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 2005.

[5] Leckie, S., Housing, *Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework*, UNHCR Legal and Protection Policy Research Series, Department of International Protection, PPLA/2005/01, March 2005.

Firstly, the overall approach to tackling such issues has varied widely from one peace operation to another.[6] In some post-conflict settings, substantial attention has been dedicated to addressing HLP rights, with the establishment of legal mechanisms mandated to address HLP issues and disputes,[7] while in others, HLP issues have been the subject of ad hoc strategies resulting in limited and sometimes ineffective responses, or they have simply been overlooked or consciously not addressed.[8]

Additionally, no restitution initiative has to date addressed the entire range of urgent property issues arising in post-conflict settings in a comprehensive manner.[9] This has undermined the impact and effectiveness of restitution initiatives already undertaken, and their contribution to the overall goals of achieving economic rebirth and sustainable return.

This chapter considers the weaknesses in the UN's response to dealing with HLP rights issues in post-conflict settings from the perspective of the United Nations Interim Administration Mission in Kosovo (UNMIK), which was confronted in June 1999 with numerous challenges in these sectors. On assuming responsibility for a region emerging from a violent conflict in which the economy had been severely disrupted, UNMIK responded within five months by establishing an independent mechanism to deal exclusively with residential property disputes and some other housing-related issues. While this initiative has proved to be a success, with the mechanism today having almost completed the resolution of some 29,000 residential property claims, its limited mandate has resulted in it addressing only a portion of legitimate and urgent property rights issues.

While UNMIK's approach to property restitution in the residential sector was extensive, other property rights challenges were not addressed with the same degree of urgency. No comparable initiatives were taken in 1999 to address disputes over nonresidential immovable property, or the

[6] See further, Leckie, S., id., pp. 17–20.

[7] Note the establishment of the CRPC in Bosnia and Herzegovina, the Land Claims Court, the Commission on the Restitution of Land Claims in South Africa, and the United Nations Compensation Commission (UNCC) dealing with claims arising out of the First Gulf War. See further Leckie, S., supra, note 5, note 1.

[8] Property restitution issues still remain unresolved in places such as Palestine, Georgia, Turkey, and Cyprus, to mention some. See id., note no. 1, pp. 275–395. In El Salvador, ONUSAL was limited to monitoring land issues; in Cambodia and Afghanistan property issues received very little attention. Note also East Timor, Guatemala, Rwanda, Georgia, Turkey; see Leckie, id., note 5, pp. 17–20.

[9] Supra, Leckie, note 5.

reconstruction of some 10,000 destroyed homes belonging to refugees and IDPs, despite the fact that these issues were centrally linked to economic rebirth and sustainable return. Further, due to divergent views within UNMIK, the institution responsible for the management and administration of socially and publicly owned enterprises was only established in June 2002.

This following analysis will consider UNMIK's response to dealing with residential property rights violations and other housing issues. Further, it will highlight the weaknesses of the property rights policy adopted in Kosovo and demonstrate how UNMIK's failure to adopt a more comprehensive policy for addressing all urgent property rights challenges early on in the peace operation has had a negative impact on post-conflict recovery and the returns process. It will also demonstrate that the resolution of property challenges is fully achievable if an orderly mechanism or program is put in place to address such issues, as the achievements of the residential property restitution mechanism in Kosovo have proved.

The chapter commences with a brief overview of the situation in Kosovo prior to the armed conflict and the developments that led to the 1999 NATO intervention. It considers the various HLP rights challenges that presented in the aftermath of the armed conflict and how their resolution was so closely interlinked with achieving UNMIK's broad goals of economic revitalization, return of refugees and IDPs, and ensuring the stability of peace building and democratization efforts. It chronicles the various initiatives undertaken by UNMIK in the property rights sector and considers in detail the independent mechanism established to resolve disputes over residential property, namely, the Housing and Property Directorate (the HPD) and its independent adjudicating component, the Housing and Property Claims Commission (the HPCC). It presents the HPD/HPCC process from legal, institutional, and operational perspectives and considers those aspects of the process that allowed the HPD/HPCC to effectively implement its mandate.

The chapter concludes with an outline of the lessons learned from the process and makes a number of proposals on how property rights can be more effectively addressed in future peace operations. It highlights the importance of a more comprehensive approach as early as possible to resolving a broader spectrum of HLP rights challenges and demonstrates how such an approach in Kosovo would have been more beneficial for the

returns process, and would have expanded the possibilities for economic development. It reiterates and concurs with those who advocate for the adoption of a policy framework at the UN institutional level for dealing with HLP rights that would serve as a guide for future peace operations in developing and implementing policies for dealing with the HLP rights challenges common to all post-conflict settings.

Historical Background and Developments

Kosovo was one of the eight constituent units of former Yugoslavia; there were six republics (Serbia, Croatia, Slovenia, Montenegro, Macedonia, and Bosnia-Herzegovina) and two autonomous provinces in Serbia (Vojvodina and Kosovo). After World War II, the new communist leadership of Yugoslavia declared Kosovo to be an autonomous "constituent part" of Serbia, while subsequently under the 1974 Yugoslav Constitution, Kosovo was declared an autonomous province. It had its own administration, assembly, and judiciary and was a member of both Serbian and federal institutions.[10]

Throughout the former Yugoslavia, one of the primary sources of housing until the early 1990s was apartments that were socially owned; only a very small proportion of homes were privately owned.[11] The construction of socially owned apartments was funded by obligatory contributions from employees' salaries to a housing fund, which comprised up to 10 percent of salaries. Employees were given a permanent right of occupation over these apartments, known as "occupancy rights," which was a statutory right that derived and was regulated by the Law on Housing Relations.[12] An occupancy right was less than an ownership right but considerably more than a leasehold right.[13] Whereas ownership was an absolute right that allowed a party to possess, use, and dispose of property, the holder of an occupancy

[10] In 1981, Kosovo Albanians made up 78% of the population. High birth rates among the Albanian population and emigration of Serbs from Kosovo substantially influenced the population demography.

[11] Privately owned dwellings were mainly houses and single-family dwellings.

[12] Official Gazette of the SAPK, No. 11/83, 29/86, 42/86.

[13] See Articles 2, 3, 32, and 52 of the Law on Housing Relations. See also supra note 1 (Das), pp. 432–433; (Leckie), p. 226; and Van Houtte, H., "Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina," *International Comparative Law Quarterly* (1999), p. 625.

right had the right only to use the apartment for life and the property could not be sold or sublet.[14] The state, as the custodians or right holders of the apartments, allocated them to their employees through a decision on allocation and the employee then concluded a contract on use with the authorized public housing enterprise, which set out the rent and maintenance obligations.[15] This regime by and large accommodated the housing needs of all ethnic groups until the loss of autonomy in 1990.

On 23 March 1989, the Kosovo Serbs, who controlled the Kosovo Provincial Assembly, agreed to constitutional changes granting Belgrade control over Kosovo's internal affairs and withdrawing its substantial autonomy, eventually leading to the revocation of autonomy.[16] The Kosovo Albanian population demonstrated against these developments by organizing mass strikes.[17] The Socialist Republic of Serbia reacted on 22 March 1990 by introducing a series of laws and administrative measures known as "special measures," which resulted in many Kosovo Albanians being dismissed from their positions in public companies and subsequently losing rights to their socially owned apartments,[18] which were then reallocated to Kosovo Serbs.[19] In a number of cases, the Serb occupancy right holders subsequently converted their occupancy rights into ownership rights by purchasing the apartment from the allocation right

[14] An occupancy right holder was limited to entering into a contract on exchange of apartment, subject to receiving approval; see Article 21 of the Law on Housing Relations. Further, if an occupancy right holder ceased to use the property for more than one year, the contract on use could be canceled.

[15] While only one member of the family household could be recorded as the occupancy right holder, all family members were entitled to reside in the property; see Articles 21 and 22 of the Law on Housing Relations.

[16] See further the report of the OSCE Mission in Kosovo, "Kosovo/Kosova: As Seen as Told, Part II," p. 28; see also the report of the Independent International Commission on Kosovo: *The Kosovo Report*, October 2000. The commission, which was chaired by Justice Richard Goldstone, a judge of the Constitutional Court of South Africa, examined key developments prior to, during, and after the 1999 armed conflict in the region. The commission was the initiative of the Prime Minister of Sweden, Mr. Göran Persson, and it was endorsed by the Secretary-General of the United Nations. For further information see http://www.kosovocommission.org.

[17] Supra, note 16, p. 14.

[18] Id., 14.

[19] See the background report of the OSCE Mission in Kosovo entitled "The Impending Property Crises in Kosovo," 25 September 2000; Leckie, S, "Kosovo's Next Challenge: Fixing the Housing Mess" *Human Rights Tribune*, Vol. 6, No. 4 (December 1999); Marshall, D. and Inglis, S., "The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo," *Harvard Human Rights Journal*, Vol. 16 (Spring 2003), pp. 97–99.

holder under the privatization process that was introduced by the 1992 Law on Housing.[20]

Additionally, legislation designed to limit real-estate transactions was enacted in 1991, namely, the Law on Changes and Supplements on the Limitations of Real-Estate Transactions.[21] Its provisions required every contract on sale of properties in Kosovo to be approved by the Directorate of Property Rights Affairs of the Ministry of Finance of the Republic of Serbia. The ministry could refuse to approve a sale if it considered that it would have an effect on "*the national structure of the population*" or on the "*emigration of members of a particular. . .nationality.*" This law had the object and effect of restricting the sale of properties from Kosovo Serbs to Kosovo Albanians as a means of ensuring that the Serb population did not decline.[22] Some 98 percent of transactions presented to the Ministry of Finance were reported to have been rejected on this ground.[23] Many citizens sought to circumvent these legislative measures and concluded informal unregistered transactions that were not recorded in the cadastre or property records. This practice, which continued up to 1999, gradually rendered the cadastre and property registration system obsolete and unreliable.[24]

The NATO Intervention and Its Aftermath

As ethnic conflict spread throughout Kosovo in 1999, some 860,000 Kosovo Albanians fled their homes.[25] After the failure of the Rambouillet peace negotiations, in March 1999 NATO began its bombing campaign against the Federal Republic of Yugoslavia. On 10 June 1999 the conflict ended with UN Security Council Resolution 1244,[26] which established the

[20] Official Gazette of the Republic of Serbia No. 50/92.

[21] Official Gazette of the Socialist Republic of Serbia 22/91, 18 April 1991, and note also the Law on Conditions, Ways and Procedures of Granting Farming Land to Citizens of the Autonomous Province of Kosovo and Metohija; Official Gazette of the Socialist Republic of Serbia 43/91.

[22] Supra Leckie, note 19.

[23] Id.

[24] Supra OSCE Mission in Kosovo's Background Report, note 19.

[25] Supra OSCE note 16, pp. 29–32 and report of the Independent International Commission, pp. 35 and 54.

[26] UN Doc. S/RES/1244; Kosovo (1999), adopted by the Security Council at its 4011th meeting on 10 June 1999.

United Nations Interim Administration Mission in Kosovo (UNMIK) as a transitional administration with legislative and executive powers.[27]

While Security Council Resolution 1244 did not prescribe substantive rules and processes for the resolution of Kosovo's housing and property crises, it made numerous references to the right of all refugees and displaced persons to return to their homes. The resolution determined to resolve the grave humanitarian situation in Kosovo and reaffirmed the right of refugees and displaced persons to return to their homes in safety.[28] It tasked the international security presence to assure "*the safe and unimpeded return of . . . refugees and displaced persons to their homes in Kosovo*" and encouraged all member states and international organizations to contribute to their safe return.[29]

In 1999 the situation on the ground in Kosovo warranted urgent intervention on the part of the international community in order to give effect to the principles and ideals espoused in Security Council Resolution 1244 in relation to the property sector, which had been severely disrupted.[30] The post-conflict environment presented numerous housing and property rights challenges, ranging from population displacement, refugee flows, and widespread illegal occupation of properties to an incomplete property registration system. The situation was further compounded by the pre-1999 period of ethnic discrimination that had also resulted in displacement and property disputes.

The majority of the Kosovo Albanians who had fled in March 1999 returned after NATO's deployment in Kosovo in June,[31] but at the same time, violence against minorities prevailed and precipitated a mass exodus of Kosovo Serbs, Roma, and other non-Albanians[32] who fled in fear of reprisals by the Kosovo Albanian population.[33] During the conflict a

[27] Supra OSCE, note 16, pp. 29–32 and report of the Independent International Commission, pp. 35 and 54.

[28] See the Preamble to Security Council Resolution 1244.

[29] See paras. 11(k) and 13 of Security Council Resolution 1244.

[30] Supra Leckie, note 19.

[31] Supra the Independent International Commission, note 16, p. 43.

[32] Including Ashkali, Egyptians, and Slavic Muslims.

[33] The Framework for Return (2001) of the Joint Committee on the Return of Kosovo Serbs reported that some 215,104 persons were displaced in Serbia and Montenegro as of January 2001. See also *The Internal Displacement Monitoring Centre's Report on Serbia and Montenegro and Human Rights Watch: Abuses Against Serbs in the New Kosovo*, Vol. 11, No. 10 (August 1999), pp. 2 and 67.

significant number of properties were destroyed. Surveys estimated that some 103,000 housing units were rendered uninhabitable, representing almost half of the available housing units in Kosovo at that time.[34] In this environment housing supply was inadequate and property rights violations that were rampant led to increased social tension.[35] As many Albanian returnees found that that their homes had been damaged or destroyed during the conflict, they moved into properties that had been abandoned by Kosovo Serbs and other minorities, thus bringing about a rapid increase in irregular and unauthorized occupation of residential dwellings.[36]

This situation was exacerbated by legal uncertainty surrounding housing, land, and property records. The cadastre and property rights registers were incomplete and inaccurate as the pre-1999 system regulating it did not adequately provide for the registration of all property transfers. Further, the conclusion of unregistered and unofficial transfers that had taken place between 1991 and 1999 also rendered records unreliable. This situation was further exacerbated by the destruction of property records during the conflict, and their removal by the FRY authorities when they retreated in 1999.[37] The Yugoslav Army removed all of their archives, while the police removed approximately 50 percent of their records. Socially owned enterprises were stripped of a significant amount of their documentation. Further, the majority of the cadastre records were removed to Serbia proper, and a significant number of municipalities were missing property records. All of these factors made an accurate determination of property title extremely difficult.

The era of ethnic discrimination that continued up to 1999, followed by the post–March 1999 period of forced population displacement, produced thousands of HLP claims. Due to the moribund state of the judicial system and the absence of an alternative independent mechanism to resolve

[34] Supra Das, note 1, 433. Some towns such as Djakovica, Orahovac, and Pec had more than 75% of their pre-war buildings in ruins. See further Leckie, supra, note 19; OSCE, note 16 in Part II, Chapter 12; and Von Carlowitz, L., "Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo," *Global Governance*, Vol. 10, No. 3 (2004).

[35] See the Secretary-General's report on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, UN Doc. S/1999/779, paras. 77 and 78.

[36] Supra Leckie, note 19.

[37] Supra OSCE, note 16; Leckie, note 19; and see further the Report of the OSCE's Department of Human Rights and Rule of Law Report on Property Rights in Kosovo, 2002–2003, Chapter 1.

property disputes in an impartial manner, illegal occupation and ethnic tensions remained high.[38] Neither the judiciary nor administrative bodies had the capacity to address housing and property issues. Further, many of the dispossessed were displaced outside of Kosovo and were not in a position to initiate legal proceedings. The property sector became a source of continuing tension, and this in turn led to a highly charged political environment that demanded urgent intervention to address HLP issues and disputes.[39]

International HLP Assistance

Initially, in August 1999, UNMIK promulgated Regulation 1999/2, On the Prevention of Access by Individuals and their Removal to Secure Public Peace, to address the problem of illegal occupation of property and other rule of law issues.[40] Soon afterwards, the SRSG requested UN-Habitat to provide technical assistance to UNMIK on housing and property matters. In October 1999, on the basis of a recommendation from UN-Habitat, UNMIK Regulation 1999/10 was enacted, repealing discriminatory property legislation. Further, UN-Habitat facilitated an Interagency Housing and Property Task Force to conduct research and provide guidance on the way to tackle certain housing and property issues. The latter identified three primary areas warranting urgent intervention, and it advocated strongly for UNMIK to undertake the following initiatives, namely, to (1) establish an adjudication mechanism for housing and property rights, (2) oversee the creation of a centralized cadastre, and (3) ensure the enhancement of municipal government and administration in the property area. It presented an action plan for the promotion and protection of housing and property rights in Kosovo, putting forward comprehensive recommendations for legislative reform and the creation of a Housing and Property Directorate. It proposed the latter be entrusted with responsibility for the coordination and centralization of UNMIK's efforts in the field of housing and property rights, and it enumerated a number of tasks that were to be assigned to it, including the resolution of residential

[38] Supra Independent International Commission, note 16, 40.
[39] Supra Von Carlowitz, note 1, pp. 605-606; and Das, note 1, pp. 433-435.
[40] See Section 1.1 of UNMIK Regulation 1999/2.

property disputes and the administration and allocation of abandoned properties.[41]

In line with these recommendations the SRSG, through the promulgation of UNMIK Regulation 1999/23 on 15 November 1999, established the Housing and Property Directorate (HPD) and its independent adjudicating component, the Housing and Property Claims Commission (HPCC) to achieve an "*efficient and effective resolution of claims concerning residential property*."[42]

Some three years later, in June 2002, the independent Kosovo Trust Agency (the KTA) was established to administer public and socially owned property.[43] It was authorized to liquidate enterprises, which included public and social enterprises in trade and industry, agriculture, telecommunications, and public utilities. Simultaneously, the Special Chamber of the Supreme Court of Kosovo was created to adjudicate and resolve disputes resulting from decisions or actions of the KTA.[44] In 2002, legislation on a revised immovable property rights registry was also promulgated.[45]

Establishment of the HPD and HPCC

The HPD was mandated to resolve residential property claims, to provide overall guidance on HLP issues, and to oversee the temporary administration of abandoned property.[46] It was headquartered in Pristina, and it had regional offices throughout Kosovo and a representative office in Belgrade (Serbia proper) with a branch in Podgorica (Montenegro).[47] Its working language was English, but public documents were also issued in Albanian and Serbian.

41 The plan was entitled "Housing and Property in Kosovo: Rights, Laws and Justice – Proposals for a Comprehensive Plan of Action for the Promotion and Protection of Housing and Property Rights in Kosovo," and it was prepared by Leckie, S. (UNCHS (Habitat)) 30 August 1999.

42 See the Preamble to UNMIK Regulation 1999/23.

43 UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency.

44 UNMIK Regulation 2002/13 on the Establishment of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.

45 UNMIK Regulation 2002/22, on the Promulgation of the Laws Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register.

46 See Section 1 of UNMIK Regulation 1999/23.

47 The institutional structure of the HPD is set out in detail in its Annual Report for 2004, which is available at www.hpdkosovo.org.

Claims Resolution

Pursuant to Section 1.2 of UNMIK Regulation 1999/23, the HPD was mandated to receive three categories of claims concerning residential property, which corresponded to the various phases of property rights violations that had taken place in Kosovo between 1989 and 1999. The process was designed to reverse the discriminatory loss of occupancy rights to socially owned apartments that had occurred during the preceding decade; to regularize or legally register informal sales of homes and properties that occurred between 1991 and 1999; and to restore possession of housing and property to persons displaced by the 1999 conflict who had not been able to return home. The claims that fell within the HPD/HPCC's jurisdiction, and which came to be termed category A, B, and C claims, were defined in Sections 1.2(a)–(c) of UNMIK Regulation 1999/23 as follows:

(a) Claims by natural persons whose ownership, possession or occupancy rights to residential real property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or intent;
(b) Claims by natural persons who entered into informal transactions of residential real property on the basis of the free will of the parties subsequent to 23 March 1989;
(c) Claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred.

The HPD did not serve as a "first instance body" and it did not have an independent decision-making authority. Pursuant to Sections 1.2 of UNMIK Regulation 1999/23 and 10.4 of UNMIK Regulation 2000/60, it was under a statutory obligation to refer all claims that could not be mediated to the HPCC for adjudication. The HPD could, however, reject claims that fell outside the HPCC's jurisdiction and issue orders in relation to uncontested category B claims to register informal transactions in the public records.[48]

[48] See Section 11.1 of UNMIK Regulation 2000/60.

The HPD's primary function was to provide secretariat services to the HPCC. It was responsible for receiving, registering, processing, and referring claims for adjudication, if their mediation was not successful.[49] This involved investigating claims, notifying parties, verifying documents, and drafting legal submissions and recommendations on claims. The practice and procedure that governed the processing of claims and their referral to the HPCC were laid down in Chapter II of UNMIK Regulation 2000/60, on Residential Property Claims and the Rules of Procedure and Evidence of the HPD and the HPCC, which was enacted in November 2000.

It was recognized from earlier experiences in post-conflict property dispute resolution in Bosnia that an efficient claims resolution process required an effective enforcement mechanism. Thus the HPD was also conferred with responsibility for implementing HPCC decisions and UNMIK Regulation 2000/60 provided the legal basis for the execution of decisions through the eviction of illegal occupants, where necessary, with the support of the law enforcement authorities.[50]

The Provision of Overall Direction on Property Rights

The HPD was mandated to "*provide overall direction on property rights in Kosovo*" until the SRSG determined that the local government institutions were able to carry out these functions.[51] Section 1.1 enumerated some of the functions that fell under this aspect of the HPD's mandate as follows:

(a) to conduct an inventory of abandoned private, state, and socially owned housing;[52]

[49] See Section 3 of UNMIK Regulation 1999/23 and para. 1.3.1 of Resolution No. 7 of the HPCC, HPCC/RES/7/2003.

[50] See Section 13 of UNMIK Regulation 2000/60.

[51] Section 1.1 of UNMIK Regulation 1999/23.

[52] The compilation of an inventory of abandoned private, state, and socially owned property served to identify housing that could be allocated to persons in need of humanitarian housing. Section 1 of UNMIK Regulation 2000/60 defined abandoned housing as "any property which the owner or lawful possessor and the members of his/her family household have permanently or temporarily, other than for occasional absence, ceased to use and which is either vacant or illegally occupied." Properties found to be abandoned were placed by the HPD *ex officio* under its administration, and at the time of writing there were some 1,841 such properties.

(b) to supervise the utilization or rental of such abandoned property on a temporary basis for humanitarian purposes;[53]
(c) to provide guidance to UNMIK, including CIVPOL and UNHCR, as well as KFOR on specific issues related to property rights; and
(d) to conduct research leading to recommended policies and legislation concerning property rights."

The Jurisdiction of the HPCC

The HPCC was the independent organ of the HPD established under Section 2 of UNMIK Regulation 1999/23. It was conferred with exclusive jurisdiction to adjudicate and settle claims referred to it by the HPD, as set out above, until the SRSG determined that the local courts were able to carry out this function.[54]

Detailed rules of procedure and evidence governing the adjudication of claims before the HPCC were set down in UNMIK Regulation 2000/60.[55] HPCC decisions were binding and enforceable and were not subject to review by any other judicial or administrative authority in Kosovo.[56] The HPCC could refer specific issues arising in connection with a claim, which were not within its jurisdiction, to a competent local court or administrative body or tribunal.[57] It could issue interim or provisional orders in cases where it considered it necessary for an orderly and

[53] Section 12 of UNMIK Regulation 2000/60 supplemented Section 1.1 of UNMIK Regulation 1999/23 by laying down a comprehensive legal framework and procedure for the administration and allocation of property on a temporary humanitarian basis. Section 12.2 extended the application of the administration scheme beyond abandoned properties, permitting the HPD to place property under its administration in the following circumstances: (i) By agreement of the parties in settlement of a claim. (ii) On the request of the claimant, following a decision by the HPCC confirming the property right of the claimant. (iii) Following eviction of the current occupant, if the claimants failed to repossess the property within 14 days of being notified of the execution of the eviction. (iv) Where no claim had been submitted for the property, and the property was either vacant, or the current occupant of the property did not assert any property right to the property. (v) Where no claim had been submitted for the property, on the request of the owner or occupancy right holder of the property.
[54] See section 2.5 of UNMIK Regulation 1999/23.
[55] See Chapters II and III of the Regulation.
[56] See Section 2.7 of UNMIK Regulation 1999/23.
[57] See Section 22.1 of UNMIK Regulation 2000/60.

expeditious resolution of a claim[58] or where it appeared necessary to protect a party's interests from irreparable harm.[59]

On 12 April 2001, the SRSG issued a Clarification on UNMIK Regulation 2000/60 in order to elaborate on a number of issues regarding the competence and jurisdiction of the HPCC. The clarification served primarily to assist the local courts in determining whether a claim fell within its competence or that of the HPCC.[60]

The HPCC was composed of two international commissioners and one national commissioner[61] who were appointed by the SRSG in 2000.[62] While their appointments were for a one-year period,[63] all three members were reappointed on an annual basis, and remained on the HPCC throughout its existence.[64] The SRSG designated one of the members as the chairperson of the panel. It was also open to the SRSG to establish additional panels in consultation with the HPCC,[65] but no additional panel was appointed due to the finite number of cases and workload.

The presence of a mix of international and national commissioners on the panel was important from a number of perspectives. Firstly, the majority presence of the international members guaranteed objective and impartial decision-making in line with international standards. Such guarantees proved vital to securing the support and confidence of the minority community in the process. Further, the fact that the national commissioner was recruited from the majority population gave the process local

[58] See Section 19.7 of UNMIK Regulation 2000/60.

[59] See Section 24 of UNMIK Regulation 2000/60.

[60] It expressly provided that where a claim involved legal issues, some of which were under the jurisdiction of the HPD and others which fell under the jurisdiction of the courts, the legal issues under the competence of the HPD were to be dealt with first. Following the HPCC's decision on a claim, the local courts retained jurisdiction to adjudicate any legal issue not decided by the HPCC; see para. 13 of the SRSG's Clarification of UNMIK Regulation No. 2000/60 and Section 22.6 of UNMIK Regulation 2000/60.

[61] The national member was a former Supreme Court Judge from the Kosovo Albanian population.

[62] See Section 2.2 of UNMIK Regulation 1999/23. The Commissioners were required to be experts in the field of housing and property law and competent to hold judicial office. Pursuant to Section 2.3 of UNMIK Regulation 1999/23, before taking office, the members of the HPCC were required to solemnly declare in writing the following declaration: "I solemnly declare that I will perform my duties and exercise my power as a member of the Housing and Property Claims Commission honorably, faithfully, impartially and conscientiously."

[63] See Section 17.3 of UNMIK Regulation 2000/60.

[64] Alan Dodson, Veijo Heiskanen, and Aqif Tuhina.

[65] See Section 2.2 of UNMIK Regulation 1999/23.

ownership and acceptability, and made the decisions sustainable, particularly when it came to their enforcement. It also ensured that decision-making was consistent with the relevant applicable domestic laws. This approach did, however, attract some criticism from representatives of the minority community who alleged that failure to appoint a member from the minority community resulted in the process not being sufficiently inclusive. It also fueled some criticism and speculation about HPCC decisions dismissing minority claims.[66]

The Legal Framework

UNMIK Regulation 1999/1, on the Authority of the Interim Administration in Kosovo, vested all legislative and executive authority in UNMIK.[67] This regulation, together with Regulation 1999/24 (as amended by UNMIK Regulation 2000/59), prescribed that the applicable law in Kosovo was to be found in regulations promulgated by the SRSG and the law that was in force in Kosovo on 22 March 1989.[68] It also prescribed that post-1989 legislation could be applied in limited circumstances where a court or a body or person required to implement a provision of the law determined that a subject matter or situation was not covered by the pre-1989 laws, but was covered by another law in force in Kosovo after 22 March 1989, which was not discriminatory or inconsistent with recognized human rights standards.[69]

Regulation 1999/1 determined how executive and legislative authority was to be exercised by UNMIK and obliged all persons undertaking pubic duties or holding public office to observe internationally recognized human rights standards.[70] Further, international human rights standards were part of the applicable law through, *inter alia*, UNMIK Regulation 1999/24 (as amended by 2000/59), which also obliged those holding public office to uphold standards reflected in international and regional human

[66] In relation to category C claims.
[67] See Section 1 of UNMIK Regulation 1999/1.
[68] See Section 1.1 of UNMIK Regulation 1999/24 on the Law Applicable in Kosovo as amended by UNMIK Regulation 2000/59.
[69] See Section 1.2 of UNMIK Regulation 1999/24.
[70] See Section 2 of UNMIK Regulation 1999/1. It outlawed discrimination against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with national community, property, birth, or other status.

rights instruments.[71] In relation to HPD/HPCC proceedings, Section 2.6 of UNMIK Regulation 1999/23 prescribed that the rules of evidence and procedure of the HPCC were required to guarantee fair and impartial proceedings in accordance with international human rights standards.

The legal framework governing the resolution of property claims was based on a combination of domestic property laws and UNMIK regulations and the HPCC applied both domestic and international legal norms. The international intervention distinctly shaped the procedural laws and enforcement mechanisms that were set down in UNMIK Regulation 2000/60,[72] while the substantive laws were contained in the applicable domestic property laws.[73]

Successful Implementation of Mandate

The HPD/HPCC process completed the implementation of its mandate, having ensured the resolution of 29,155 residential property claims in 2007. HPCC decisions have been issued and delivered in respect of all claims, including some 4,105 requests for reconsideration of HPCC decisions.

This has been achieved in a manner that can be described as both expeditious and cost effective while at the same time ensuring procedural fairness. Claims were fully resolved for a very economical 720 Euros per

[71] See Section 1.3 of UNMIK Regulation 1999/24 – The Universal Declaration of Human Rights; The European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto; The International Covenant on Civil and Political Rights and the Protocols thereto; The International Covenant on Economic, Social and Cultural Rights; The Convention on the Elimination of All Forms of Racial Discrimination; The Convention on Elimination of All Forms of Discrimination Against Women; The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and the International Convention on the Rights of the Child.

[72] Chapter I of the regulation set down a number of substantive provisions and general principles. Chapter II governed the work of the HPD and set down procedures for the collection and registration of claims, the notification and participation of parties, the enforcement of HPCC decisions, and the filing of reconsideration requests. Chapter III set down the rules of procedure and evidence applicable to the adjudication of claims before the HPCC.

[73] See the Law on Housing Relations, Official Gazette of the SAP Kosovo, No. 11/83, 29/86, 42/86; the Law on Housing of 1992, Official Gazette of the Republic of Serbia No. 50/92; the Law on Co-ownership of an Apartment (Official Gazette of the SAP Kosovo, No.43/80, 22/87); the Law on Construction of Annexes to Buildings and the Conversion of Common Premises into Apartments (Official Gazette of the SAP Kosovo, No. 14/88); the Law on the Transfer of Real Property (Official Gazette of SAP, Kosovo, No. 45/81, 29/86, 26/88); and the Law on the Registration of Real Properties in Social Ownership (Official Gazette of SAP, Kosovo, No. 37/71), all available on HPD's website at www.hpdkosovo.org.

claim, and some 68 percent of claims were decided within three years of being filed. This accomplishment is noteworthy and has made a significant contribution to assisting dispossessed property right holders to return to their homes or enter into lawful transactions in respect of their properties. It has also contributed to post-conflict rehabilitation and the promotion of economic growth and prosperity for all the people of Kosovo.

However, this achievement in the aftermath of an armed conflict would not have been possible had the design of the property restitution mechanism not taken account of the particular circumstances in which it had to operate, and the urgent needs of the claimants to return to their homes. Central to the achievement was the fact that the process adopted a goal-oriented approach whereby it was equipped with the necessary tools, techniques, and evidentiary rules that allowed it to handle its voluminous caseload in an expeditious and efficient manner from the inception of operations to the final implementation of HPCC decisions.

The primary procedural mechanics adopted in order to achieve this balance were (i) an accessible, free claims procedure with an extensive outreach campaign; (ii) the adoption of procedures that facilitated rapid decision-making but at the same time ensured fair procedures; (iii) access to evidence; (iv) broad decision-making powers; and (v) an effective implementation of final and binding decisions.

An Accessible, Free Claims Procedure with an Extensive Outreach Campaign

The HPD devised an effective outreach program that focused on an accurate claim collection and on making the process accessible to claimants. A standardized but comprehensive claims form was designed in Albanian, English, and Serbian.[74] Offices were established in each of the five regions of Kosovo, and in recognition of the fact that the majority of claimants were dispersed throughout Serbia proper, the former Yugoslav Republic of Macedonia (fYROM), and Montenegro, representative offices were opened in Belgrade (Serbia proper), Podgorica (Montenegro), and Skopje (fYROM). Further, satellite offices were opened and mobile units were deployed to other areas and to service collective centers

[74] Authority for this is to be found in Sections 7.2, 7.3, and 8.1 of UNMIK Regulation 2000/60.

throughout the former Yugoslavia.[75] This approach also took on board the freedom of movement restrictions and security concerns that would have prevented many claimants from traveling to Kosovo to file claims.[76]

HPD personnel in these offices provided free legal assistance through assisting claimants in filling out claim forms and advising on the legal process.[77] Claims were required to be filed personally,[78] but the process was made accessible to claimants who could not meet this requirement by allowing them to file claims through family household members[79] or authorized persons.[80] The requirement to file claims personally as opposed to doing so through postal or other means was introduced to facilitate a comprehensive interview with the claimant at the outset of

[75] The outreach to claimants at the inception of operations was slower than initially envisaged due to financial constraints and limitations. Although the deadline for filing claims was 1 December 2001, claims registration offices opened in only four of Kosovo's five regions in 2001, and no arrangements were put in place then for collecting claims outside of Kosovo. At the end of 2001, the HPD had collected only approximately 6,000 claims, at which stage it turned its focus to claimants outside of Kosovo. Offices were opened in Berane, Podgorica, and Sutomore (all Montenegro) and Belgrade, Kraljevo, Nis (Serbia proper), with satellite offices and mobile units serving Novi Pazar, Krusumlija, and Vranje, to mention some.

[76] Claimants were also required to submit with their claim form originals or certified copies of any documents on which they sought to rely in support of their claim, and which were within their possession or reasonable power of procurement; see Section 8.2 of UNMIK Regulation 2000/60.

[77] These offices subsequently played a central role in facilitating, among other tasks, the service of HPCC decisions on parties, and the filing of reconsideration requests and other documents necessary to process claims.

[78] The requirement to file claims personally as opposed to doing so through postal or other means was introduced in order to ensure that all necessary contact details and information were inserted into the claim form. This approach was adopted out of the lessons learned from the CRPC in Bosnia, where a significant number of claims received through the postal system did not contain essential information, including the claimant's contact details, and could not be processed.

[79] See Section 7.3 of UNMIK Regulation 2000/60, which prescribed that the right to file a claim through a family household member was limited to cases in which a claimant was "unable to make a claim" in person. The term "family household members" was defined in accordance with Section 9 of the Law on Housing Relations, which listed various members of the family that fell within this definition, but this provision also required that the member be residing with the property right holder in order to be recognized as such. The HPCC held that the Section 9 definition was formulated in the context of determining occupancy rights and that because the HPCC was considering claims dealing with a wider range of property rights, any family member listed in Article 9 of the Law on Housing Relations should be considered a family household member, regardless of whether or not that person resided in the property together with the property right holder.

[80] See Section 7.3 of UNMIK Regulation 2000/60, which prescribed that a claimant could authorize a party to represent him or her by executing a valid power of attorney in that party's favor. This provision also prescribed that in exceptional cases, where the provision of a power of attorney was problematic, the HPD could certify an alternative document authorizing representation of a claimant

the proceedings, and to ensure that all details and information necessary to process claims were inserted into the claim form, which was filled out with the assistance of an HPD officer. This approach was of crucial importance given that no party could ordinarily give oral evidence before the HPCC.[81] In order to enhance the outreach, information campaigns on the process were launched throughout Kosovo, fYROM, Montenegro, Serbia proper, and in Western European countries that hosted significant numbers of potential claimants,[82] through radio and television commercials, newspapers, information leaflets, posters, and billboards.

Of the 29,155 claims filed with the HPD at the close of the claim intake in July 2003,[83] the majority of claims (93.2%) were filed pursuant to Section 1.2(c) of UNMIK Regulation 1999/23 (category C claims), 4.2 percent were filed pursuant to Section 1.2(a) (category A claims), and 2.6 percent were filed pursuant to Section 1.2(b) (category B claims). The highest number of claims related to properties in the Pec and Pristina regions, and Table 1 sets out the claim intake by region and category. Somewhere in the region of 20,000 claims were collected outside of Kosovo.

The claims collected contrasted with earlier expectations in relation to the category and volume of claims that the HPD/HPCC process was established to resolve. The initial proposal for the establishment of a property dispute resolution mechanism focused on the provision of redress to the Kosovo Albanian population for the discriminatory loss of property

Table 1. Claimed Properties

Cat.	Gnjilan	Mitrovica	Pec	Pristina	Prizren	Total	%
A	114	203	97	698	102	1.214	4.2
B	45	65	57	577	19	763	2.6
C	3.615	3.534	7.972	8.290	3.756	27.167	93.2
Total	**3.774**	**3.802**	**8.126**	**9.565**	**3.877**	**29.155**	
%	**12.9**	**13**	**27.9**	**32.9**	**13.3**		

[81] Unless invited to do so by the HPCC; see Section 19.2 of UNMIK Regulation 2000/60.

[82] Most notably Germany, Austria, Slovenia, and Switzerland.

[83] The total number of claims received fluctuated slightly over time. This was due to technical corrections made during the processing of the claims, which required that claims be split or consolidated. For example, where one claimant filed multiple claims over the same property, these claims were merged into one claim. Where a claimant filed one claim that covered multiple properties, this claim was split into several claims and a new claims file was created for each property.

rights that occurred before March 1999. Claims arising out of the pre–March 1999 period were estimated to be in the region of 20,000 to 100,000. However, only a fraction of the total number of claims filed with the HPD arose out of events during this period. The vast majority of claims, namely 93.2 percent, were submitted by claimants who fled in the aftermath of the 1999 NATO air campaign, to include Kosovo Serbs and other minorities and a number of Kosovo Albanians who had fled the northern part of Kosovo and other areas that became minority enclaves.

The Adoption of Procedures That Facilitated Rapid Decision Making but at the Same Time Ensured Fair Procedures

In designing the HPD/HPCC process, the intention was to ensure the creation of an independent dispute resolution mechanism that could resolve a significant number of claims efficiently so as to provide remedies to claimants within a reasonably prompt period of time, and take account of their urgent need to return to their homes. It was acknowledged that traditional adversarial court proceedings, which enshrined oral hearings and elaborate procedural rights, could not meet this demand and that consideration had to be given to drafting rules of procedure that struck a balance between due process, speed, and efficiency.[84] Thus a particular emphasis was placed on the adoption of standardized procedures that permitted the rapid processing of claims in a manner that balanced the rights of claimants to a speedy and effective remedy and the rights of all parties to fair procedures.

The following procedures were incorporated into the process:

1. *Mass claims processing techniques*
   The HPD/HPCC process was designed to be a hybrid of a mass claims processing system that could facilitate the resolution of high numbers

[84] *Redressing Injustice Through Mass Claims Processes, Innovative Responses to Unique Challenges*, edited by the Permanent Court of Arbitration, Oxford University Press, Oxford, 2006, p. xxix. See also, supra Das, note 1, 437. Further, this was acknowledged by the HPCC Commissioners wherein the HPCC held that "a fair and efficient organization of a mass claims process requires that specific mass claims processing tools such as grouping of claims and fast-tracking of simple claims are used to organize the claims process; in these circumstances, first-come first-served cannot be used as the overriding criterion in determining which claims should be processed first, as focusing on individual claims based on dates of filing would encumber and slow down the process and thus adversely affect the legitimate interests of the great majority of the claimant population"; see HPCC/RES/7/2003 dated 11 April 2003.

of residential property claims. UNMIK Regulation 2000/60, on the rules of procedure and evidence, reflected and recognized its nature as a special (*sui generis*) regime with its own procedural rules.[85] A number of provisions in the regulation invoked the concept of mass claims processing in the decision-making process. The following provisions of UNMIK Regulation 2000/60 are noteworthy:

> Section 19.2 authorized the HPCC to decide claims on the basis of written submissions and prescribed that no party could give oral evidence unless invited to do so by the HPCC.
>
> Section 19.5(a) permitted the HPCC to "*consider claims raising common legal issues together*."
>
> Section 19.5(b) permitted the HPCC to delegate to the registrar, and the staff members of the HPD assigned to the service of the HPCC, certain claims and evidentiary review functions, subject to its supervision.
>
> Sections 19.5(c) and (d) authorized the HPCC to utilize computer databases, programs, and other electronic tools and measures it considered appropriate to expedite its decision-making.
>
> Section 22.9 authorized the HPCC to sign a single cover decision for many individual decisions in cases where the numbers of similar claims before it were high.
>
> Section 23 permitted the HPCC to process uncontested category C claims in a fast track summary procedure.[86]

The practical application of these provisions permitted claims arising out of one and the same event, and raising similar legal issues to be batched or grouped into categories for referral to the HPCC. These claims were individually adjudicated by the HPCC and thereafter a single cover decision issued in respect of each batch of claims, thus expediting the decision-making process.

2. *Adoption of evidentiary requirements that were less onerous than in normal civil proceedings*

The process adopted evidentiary provisions that effectively reduced the standard of proof and shifted the traditional burden of proof away

[85] The HPCC itself defined the concept of mass claims processing as follows: "a mass claims process can be broadly understood as a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with the decision-making body within a limited period of time; thus, claimants in a mass claims process are generally in the same situation, having suffered the same or similar losses within the same period of time"; see HPCC Resolution, HPCC/RES/7/2003 dated 11 April 2003.

[86] See Section 23.1 of UNMIK Regulation 2000/60 and analysis in this chapter.

from the claimant in order to take account of the historical situation and the impact that the conflict had on the public records. Such factors had brought about a situation where the availability of records and information had been seriously impaired. Cadastral and property records had in many instances become obsolete, or had been destroyed or removed by the domestic authorities in 1999. Further, the claimants themselves in the majority of cases had fled without their documentation, and any supporting evidence that they might have possessed was either lost or destroyed in the wake of the conflict.[87] Also, genuine security concerns and limited freedom of movement prevented the majority of claimants from returning to their homes or municipalities to source documentation. In such cases, the application of the standard of proof that applied generally in civil proceedings, requiring claims to be proved on "*the balance of probabilities*,"[88] would have presented an insurmountable obstacle for many claimants, and more than likely have discouraged them from filing claims. In order to take into account the reality of the claimant's circumstances, the evidentiary rules were less onerous.

3. *Burden and standard of proof*

The burden of proof in cases where the claimant could not furnish evidence to support his or her claim effectively shifted onto the HPD, which was conferred with a statutory obligation to conduct searches for relevant documentation in the public property records.

In assessing evidence, the HPCC's rules prescribed that "the Commission may be guided but is not bound by the rules of evidence applied in local courts in Kosovo."[89] The only evidentiary requirement was that evidence be reliable and Section 21.1 permitted the HPCC to "consider any reliable evidence, which it consider[ed] relevant to the claim",[90] including evidence presented by the HPD concerning the reliability of any public record.

[87] Supra, note 84, 61.
[88] For a more detailed discussion of this subject matter, see id., 61.
[89] See Section 21.1 of UNMIK Regulation 2000/60.
[90] See Section 21.1 of UNMIK Regulation 2000/60.

In addition to considering written submissions and evidence submitted by the parties, it was also open to the HPCC to consider written or oral submissions from any intergovernmental, governmental, or nongovernmental entity or expert witness on any matter relevant to a claim.[91]

In so far as the standard of evidence was concerned, the claimant was required to show *prima facia* evidence of a property right. In cases where the HPD could not find corresponding documents in the public records to support an alleged property right, but documents were found that constituted indirect evidence, the HPCC held that "[t]he failure to find corresponding documents in the records of the relevant public authorities [did] not necessarily give rise to the inference that the documents produced [were] not truly what they purport[ed] to be," and it held that uncontested indirect evidence could be accepted to support a claim in such circumstances.[92]

Section 23 of UNMIK Regulation 2000/60 permitted the HPCC to process "uncontested" category C claims in a fast track summary procedure.[93] Claimants were only required to meet a very basic evidentiary requirement in such cases. The HPCC could make an order for the recovery of possession of the property if the claimant made a *prima facia* case that he or she had been in uncontested possession of the property prior to 24 March 1999.[94] The HPCC held that a category C claim could be treated as uncontested where either

[91] See Section 19.3 of UNMIK Regulation 2000/60.

[92] In such cases, the HPCC had regard to the fact that, in many instances, official records went missing during the war; whether the respondent had adduced any evidence to contradict or challenge the veracity of the documentary evidence produced by the claimant and whether the documents presented by the claimant were originals and appeared on their face to be in order, see HPCC/D/4/2001/C, paras. 7 and 8; HPCC/D/12/2001/C, para. 8; HPCC/D/27/2001/C.

[93] See Section 23.1 of UNMIK Regulation 2000/60.

[94] In interpreting and applying Section 23 of UNMIK Regulation 2000/60, the HPCC held that the claimant was required to evidence the following: (a) *prima facia* on the basis of the evidence presented a property right in respect of the claimed property; (b) that the claim was uncontested in that the respondent has either chosen not to participate in the proceedings or has not contested the validity of the claim; (c) there was evidence that the claimant was in uncontested possession of the property prior to 24 March 1999; and (d) that all other requirements of Section 1.2(c) of UNMIK Regulation 1999/23 and Sections 2.5 and 2.6 of UNMIK Regulation 2000/60 had, *prima facie*, been met in each case.

the respondent had chosen not to participate in the proceedings or had not contested the validity of the claim.[95]

4. *Due process*

Notwithstanding the adoption of the above procedures, which facilitated the rapid processing of claims, UNMIK Regulation 2000/60 incorporated the core concepts of due process and the principles akin to them. The process secured an individual investigation of each claim, and Chapter II of UNMIK Regulation 2000/60 prescribed provisions that ensured the notification and participation of parties in all cases. Pursuant to Section 9, after the receipt of a claim, the HPD was required to notify the occupant and to make all reasonable efforts to notify other persons with a legal interest in the property. Parties were informed about their right to participate in the proceedings and were given a period of thirty days within which to respond to the claim. Further, a person with a legal interest in the property could be admitted as a party to the claim at any point in the proceedings, provided the claim had not been finally adjudicated.

In order to enhance the notification process, the HPD published a list of claims in an official bulletin that was made available on its website. Hard copies of the bulletin were distributed to courts, municipalities, consular offices, IDP organizations, and nongovernmental organizations (NGOs).

Section 2.6 of UNMIK Regulation 1999/23 expressly required the rules of evidence and procedure of the HPCC to guarantee fair and impartial proceedings in accordance with internationally recognized human rights standards. It explicitly required such rules to include a provision on reconsideration of decisions. Thus, Section 14 of UNMIK Regulation 2000/60 provided for a reconsideration procedure for claims on grounds that legally relevant evidence not considered by the HPCC in initially deciding a claim was submitted, or on the grounds that there was a material error in the application of the applicable law.

[95] For example, where he or she only referred to his or her housing needs as a basis for occupying the property, or put forward allegations that were so vague and ambiguous that they did not constitute a legal challenge to the claim.

Access to Evidence

The first step in processing claims involved searching for and/or verifying documents in the public property records. Where a party did not submit documentary evidence, access to property records was also essential, to permit the HPD to exercise its statutory obligation to "investigate . . . and obtain any evidence relevant to a claim from any record held by a public body, corporate or natural person."[96] Thus, a thorough search of all accurate sources of documentary evidence of property rights was required to be undertaken, and this could only be achieved through agreements on access to the property records.

Within the territory of Kosovo, the provisions of UNMIK Regulations 1999/23 and 2000/60 provided for free and open access to all records. Section 10.2 of UNMIK Regulation 2000/60 prescribed that "The Directorate may investigate a claim and obtain evidence relevant to a claim from any record held by a public body, corporate or natural person" and that it was entitled to "free access without charge to any records . . . relevant to the settlement of a claim or for any other verification purposes." Further, Section 2.4 of UNMIK Regulation 1999/23 prescribed that the HPCC was also "entitled to free access to any and all records in Kosovo relevant to the settlement of a dispute submitted to it." However, given that a substantial portion of the property records were dislocated in Serbia proper, the HPD had to secure access to property records there.[97] Throughout 2000 the HPD engaged in negotiations with the central authorities in Serbia to arrange for access to all property records. Agreements were reached with the Ministry of Finance, the Ministry of the Interior, and the Ministry of Justice by which the HPD was granted access to records in their possession to include all courts and dislocated Kosovo archives.

Broad Decision-Making Powers

While proceedings before the HPCC were governed by Chapter III of UNMIK Regulation 2000/60, Section 26 of the regulation also permitted the HPCC to adopt its own additional rules for carrying out its functions,

[96] See Section 10.2 of UNMIK Regulation 2000/60.
[97] The background and historical situation are considered later in this chapter.

provided such rules were consistent with the regulation.[98] Further, in the interests of the efficient and fair resolution of claims, the HPD was permitted to extend any deadline or dispense with any procedural rule, where there was good reason to do so, and this would not materially prejudice the rights of any party.[99] The HPCC could also, in specific cases, proceed notwithstanding noncompliance with any procedural rule by any party or by the HPD in the interests of the efficient administration of justice.[100]

In relation to the issuing of decisions, to allow for the rapid resolution of thousands of claims it utilized a technique provided for in Section 22.9 of UNMIK Regulation 2000/60 that permitted it to issue one decision, known as "a Cover Decision," in respect of high numbers of claims that raised similar legal issues. The claim number to which the decision applied (i.e., the DS number) was listed in the Cover Decision and it was signed by the chairperson of the HPCC.[101] In addition to the Cover Decision, an individual decision was prepared by the registrar in respect of each claim[102] and the Cover Decision, and the individual decisions were subsequently served together on the parties to the claim. This procedure facilitated the expeditious notification of decisions.

Effective Implementation of Final and Binding Decisions

In recognition of the fact that a decision recognizing a property right on its own was not sufficient in a post-conflict society to restore possession of property to claimants, the restitution program was explicitly conferred with power to fully enforce and ensure compliance with legally binding decisions. The process also presented claimants with a number of options for the implementation of their decision, and, in order to deal with the problem of illegal occupation of properties, the HPD was authorized to

[98] See Section 26 of UNMIK Regulation 2000/60.

[99] See Section 9.10 and 19.6 of UNMIK Regulation 2000/60.

[100] See Section 19.6 of UNMIK Regulation 2000/60.

[101] Section 22.9 of UNMIK Regulation 2000/60 also prescribed that a copy of an original document signed by the chairperson that had been sent to the registrar by facsimile transmission of the original was sufficient authority for any actions taken pursuant to that document. It should be noted that in summary procedure cases, Section 23.3 of UNMIK Regulation 2000/60 prescribed that decisions should contain the date of adoption, the names of the parties and their representatives, and the operative provisions of the decision. Some 17 different template cover decisions were drafted to cover all legal issues arising in cases.

[102] See Section 22.9 of UNMIK Regulation 2000/60.

enforce HPCC decisions through issuing and executing eviction orders where such measures were necessary.

Successful claimants who received decisions in category B cases, in relation to unauthorized transactions concluded in respect of residential property, received a decision from the HPD/HPCC ordering their ownership to be registered in the appropriate public record.[103]

In category A and C cases in which the HPCC ordered repossession, claimants were entitled to choose between three possible options for implementation of their decision. They could request repossession of the claimed property and on receipt of such a request the HPD made arrangements for the handover of the property to the claimant. Alternatively, in recognition of the fact that not all successful claimants wished to return to their properties, it was also open to them to request the HPD to place their property under temporary administration. In such cases, the HPD took possession of the property and utilized it on a temporary basis for humanitarian housing purposes.[104] The third option was closure of the

[103] In order to affect the registration, which was a matter that fell within the remit of the Kosovo Cadastre Agency (KCA) pursuant to Section 3.7 of UNMIK Regulation 2000/22, a joint understanding was reached between the KCA and the HPD in May 2005. The KCA undertook to register all category B orders on receiving a certified copy of the HPD/HPCC Order, together with a written request for registration from both the HPD and the claimant. The HPD furnished all claimants with the HPD/HPCC Order in their case, and they were also informed about the requirement to submit a written request to the KCA.

[104] The legal framework that governed the management of property placed under temporary HPD administration was set down in Section 12 of UNMIK Regulation 2000/60 and in internal procedures that were adopted by the HPD for the implementation of this aspect of its mandate, pursuant to Section 12.5, which prescribed that the HPD should "establish criteria for the allocation of properties under administration on a temporary humanitarian basis." Temporary permits were granted for a limited period of time, but could be renewed on application. For as long as the property was under administration, the claimant's right to take possession of the property was suspended. It was open to claimants to give notice to the HPD at any time of their intention to return to possession of the property, and following receipt of such a notice, the HPD delivered an eviction order requiring the temporary permit holder to vacate the property within 90 days. When the latter did not vacate the property within the prescribed time period, the HPD issued a warrant authorizing the execution of the eviction order. Further, it was also open to the HPD to issue an eviction order on the temporary permit holder of its own violation, when the latter no longer qualified for a temporary permit, such as when the permit had expired, he or she ceased to qualify for accommodation on humanitarian grounds or failed to comply with the terms and conditions of the permit. The administration of the property by the HPD terminated upon repossession by the claimant. The HPD was under a statutory obligation to take all reasonable efforts to minimize the risk of damage to any property under its administration, but it had immunity from responsibility for any damage to property under administration or loss of or damage to its contents.

claims file, and this was mainly an option for claimants who had sold or voluntarily disposed of their property and did not therefore require any further assistance from the HPD.

Dealing with the Illegal Occupation of Property

Where a property over which a successful claimant had requested repossession or administration was found to be illegally occupied, a copy of the HPCC decision was served on the occupant, ordering him or her to vacate the property within thirty days, or, failing this, that he or she would be evicted.[105] In order to ensure fairness of procedures, it was open to an occupant in such cases to request humanitarian housing, or to file a request for reconsideration of the decision.

Requests for humanitarian housing were required to be filed within fourteen days of receiving the decision.[106] In cases where the claimant had requested administration and the HPD found that the occupant's request for housing assistance was well founded,[107] it could, on taking the property under its administration, grant the occupant a temporary permit to reside there pursuant to Section 12 of UNMIK Regulation 2000/60. Where the claimant requested repossession, the provision of humanitarian housing for the occupant was subject to the availability of suitable alternative properties and eligibility criteria, but the HPD could, at its discretion, delay the execution of an eviction order for up to six months, pending a resolution of the housing needs of the occupant, or under such circumstances as it deemed fit.[108]

[105] See Section 13.2 of UNMIK Regulation 2000/60. Where the occupant sought to evade service of the decision, the process server noted this fact on a receipt that he or she signed and placed in the claim file.

[106] The 14-day period allowed the complete processing of the application before the expiry of the 30 days. Where the HPD found that the occupant's request for housing assistance was well founded, and in line with its internal criteria for granting housing assistance, it could, on taking the property under its administration, grant a temporary permit to occupy the property pursuant to the provisions of Section 12 of UNMIK Regulation 2000/60. In cases where repossession was requested, an occupant who applied for and qualified for humanitarian housing was reallocated an alternative available property already under HPD administration.

[107] In line with its internal criteria for granting housing assistance.

[108] See Section 13.2 of UNMIK Regulation 2000/60.

Requests for reconsideration of HPCC decisions were required to be filed within thirty days of receiving the decision.[109] The execution of a pending eviction order was automatically stayed from the time of filing a reconsideration request until the HPCC had decided on the request, unless the HPCC decided otherwise.[110]

Where an occupant failed to vacate the property and did not request humanitarian housing or reconsideration of the decision, the eviction order was enforced and a warrant authorizing its execution was issued.[111] Evictions were carried out by HPD officers with the support of the law enforcement authorities. Initially support was provided by international police officers (UNMIK Police) and the NATO-led military presence, KFOR, but this responsibility was gradually transferred to the local Kosovo Police Service under the direction of UNMIK police.[112] An eviction order was executable against any party occupying the property at the time of the eviction.[113] The responsible HPD officers were required to be in possession of the signed eviction warrant authorizing the execution of the eviction order. Pursuant to Section 13.5 of UNMIK Regulation 2000/60, during the execution of an eviction order any party who failed to comply with an instruction issued by the responsible officer requesting him or her to vacate the premises could be removed by the law enforcement authorities. Following an eviction, the responsible HPD officers sealed the property[114] and arrangements were made to place it under administration or secure repossession, depending on the claimant's choice of implementation. A similar procedure was followed for evictions carried out in favor of claimants who originally opted to place property under HPD administration and subsequently requested repossession of the property, where a temporary permit holder or other occupant failed to vacate the property after the expiry of the statutory notice period.[115]

[109] See Section 14.1 of UNMIK Regulation 2000/60.
[110] See Section 14.3 of UNMIK Regulation 2000/60.
[111] See Section 13 of UNMIK Regulation 2000/60.
[112] See Section 13.4 of UNMIK Regulation 2000/60.
[113] See Section 13.3 of UNMIK Regulation 2000/60.
[114] Officers from the HPD's Enforcement Unit took photographs of the claimed property, recorded its grid number using GPS technology, and prepared a report setting out the condition of the property.
[115] Note, however, that Section 12.7 of UNMIK Regulation 2000/60 governed the procedure to be applied where a claimant requested repossession of his or her property that was under HPD administration.

Dealing with Property Under Temporary Administration

At the time of writing there were 5,312 properties under temporary HPD administration.[116] In April 2006 approval was given by the SRSG for the implementation of a rental scheme for these properties, and the Provisional Institutions of Self Government expressly concurred to its implementation in August 2006. The scheme which was designed by the Kosovo Property Agency[117] became operational in October 2006 and provides legal and physical protection for abandoned residential property, and ensures a minimum income source from the property for displaced property right holders, who otherwise may decide to sell.

The Issue of Compensation Where Restoration of Property Rights Was no Longer Feasible

It is well recognized that the destruction of property should not disentitle refugees or IDPs from seeking or obtaining monetary compensation for their loss of property right and the restoration of the land parcel on which their home once stood.[118] However, one of the primary shortcomings of the HPD/HPCC process was that it was not conferred with jurisdiction to deal with claims for monetary compensation for damage or destruction to property. Section 2.6 of UNMIK Regulation 2000/60 expressly precluded the HPCC from receiving "claims for compensation for damage to or destruction of property."

Out of the 29,155 residential property claims filed with the HPD, some 10,336 were confirmed destroyed by the HPCC.[119] Claimants in such

[116] Of the 5,312 properties under administration, some 1,841 are abandoned properties that were placed *ex officio* under administration, while 3,471 relate to cases in which successful HPD claimants requested that their properties be placed under administration.

[117] The Kosovo Property Agency (the KPA) was established in March 2006 to resolve claims over private immovable property, including agricultural and commercial property. The HPD was subsumed into the KPA, and the latter was thereby conferred with responsibility for dealing with properties under HPD administration together with the resolution of all property claims pending at that time with the HPD; see further UNMIK Regulation 2006/10 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property.

[118] Supra Leckie, note 1, 38–40.

[119] Three of these decisions were issued in category A claims and the rest in category C claims.

cases, who proved compliance with the requirements for an order for repossession at the time of the destruction of the property, were issued with a declaratory order confirming their property right as at the time of its destruction. A Declaratory Order could be used in court proceedings to contest any subsequent illegal occupation of the land parcel on which the residential property stood or as evidence of the property right where the claimant sought to benefit from any future reconstruction project or compensation scheme.[120] However, this limitation of jurisdiction resulted in more than one-third of claimants (some 10,336 families) who filed claims with the HPD not receiving compensation in lieu of restoration of their property right, where their property was found to be destroyed. Further, reconstruction programs in Kosovo have not been undertaken and implemented on a scale necessary to meet the needs of all these claimants.

The HPCC's jurisdiction to award compensation was limited by UNMIK Regulation 2000/60 to cases involving successful occupancy right and ownership right claims filed over the same property, where it was necessary to compensate one party through an award of compensation when restitution in kind was ordered in favor of the other party.[121] The scheme applied only in cases where the occupancy right to a socially

[120] In destroyed property cases, the granting of an order for repossession by the HPCC depended on whether the site was occupied, and the nature and form of the occupation. In cases where the property had been totally destroyed and a substantially different form of structure had been erected on the land parcel (e.g., a building or a monument), the HPCC recognized that it was legally impossible to restore possession of the destroyed property to the claimant. It held that the claimant had an entitlement in such cases to relief in respect of both the land parcel and the new structure, but as a determination of this issue fell outside of its jurisdiction, it referred the matter to court for determination. The situation was somewhat different in cases in which the property had been partially destroyed and the respondent had illegally occupied it, and built a new residence alongside the claimant's residence. In such cases, the HPCC held that where the new structure on the land parcel was a residential structure that was comparable in terms of its purpose or otherwise with the structure that was on the land parcel before, there was no reason why the claimant's rights in terms of Sections 2.5 and 2.6 of UNMIK Regulation 2000/60 should not be recognized. In these circumstances it granted an order restoring possession of the land parcel and the structure on it. The respondent was ordered to vacate the property within 30 days of the delivery of the order, or failing this, that he or she would be evicted from the property. The HPCC referred the claim to the municipal court for the purpose of determining the relief that was appropriate in respect of the new structure that had been erected on the land parcel. In cases in which the claimant's property had been totally destroyed and no new structure had been erected but the land parcel itself was illegally occupied and used, for example, as a garden or parking lot, the HPCC granted an order for repossession.

[121] See Section 4 of UNMIK Regulation 2000/60. Section 4 is also considered below.

owned apartment was canceled as a result of discrimination and where the apartment was subsequently purchased from the allocation right holder pursuant to the 1992 Law on Housing[122] by another party (the category C claimant), known as the "First Owner." It should be noted that category C claimants with property rights other than ownership rights were not included in this scheme.[123] In determining the respective property rights of the parties in such cases, the HPCC applied the provisions of Section 4 of UNMIK Regulation 2000/60, which regulated awards of restitution and compensation and provided for the establishment of a trust fund to be administered by the HPD.

Lessons Learned

This chapter has presented an extensive account of the essential features of the HPD/HPCC process from its inception in 1999 to the final stages of implementation of its mandate in 2006. As the process was a relatively new experience in property restitution in the context of international peace operations, there are a number of valuable lessons that can be learned from the process, both in the context of the treatment of HLP rights challenges by the UN in post-conflict settings, and in relation to the establishment and design of legal mechanisms for redressing HLP disputes. This chapter enumerates the lessons learned from the process, which are undoubtedly relevant in formulating policy and establishing mechanisms to tackle similar challenges in future post-conflict settings.

1. Policies on Addressing HLP Issues and Concerns Should Be Included in Peace Settlements and Agreements

Comprehensive proposals to deal with property rights issues should be explicitly provided for in future peace settlements and agreements. These proposals should include provisions on the mechanisms and programs to be utilized in the resolution of HLP issues and the institutions to be mandated to resolve disputes. The inclusion of mere references in peace agreements to resolving property issues and creating conditions conducive

[122] Official Gazette of the Republic of Serbia, No. 50/92.

[123] Category C claimants who had occupancy rights or possession rights were not included; see Section 4.3 of UNMIK Regulation 2000/60.

for refugees and displaced persons to return to their homes, which are inspirational in nature, do not represent concrete actions or impose firm obligations on authorities to actively engage in resolving such issues. On the contrary, they have proven in the past to be insufficient in guaranteeing that effective action will subsequently be taken to address HLP issues.[124]

2. Comprehensive Policies on Addressing HLP Issues and Concerns Should Be a Key Component of Peace Operations and Be Institutionalized Within the UN System

HLP rights challenges are common to all post-conflict settings, and they must therefore become a key component of post-conflict resolution and peacebuilding. They must be afforded the same priority within peacebuilding operations as other human rights violations and rule of law issues. In the absence of such external intervention, it is clear in particular from the Kosovo experience that property-related issues will not be effectively addressed, due to the inevitable legal and institutional vacuum that ensues in the aftermath of a conflict. This is for the most part due to the lack of judicial capacity, doubts concerning the impartiality of the judicial process, and political and financial factors. It has been widely recognized that the effective transformation of a dysfunctional judicial system into one that is capable of dealing with its caseload in an efficient and effective manner, and meets fundamental international standards is a long and arduous process. In such an environment, the resolution of property disputes and other urgent property issues will only occur if the necessary actions are taken by peace operations to develop, establish, and implement restitution programs.[125] Such initiatives can take various forms, depending on the circumstances pertaining in the post-conflict setting, from the creation of entirely new and independent mechanisms like the HPD/HPCC or simply supporting existing national authorities and institutions through the allocation of human and financial resources that focus on capacity building and education.[126]

[124] See Leckie, note 5, and Leckie, note 1, 396.
[125] See further, supra, Leckie, note 1, 396–397.
[126] See further, supra, Leckie, note 5, 11.

In developing post-conflict restitution programs, care should be taken to adopt a comprehensive policy that addresses all urgent HLP rights challenges. As highlighted earlier, the HPD/HPCC process was mandated exclusively to deal with residential property issues. While tackling issues in the residential property sector as early as possible is in itself a key component of peacebuilding, no comparable initiatives were taken to address other urgent property rights challenges, such as the resolution of disputes over land and commercial properties, or the reconstruction of some 10,000 destroyed properties belonging to the minority population. As the HPD/HPCC process in 1999 was mandated to deal with only a small portion of the numerous legitimate issues that needed to be resolved in the property sector in the aftermath of the armed conflict, agricultural and commercial property disputes remain unresolved today, some seven years later, as the efficiency and capacity of the domestic courts were wrongly projected.[127] Only in March 2006 did UNMIK enact Regulation 2006/10, which mandated an independent property restitution mechanism, namely, the Kosovo Property Agency (the KPA), to resolve claims over immovable property, including agricultural and commercial property, arising out of the 1999 armed conflict. This clearly had implications for the returns process, as many refugees and IDPs have not taken repossession of their homes due to the fact that their income generating source, namely, their land or commercial premises, remains illegally occupied.

Not only was the creation of the KPA six years late, it also introduced a new legal machinery and procedures, and therefore demands a new inception period before becoming effective, thus making the commencement of operations slow and expensive.[128] Further, efforts and initiatives to reconstruct some 10,000 minority homes destroyed during and immediately after the conflict and the provision and management of social housing for the less well off in Kosovo are slow to be addressed and realized.

[127] See the OSCE's Review of the Criminal Justice System entitled "The Administration of Justice in the Municipal Courts," March 2004, p. 9. See also the Final Report prepared by ECO and submitted to the European Agency for Reconstruction (EAR) dated 13 December 2004, p. 13 and p. 25; See para. 67 of the Report of the Secretary-General on the United Nations Interim Administration in Kosovo to the Security Council, dated 26 May 2005 (S205/335).

[128] At the time of writing, the provisions of UNMIK Regulation 2006/10 dealing with the adjudication process are under review.

It is therefore clear from the Kosovo experience that the development of a clear institutional and policy framework for addressing all legitimate HLP issues and concerns is of paramount importance in post-conflict recovery and rehabilitation. All relevant HLP rights issues should be consistently and comprehensively addressed in future peacekeeping operations as early as possible. In order to achieve this, the authors concur with the proposal in the UNHCR's Report on Housing, Land and Property Rights in Post-Conflict Societies, which advocates for an operational response to housing, land, and property issues to be institutionalized within the UN system, so as to ensure their automatic inclusion in the overall operational design and mandate of peacebuilding operations.[129] The UNHCR report proposes that the UN (including agencies and departments such as UNHCR, UN-Habitat, DPKO, OCHA, OHCHR, and others) establish a housing, land, and property rights policy group with a mandate to develop a UN Institutional and Policy Framework on such issues.[130] Such an initiative would go a long way toward ensuring that property rights concerns are not overlooked in the future, and that all urgent issues are addressed in an equitable and comprehensive manner.[131] Such a framework can be utilized in situations where the UN functions as the Interim Authority and exercises powers of governance as well as in peace operations where it plays a supportive or advisory role.[132]

3. Institutional Models and Procedures

Institutional mechanisms established to resolve HLP disputes should be grounded on a firm regulatory framework. Their design must take into account the particular circumstances in which they have to operate, and the urgent needs of claimants to return to their homes. They must therefore be equipped with the necessary tools that allow them to implement their mandates effectively and efficiently, to include rules of procedure and

[129] See further, supra, Leckie, note 5.

[130] This paper also recommends that the appropriate UN department or agency create a new, permanent post entitled Senior Coordinator for housing, land, and property issues to oversee the development of the new UN housing, land, and property institutional and policy frameworks, with its eventual incorporation into all future UN peace operations; see supra, Leckie, note 5.

[131] See supra, Leckie, note 1.

[132] See supra, Leckie, note 5.

evidence that permit the utilization of mass claims processing techniques and other standardized procedures.[133] Further, the adjudicating body should be conferred with broad decision-making powers and be permitted to take such other measures as it considers necessary to expedite decision-making.

Where the adjudicating component does not hold hearings, the process must be designed in a way that ensures fairness of procedures. Such procedures should set-down provisions for the notification of all parties with an interest in the claimed property to be notified of the claim and of their right to participate in the proceedings. Procedures should also provide for the exchange of written evidence and legal submissions between the parties, permit the reconsideration or appeal of first instance decisions, and ensure adequate notice prior to the execution of eviction orders. Further, the legal process must comply with internationally recognized human rights standards, which may require the repeal of discriminatory laws.

In order to take account of the particular circumstances in which the restitution mechanism will have to operate in the wake of a conflict, and recognizing the difficulties that will be encountered by some claimants in sourcing and adducing documentary evidence, the rules of procedure should permit claimants to file claims even if they are not in a position to submit supporting evidence. The mechanism should be conferred with a statutory authority to conduct searches in all public records for relevant documentation and evidence. Rules of evidence should be prescribed that effectively reduce the standard of proof and shift the traditional burden of proof away from the claimant and onto the restitution mechanism.

An essential prerequisite for determining claims is that the claims processing mechanism be afforded free and unhindered access to records held by public or corporate bodies and natural persons that are relevant to the investigation of claims. Further, the mechanism must invoke standardized and comprehensive procedures for investigating claims and verifying documentary evidence.

[133] Thus enabling it to consider claims raising common legal issues together; process uncontested claims in accordance with a summary procedure; utilize computer databases, programs, and electronic tools; and issue cover decisions in respect of high numbers of individual cases.

4. An Accessible and Free Claim Procedure and an Effective Public Information Campaign

Restitution mechanisms must be easily accessible, user-friendly, and fully subsidized so that claimants do not incur legal fees, regardless of whether their claim is granted or dismissed. Further, the process must be relatively straightforward so that claimants can easily understand its procedures and thus be expected to have confidence in the system. In order to achieve clarity of procedures and accessibility, the claim form must be available in a language that claimants understand and the necessary resources must be put in place to render assistance to claimants in filling out the claim form, and answering their questions on the process. Further, the applicable law should contain provisions permitting claimants to file claims through family members and authorized persons, and claim intake offices or mobile units should be established in regions where refugees and IDPs are residing.

An effective outreach to claimants is crucial to the legitimacy and transparency of the program. An insight into the claim processing activities, coupled with reliable information on claims status, will lend confidence to the mechanism and ensure that claimants do not feel alienated from the process. This can be achieved through the establishment of an outreach unit that is equipped with adequate resources to respond to incoming inquiries from claimants and the public at large. An interactive website is also crucial for the publication of up-to-date information on the restitution program, statistics, and final decisions, and it should also contain a search engine that allows claimants to ascertain the status of their claim. The HPD/HPCC experience found that the overall perception of the institution improved significantly with the establishment of an outreach unit and an interactive website.

5. Effective Remedies and the Implementation of Final and Binding Decisions

A decision recognizing a claimant's property right on its own is not sufficient in a post-conflict society to restore possession of property to claimants. Such decisions must also be enforced in favor of claimants. Thus an essential component of an effective property dispute resolution program is that it is conferred with the power to deal with illegal occupation of property and to fully enforce and ensure compliance with legally binding decisions. In order to meet these requirements, the mechanism must be

explicitly empowered under its enabling legislation to implement final and binding decisions, and to do so through the execution of eviction orders, where necessary.

Further, the process must have at its disposal a range of remedies that can be utilized in enforcing decisions from which refugees or IDPs can choose depending on their circumstances. These should include options such as repossession, placing property under temporary administration, and operating a rental scheme in respect of such properties in order to ensure a minimum source of income to displaced property right holders.

6. Funding

Throughout the HPD's years of operations, funding was the single biggest and most difficult challenge plaguing the institution. This was largely due to the fact that the process was dependant on donor contributions, which made up 70 percent of the total funding requirements of the operation.

The limited funding available posed a serious threat to the efficiency and viability of the entire operation. Shortages of funding severely affected the claim intake and case processing stages of operations, and impacted on the recruitment of personnel, which in turn negatively affected the overall efficiency of the mechanism. For example, in February 2002, funds were nearly exhausted and the HPD was forced to lay off half of its international staff and to scale down its operations considerably. Case processing suffered serious setbacks and the institution was forced to run with a skeletal staff that struggled to keep it functioning. This situation was only reversed through concerted efforts with key donors, through the provision of up-to-date information on the financial situation together with a commitment to substantive delivery. As a consequence, much energy and time had to be directed toward fundraising and away from the daily management and substantive work of the institution.

The lesson to be learned from this experience is that sustained financial support is vital to the overall efficiency of the claims resolution program and that the effective and efficient implementation of the programs requires funding commitments at all stages throughout the period of operations. The initial cost of setting up computer-supported processes for claims registration and verification, designing software and databases, and training and equipping personnel is high. Without sufficient and reliable funding from the outset, proper planning and implementation

become very difficult, if not almost impossible. Thus, donors need to be identified prior to the establishment of the mechanism, who are committed to acting as key financial supporters throughout the duration of its operations.

7. Fulfilling Statutory Undertakings and Commitments

Peacekeeping operations that engage in establishing mechanisms for resolving property disputes and subsequently enact legislation setting down the rights of parties must be willing to follow through and honor such legislative commitments. Under the HPD/HPCC process, the HPCC did not have jurisdiction to award compensation to dispossessed property right holders, even in cases where the claimed property had been damaged or destroyed. On receiving a decision from the HPCC recognizing their property right, claimants had a right to either return to their property or place it under temporary HPD administration.[134] The question of monetary compensation only arose in a limited number of claims[135] where the law prescribed for the payment of compensation *inter partes*.[136] While the overall performance of the HPD/HPCC process can be judged positively, its mandate will only be fully implemented as and when the compensation provisions are implemented. For similar future operations there must be a willingness to follow through on and honor legislative commitments.

8. Coordination and Follow-Up Among the Major Stakeholders and Entities

A better understanding of the relationship between the resolution of property rights and refugee return is of paramount importance in designing an effective and fair restitution process. The resolution of property disputes and the return of property to the lawful property right holder is only one aspect of creating conditions conducive to sustainable return as from a practical

[134] See Section 2.5 of UNMIK Regulation 2000/60.

[135] This occurred in cases where the occupancy right over a socially owned apartment was canceled as a result of discrimination (category A claim) and where the apartment was subsequently purchased from the allocation right holder (by the category C claimant) pursuant to the Law on Housing 1992 (Official Gazette of the Republic of Serbia, No. 50/92).

[136] See Section 4 of UNMIK Regulation 2000/60. A party with the occupancy had a right to ownership of the property upon payment of a sum to be determined by the HPD, and the first owner (who participated in the privatization scheme under the 1992 Law on Housing) was entitled to receive compensation for his or her loss of property right, considered below.

perspective, granting repossession to claimants over their homes is not sufficient to render their return viable. There are many other issues that need to be addressed in order to ensure that return is sustainable, such as ensuring access to services, a means to generate an income, freedom of movement, security, and reconstruction of destroyed properties. Unless concerted action is taken to formulate comprehensive policies to address these issues, which are subsequently implemented by the various responsible stakeholders in as effective and efficient a manner as the property dispute resolution mechanism implements its mandate, return will not be feasible. Failure to address these issues will hamper return and will result in claimants not exercising their right to take repossession and return home after they have received a successful decision in relation to their property claim. In such cases, there is a danger that the property institution mechanism, no matter how efficient and successful, will be "blamed" for the lack of visible return.

Conclusion

The HPD/HPCC process has effectively implemented its mandate and resolved some 29,000 residential property claims. This accomplishment is noteworthy and has made a significant contribution to assisting dispossessed property right holders gain repossession of their homes. It has also contributed both to the ideals espoused in Security Council Resolution 1244 and to post-conflict rehabilitation, effectively addressing the loss of property rights brought about due to ethnic discrimination, mass population displacement, and refugee flows. It is well recognized that such events, if left unaddressed, will continue to precipitate social unrest and ethnic tension, leading to further violence and unrest.[137]

The HPD/HPCC process and other HLP restitution initiatives undertaken by the international community in post-conflict settings over the past decade serve as a testimony to the strength and widespread acceptability of the right to restitution for violations of HLP rights. They also indicate a recognition of the fact that the resolution of property rights issues is a central component of peacebuilding efforts and indispensable to economic revitalization and the stability of peacebuilding and

[137] Supra, Leckie, note 5, and Lewis, D., "Challenges to Sustainable Peace: Land Disputes Following Conflict," UN-HABITAT, April 2004.

democratization efforts. Most importantly, they demonstrate a willingness on the part of the international community to engage actively to ensure that the restitution remedy is enforced as an integral part of post-conflict reconstruction and rehabilitation.

However, while the approach to the resolution of residential property issues in Kosovo has been successful, a more comprehensive approach to addressing HLP issues earlier on in the mission would have ensured that other legitimate and urgent challenges were also effectively addressed. This, in turn, would have been more beneficial for the returns process and would have expanded the possibilities for economic development.

An institutional and policy framework within the UN system for dealing with property issues could potentially have ensured that UNMIK addressed a broader range of HLP issues in 1999, and that the HPD's mandate would have been more all encompassing. It is hoped that such an approach will be adopted in the future and that the lessons learned from both UNMIK's overall response to dealing with HLP issues and the HPD/HPCC process itself will be taken on board when formulating policies to tackle HLP rights challenges and design HLP restitution models. The adoption within the UN system of an institutional and policy framework on housing, land, and property issues that would be applicable to all post-conflict settings where the UN is actively involved would undoubtedly go a long way toward ensuring that restitution rights are recognized through the enactment of laws and procedures vindicating these rights. It would also ensure that the many millions of refugees and displaced persons who wish to return to their homes are enabled to do so, as restitution rights for property violations are addressed comprehensively by peacekeeping operations together with other human rights violations.[138]

[138] This chapter was written by Knut Rosandhaug (Former Director of the Kosovo Property Agency and former Director of the Housing and Property Directorate) and Margaret Cordial (Legal Advisor and External Relations Officer at the Kosovo Property Agency). Opinions expressed in this chapter are solely those of the authors and do not represent the views of any organizations or governments with which the authors have been or are associated.

4

Balancing Rights and Norms

Property Programming in East Timor, the Solomon Islands, and Bougainville

Daniel Fitzpatrick and Rebecca Monson

Appropriate policies for housing, land, and property (HLP) are important elements of a successful peace operation.[1] This chapter considers property-related policies in East Timor, the Solomon Islands, and Bougainville. These cases fall in the region to the northeast of Australia that has become known as an "arc of instability." While each case involved very different forms of peace operations – from the UN transitional administration in East Timor to Australian-led peacekeeping in the Solomon Islands and Bougainville – all had very similar HLP problems. These included a range of post-conflict phenomena: mass population displacement, widespread damage to housing and land administration, and systematic failure in the institutions of government. They also involved a land issue common to many postcolonial conflicts, namely, the status and recognition of customary land tenure.

We base our analysis of each case around the application (or non-application) of international standards. The relevant international standards relating to property may be summarized as follows:

- *Housing*: There is a basic right to adequate housing.[2] There are also more specific rights to equality and nondiscrimination in the provision of housing.[3]

[1] Daniel Fitzpatrick, "Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor," *Journal of Humanitarian Assistance*, http://www.jha.ac/articles/a074.htm (2001); Scott Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons,* Transnational Publishers, Ardsley, NY (2003).

[2] *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, United Nations, E/CN.4/Sub.2/2005/17 (2005) Art. 8.1; *Comprehensive Human Rights Guidelines on Development-Based Displacement*, United Nations, E/CN.4/Sub.2/1997/7 (1997) Art. 18; *General Comment No. 7 on Forced Evictions*, United Nations (1997), Para. 9.

[3] Supra *Principles*, note 2, Art. 4.1.

- *Restitution*: All displaced persons have a basic right of return.[4] This right may now include a right of return to one's home, or compensation in lieu of such return.[5]
- *Tenure Security*: Landholders have a right to secure forms of land tenure.[6] This right may be found in guarantees of private property, or in support for common property systems. It encompasses protection against forced evictions.[7]
- *Access*: Indigenous groups have a right to access and manage resources in their traditional territory.[8] Other landholders have a right to livelihoods, including the opportunity of access to natural resources.[9]
- *Nondiscrimination*: Displaced persons must not be discriminated against on the basis of race, sex, or religion.[10] Special measures may be appropriate for vulnerable groups including women, children, and the poor.[11]

[4] Id., Art. 10.1; *Guiding Principles on Internal Displacement*, United Nations, E/CN.4/1998/53/Add.2 (1998) Principle 28; *UNHCR Executive Committee Conclusion No. 18* (XXXI) "Voluntary Repatriation," A/AC.96/588 (1980) paras (d), (f), (i); *UNHCR Executive Committee Conclusion No. 40* (XXXVI) "Voluntary Repatriation," A/AC.96/673 (1985) paras (a), (b), (d), (h); *Comprehensive Human Rights Guidelines on Development-Based Displacement*, United Nations, E/CN.4/Sub.2/1997/7 (1997), Art. 25.

[5] Supra *Principles*, note 2, Arts. 2.1, 13.1, 21.1; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations Commission on Human Rights, res. 2005/35, E/CN.4/2005/L.10/Add.11 (2005), Arts. 19 and 20; *Comprehensive Human Rights Guidelines on Development-Based Displacement*, United Nations, E/CN.4/Sub.2/1997/7 (1997), Art. 24.

[6] Supra *Comprehensive Human Rights Guidelines*, note 4, Arts. 9, 17, 19.

[7] Supra *Principles*, note 2, Arts. 5.1 and 5.3, and *Comprehensive Human Rights Guidelines*, Art. 15.

[8] *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples*, International Labour Organisation (1989), Art. 15; see also *Proposed American Declaration on the Rights of Indigenous Peoples*, Organisation of American States (1997), Art. XVIII(4).

[9] The definition and status of these rights in international law require further clarification. For references concerning rights of access see, e.g., *Declaration of Principles and Programme of Action of the World Conference on Agrarian Reform and Rural Development*, United Nations Food and Agriculture Organisation (1981), Principle viii, Chapter II(e)(ii); *Agenda 21*, United Nations Department of Economic and Social Affairs – Division for Sustainable Development (1992), Chapter 3.8(o).

[10] Supra *Principles* note 2, Art. 3.1; *Guiding Principles*, Principles 1, 4, and 22; *Comprehensive Human Rights Guidelines*, Art. 14.

[11] Supra *Principles*, note 2, Arts. 4.3 and 12.2; *Comprehensive Human Rights Guidelines*, Art. 9; and *General Comment No. 7 on Forced Evictions*, para 11.

The application of these standards to the following three case studies leads to the following conclusions and recommendations:

- International standards must provide a universal normative framework that allows sufficient flexibility to meet particular challenges. A "one size fits all" approach will not resolve the full variety of HLP issues after armed conflicts.
- Most armed conflicts stem from greed or grievance.[12] Resource wealth encourages greed. Inequality and dispossession encourage grievance.
- Effective HLP programming requires early problem identification and policy development. Whatever the mission, no peace operation can afford to ignore HLP-related programs. A failure to develop HLP programs jeopardizes the longer term success of a peace mission.
- HLP programming after an armed conflict must focus on all aspects of international standards. This includes housing, restitution, tenure security, access to natural resources, and nondiscrimination.
- Effective HLP programming is not a zero-sum game. Careful choices may be required between competing demands imposed by international standards. Demands for restitution, for example, may need to be balanced with requirements for housing, tenure security, access to natural resources, and nondiscrimination.
- Restitution of land and housing may be an appropriate policy response in circumstances of one-off displacement or ethnic cleansing. In cyclical cases of displacement, a focus on restitution alone may entrench patterns of grievance that are underlying causes of conflict.
- Programs of restitution or compensation for displaced persons have a high degree of institutional difficulty. Quick action is required to avoid escalating claims that inflame tensions and induce further forms of grievance.

[12] Paul Collier and Anneke Hoeffler, "Greed and Grievance in Civil War," 56(4) in *Oxford Economic Papers* 563 (2004).

East Timor

Geography, Economics, and Society

East Timor has a land area of approximately 14,600 square kilometers. Some 600,000 hectares, or 42 percent of the land mass, is viable agricultural land. With 44 percent of the land mass at an incline of greater than 40 percent, large areas of East Timor are not cultivated. The bulk of agricultural activity is subsistence farming (corn, rice, root crops, vegetables, and fruit), although there has been some production of coffee, tobacco, cloves, cocoa, vanilla, and areca nuts. The soil is generally shallow and susceptible to landslides and flooding. Many areas will require reforestation.[13]

Culturally and linguistically, the country is a patchwork of twenty-five or so ethno-linguistic groups. Outside urban areas, land is managed through traditional systems of kinship and exchange. Typically, these systems are represented through membership of groups that cluster around the concept of "sacred houses" (*uma lulic* in the Tetum *lingua franca*). These structures represent ancestral origin houses where sacred heirlooms are stored and where affiliated members of the "house," often living in widely dispersed settlements, periodically convene to enact rituals and celebrate their mythic unity.[14] The strength of East Timor's resistance to Portuguese colonization, Japanese invasion, and Indonesian occupation is closely associated with kinship and exchange relations within these ancestral lineage houses.

Decolonization and Invasion

In 1960, the UN General Assembly included East Timor on its list of non-self-governing territories, which meant that the then colony of Portugal was viewed as a candidate for decolonization and self-determination (U.N. Doc. A/4684 1961). This principle of self-determination was accepted by Portugal

[13] Kathryn Monk, Yance de Fretes, and Gayatri Reksodiharjo-Lilley, *The Ecology of Nusa Tenggara and Maluku*, Periplus Editions, Jakarta (1997), 52.

[14] Daniel Fitzpatrick and Andrew McWilliam, "Waiting for Law: Land, Custom and Legal Regulation in Timor-Leste," in H. Hill and P. Thomas (eds.), *Cooperating with Timor-Leste: Options for Good Development Practice*, 2005, Development Bulletin No. 68, ANU, Canberra.

in 1974. As a result, the Portuguese administration in East Timor was reorganized in late 1974, and local political parties were allowed to be formed. This led to the establishment of two main parties: Fretilin (Frente Revolucionara de Timor Leste) and UDT (Uniao Democratica Timorense).[15] On 28 November 1975, Fretilin issued a declaration of independence for East Timor. In response, the UDT issued a statement, on behalf of a group calling itself the "Anti-Communist Movement," calling for intervention by the Indonesian government and integration of East Timor into Indonesia. On 7 December 1975, Indonesian armed forces invaded East Timor.

Indonesian Law No. 7 of 1976 purported to integrate East Timor into Indonesia. It also purported to import all Indonesian law, including the Basic Land Law of 1960, into East Timor as of 16 July 1976. Notwithstanding this "formal" integration, the reality was that by the end of 1976 approximately 80 percent of East Timor remained outside the control of Indonesian forces. In September 1977, the Indonesians embarked on a new offensive, with the use of naval artillery, aerial bombardment, and defoliants. They also began their tragic destruction of food crops and forced resettlement of villagers into "strategic camps." By December 1978, Indonesian military statistics estimated that an extraordinary 372,921 people, as many as one-half of the population, were refugees in these strategic camps. In 1979, Indonesia declared this offensive a success, and claimed that the province had now successfully been integrated within Indonesia. By this time, Fretilin had reportedly lost approximately 90 percent of its weapons and 80 percent of its soldiers.[16]

In reality, however, the armed resistance had not been extinguished and, in June 1980, after Fretilin had launched attacks on Dili itself for six hours, the Indonesian military launched a new offensive named "Operation Security" (*operasi keamanan*). This extraordinary plan involved the forced recruitment of all men between the ages of eight and fifty years old to form human chains, known as the fence of legs (*pagar bettis*), across the entire island at the easternmost and westernmost parts of East Timor. They were then forced to march toward each other, converging in the middle of the island. Taylor reports that, at its most conservative estimate,

[15] Xanana Gusmao, *To Resist is to Win: The Autobiography of Xanana Gusmao*, Sarah Niner, ed., Aurora Books, Melbourne (2000), 17.

[16] John G. Taylor, *East Timor: The Price of Freedom*, Zed Books, New York (1999), 90.

this operation involved 80,000 men. Because it was undertaken during the harvesting and planting seasons, agricultural production plummeted and a famine ensued.[17] In the event, as a result of both the invasion and this subsequent famine, it is estimated by international and East Timorese sources that between 160,000 and 200,000 East Timorese died between 1975 and 1981.[18]

The Militia Violence of 1999

At the time of the UN-organized vote for independence in August 1999, Indonesian statistics estimated the population of East Timor as almost 900,000. As a result of the pro–Indonesian militia violence, approximately 450,000 people were internally displaced within East Timor itself, and a further 300,000 fled or were forcibly transported across the border to West Timor.[19] Not surprisingly, this extraordinary displacement – more than 75 percent of the population – created a humanitarian crisis. Security had to be re-established, food and water provided, transport and return arranged, and housing and shelter re-built. Population flight stripped East Timorese institutions of expertise in governance and administration.[20] Most relevantly, it also re-awakened endemic cycles of land conflict as some took advantage of displacement or abandonment to re-possess lands allegedly lost as a result of dispossession in the Portuguese, Japanese, and Indonesian periods.

Seriously compounding these problems of population displacement was the destruction of land records, housing, and infrastructure. Most land title offices and records were destroyed.[21] More than half the housing stock was seriously damaged or destroyed. As a result, there was an understandable rush to occupy habitable houses when internally displaced persons (IDPs) and refugees returned to seek shelter. This phenomenon of ad hoc occupation has also been a feature of historical cycles of

[17] Id., 119.
[18] Jon Pedersen and Marie Arneberg (eds.), *Social and Economic Conditions in East Timor*, Columbia University International Conflict Resolution Programme, New York (2000), 74; Commission for Reception, Truth and Reconciliation in Timor-Leste, *Final Report* (2005).
[19] Daniel Fitzpatrick, *Land Claims in East Timor*, Asia Pacific Press, Canberra (2002).
[20] For a general description see the World Bank, *Report of the Joint Assessment Mission to East Timor* (8 December 1999).
[21] Supra, note 19.

displacement in East Timor, most notably in the 1940s (Japan) and the 1970s (Indonesia). The 2006 violence in East Timor also owes much to ad hoc housing occupations as longstanding Dili residents (Westerners) have acted – in the shadow of political and military instability – to expel "Easterners" that occupied Dili houses during the chaos of displacement and return in 1999 and 2000.[22]

The Nature of the Intervention

On 25 October 1999, the United Nations Security Council passed Resolution No. 1272, establishing the United Nations Transitional Authority in East Timor (UNTAET). Article 1 vested all legislative and executive authority with respect to East Timor, including the administration of justice, in the hands of UNTAET. Article 8 stressed "the need for UNTAET to consult and co-operate closely with the East Timorese people . . . with a view to developing local democratic institutions and transfer to these institutions of UNTAET administration and public service functions." UNTAET's first regulation (No. 1 of 1999) contained similar provisions. It announced that all legislative and executive authority with respect to East Timor, including the administration of the judiciary, was vested in UNTAET and was to be exercised by the Transitional Administrator, but that, in exercising these functions, the Transitional Administrator was to consult and cooperate closely with representatives of the East Timorese people (Article 1).

UNTAET Regulation No. 1 established a governing law for East Timor that was the law of the previous regime (i.e., Indonesia), as it was applied on 25 October 1999, subject to certain international human rights standards. These included the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on Elimination of All Forms of Discrimination Against Women; and the International Convention on the Rights of the Child (Articles 2 and 3). Only a few months earlier, the UN mission in Kosovo (UNMIK) adopted a similar formulation. In essence, UNMIK Regulation No. 1 applied Yugoslav law to the territory of Kosovo in so far as it did not conflict with

[22] Andrew Harrington, Land and Property: Impact on Crisis and Recovery in Timor-Leste, Oxfam, Australia (2006).

the same declarations, covenants, and conventions as were listed in UNTAET Regulation No. 1 (see Articles 2 and 3).

In contrast to Kosovo, however, UNTAET did not establish a land claims commission, or indeed any effective form of regulation of privately held land in East Timor. In September 2000, the United Nations Transitional Administrator (on advice from the National Cabinet) rejected a draft regulation that envisaged systematically registering uncontested titles, beginning first in Dili, while referring disputed claims to a proposed land claims commission. As a result of this decision, the UNTAET Land and Property Unit (by then under the East Timor Transitional Administration) was authorized only to file and record property claims, but not to continue preparations either for a land claims commission, a systematic titles registration project, or indeed any form of normal land registry function. Its major task remained the supervision of systems for mediating land conflicts and allocating public and abandoned properties through temporary lease rights. It otherwise performed no role in relation to recording interests or transactions in private land.

Little progress has been made since the departure of UNTAET and the election of an East Timorese government. The new constitution guarantees rights to housing, private property, and protection against expropriation without due process and compensation.[23] There are also now regulations governing the definition and nature of state land, and the grant of leases over state and private lands.[24] However, the key issue of ownership – who

[23] Daniel Fitzpatrick, *Restitution and Dispossession: International Property Norms in East Timor's New Constitution*, Refereed Published Proceedings of the Australia New Zealand Society of International Law Annual Conference (2002).

[24] See Law 01/2003, Juridical Regime of Real Estate – Part I: Ownership of Real Estate; Law 19/2004, Juridical Regime of Immovable Property – Official Allocation and Lease of State Property; Law 12/2005 Juridical Regime of Real Estate – Part II: Leasing between Individuals. These laws are discussed in Warren Wright, "Some Observations on the Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation Prepared by Timor-Leste Land Law Program," *East Timor Law Journal* (2004), 10; Warren Wright, "An Overview of the Provisions of East Timor's Law No. 1 of 2003 on the Juridical Regime on Immovable Properties," *East Timor Law Journal* (2004), 6; East Timor Land Law Program, Universidade Nacional Timor Lorasa'e, The Direcção de Terras e Propriedades, and ARD Inc., Report on Research Findings and Policy Recommendations for State Property Administration/Lease of Government and Private Property <http://landlawprogram.com/web/pdf/research/StateProperty-e.pdf>; (2003); Pedro Xavier De Sousa, East Timor, Land Management – A Long Way to Go but We Have Started <http://www.fig.net/commission7/bangkok_2005/papers/6_3_sousa.pdf>; (2005).

owns land, where, and under what title – has not been resolved. While a law establishing a land claims commission was expected in 2006 – with little public consultation or advance notice of its contents – it is now likely to be delayed by recent political and social instability.

Application and Assessment of International Standards

The Right to Housing

By April 2000, a significant proportion of intact housing in the capital city of Dili was occupied by persons other than their former owners. All these houses were extremely overcrowded. Conflict – sometimes violent – over housing was causing social unrest. Further uncertainty was then developing as those occupying houses sought to lease them to whoever was willing to take the risk. In these circumstances, not surprisingly, the market for housing in Dili quickly experienced hyperinflation as employees of international agencies poured into Dili, and rushed to enter into rental agreements with anyone appearing to own or control a habitable house.[25]

No provision was made for housing issues in the original planning of UNTAET. There was no division or department of housing, and the nearest body – UNTAET's Land and Property Unit – lacked resources and a mandate to cover housing issues. Indeed, it is remarkable that even in the UNTAET budget for 2000–2001, put forward in mid-2000, no specific provision was made for the construction of public housing.[26] As a result, there was still no significant "safety valve" to help unravel and regularize the rush to occupy habitable housing that occurred in late 1999 and early 2000.

In short, there was virtually no planned policy response to the relatively predictable effects on housing of widespread property destruction, mass population return, and the rapid influx of well-remunerated international personnel. Not only would programs based on the international right to housing have ameliorated these problems, but the absence of such programs has complicated the longer term tasks of re-establishing land administration, providing for property restitution, and enhancing legal security of tenure.

[25] Supra, note 1.
[26] Id., 45.

UNTAET'S inability to manage ad hoc housing occupations in 1999–2000 contributed significantly to the 2006 outbreak of violence in Dili. To the surprise of many experienced observers, political tensions involving the prime minister (Alkatiri) and the president (Gusmao) quickly evolved into a violent conflict between "Easterners" and "Westerners" in Dili. This conflict largely involved attempts at eviction by Westerners (long-standing Dili residents) of Easterners who occupied houses in Dili in 2000 without licence from the pre-2000 owners.[27] In this way, East Timor illustrates a direct relationship between housing occupations, property rights, and cyclical phases of violence.

Restitution: The Right to Return to One's Home

Even without these housing-related problems, East Timor provides a paradigmatic case of the difficulties of implementing international rights to HLP restitution. It squarely raises the question: Restitution for whom? Some cases, such as Bosnia-Herzegovina, Kosovo, and South Africa, are relatively straightforward in the sense that they are directed at reversing "ethnic cleansing" or systematic racial discrimination. In other conflict cases, however, restitution will be greatly complicated by multiple categories of dispossessed claimants and large numbers of current occupiers with no alternative place of residence. East Timor is such a case.

In East Timor, those who could claim restitution included: (1) holders of pre-1975 Portuguese titles, (2) customary landholders dispossessed in Portuguese times, (3) holders of Indonesian era titles, (4) those dispossessed of land in Indonesian times, and (5) those who were displaced or dispossessed in 1999.[28] Of course, UNTAET could have focused on the events of 1999 alone. It could have limited restitution or compensation to all those displaced without return in 1999. But this would simply have restored land to those who acquired titles during the Indonesian occupation. It would also have involved widespread evictions of ad hoc housing occupation in Dili and other urban areas. In the event, a restitutionary program could only have worked in East Timor if it were balanced with other

[27] Supra, note 22.
[28] For a full discussion see supra, note 23; see also supra, notes 26, 33–51.

international standards relating to housing, tenure security, and nondiscrimination.[29]

The Right to Security of Tenure

The major tenure security problem in East Timor was (and is) the inability to make final determinations of land ownership. Arguably, there are two interim measures that could enhance tenure security in post-conflict circumstances while a system for restoring and determining land ownership is established.[30] First, ad hoc housing occupation could be "captured" within an interim system of land administration by an effective system for the temporary allocation of public and abandoned properties. Second, an interim registration system could focus on transactions rather than title. The aim would be to extend administrative control over burgeoning informal land markets through a rudimentary form of a "deeds registration system."

Opportunity of Access to Natural Resources

UNTAET's failure to introduce either a land claims commission or any mechanism to record or regulate transactions in private land, dramatically restricted the ability to develop land-related policies on natural resources and economic development. This included comprehensive regulations relating to conflict resolution, land use, and spatial planning; environmental protection; housing and shelter; and village development programs.

Nondiscrimination

Nondiscrimination is relevant because it can counterbalance international requirements for property restitution. As discussed, a property restitution program that focused on 1999 alone would have favored holders of Indonesian titles, many of whom had fled East Timor for Indonesia and had acquired their rights in dubious circumstances. In contrast, the principle of nondiscrimination – and its accompanying rights to housing and tenure security – would have favored poor and displaced groups with no other available sources of shelter over competing holders of Indonesian titles.

[29] For a comprehensive discussion see supra, note 23, Chapter 8.
[30] Supra, note 1.

Solomon Islands

The Nature of the Conflict

From 1998 to 2003, the Solomon Islands were plagued by conflict popularly known as "the Tensions," which resulted in the death of hundreds of Solomon Islanders, the internal displacement of tens of thousands more, and the destruction of the country's narrow economic base. By 2003, the country had many of the characteristics of a failed state, and the Solomon Islands Government was seeking the assistance of regional partners in the Pacific. The primary protagonists of the conflict were the indigenous inhabitants of Guadalcanal, the island on which the capital Honiara is based, and those who originate from the neighboring island of Malaita. However, there were also a number of subconflicts involving factions based on loyalties to particular leaders, places of origin, languages, and kinship ties. While ethnicity played a role in the Tensions, the roots of the conflict lay more in competition for access to land and employment in the cash economy.

Geography, Economics, and Demographics

The Solomon Islands is a scattered archipelago of more than 900 mountainous islands and low-lying coral atolls in the Southwest Pacific Ocean. It comprises six main islands of Choiseul, Guadalcanal, Malaita, New Georgia, San Cristobal, and Santa Isabel. Most of the islands are of volcanic origin, with narrow valleys and mountain ranges covered in rain forest. While land is predominantly forested, with only 2–3 percent being devoted to agriculture (cocoa and copra), logging and deforestation are occurring at an alarming rate. Today, the Solomon Islands has a population of approximately 500,000 people, 84 percent of which are subsistence or cash cropping farmers or fishers and live in small, highly dispersed villages within culturally distinct communities. Approximately 12 percent (or 30,000) of the population lives in Honiara, the capital, and the remaining 4 percent live in provincial urban centers.[31] The population is rich in

[31] Asian Development Bank (2005) "Solomon Islands," in *Asian Development Bank Outlook 2005*, Asian Development Bank; Solomon Islands Government, *Report On The 1999 Population And Housing Census: Analysis*, Honiara, Statistics Office (2002).

cultural diversity, and communal, familial, and clan ties are far stronger than any sense of "national identity." The most important framework for social, political, and economic interactions is clan-based relationships (the "wantok" system). As is the case elsewhere in Melanesia, social structures are closely tied to rights to land, which is not merely an economic asset, but has religious, political, and social significance. Approximately 10 percent of the land in the Solomon Islands is freehold land, and the remaining land is customary land, its ownership and use regulated according to customs that vary from place to place.[32] While several attempts have been made to register customary land, they have had little success. European traders and missionaries began to arrive in the Solomon Islands toward the end of the nineteenth century, bringing with them not only Christianity, but also the cash economy. They introduced new beliefs, extracted natural resources, began a barter system of exchanges, and established an export-oriented economy. Migration to Guadalcanal increased as inhabitants from other islands migrated there in search of work. This migration escalated during World War II, when the U.S. forces brought laborers from Malaita, the most populous nation in the Solomon's chain, to work on Guadalcanal.

The development of infrastructure and the cash economy has always been heavily focused on Honiara and has even been actively discouraged elsewhere.[33] The social and ecological consequences of urbanization and utilization of natural resources have therefore been greatest on Guadalcanal. Large numbers of migrants continue to be attracted to Honiara by the prospect of access to utilities such as electricity and water, as well as employment offering cash income, which is now essential but largely unavailable on other islands. This migration has led to competition for resources such as paid employment and land, which has in turn created a source of social conflict. By the 1990s, the workforce in Honiara had become largely Malaitan, and in 1998, people from Malaita accounted for approximately 75 percent of the Royal Solomon Islands Police Force.[34] Land Ministry grants of Temporary Occupational Licenses (TOLS)

[32] Constitution of Solomon Islands, s.110, *Land and Titles Act* [Cap 113], s.241(1).

[33] For example, successive National Development Plans actively discouraged development on Malaita so as to use the island as a source of indentured labor.

[34] Amnesty International, "The Solomon Islands: A Forgotten Conflict," August 2000, AI Index ASA 43/05/00, p. 7.

enabled the growth of settlements on government-owned lands, and Malaitan settlements also sprang up just outside the official town boundary on Guadalcanal customary land. The dominance of Malaitans in the economy became highly visible as many purchased rural property, built modern houses on prime coastal sites, or commenced small-scale commercial farms out on the plains.[35]

As the number of land transactions grew, so too did the conflict surrounding them. Many transactions were surrounded by uncertainty and controversy, because land outside the town boundaries was customary land, generally unregistered, and settlement usually occurred after informal temporary arrangements were struck between migrants and land-owning communities. These arrangements were rarely documented,[36] and the "customary" nature of many transactions was questionable, because, firstly, deals were often struck by men, despite Guadalcanal being a matrilineal society, and, secondly, many individuals sold usufructuary rights to communal land without consulting other members of the landholding group.[37] The destructive impacts of logging and the unequal distribution of timber revenues provided yet another cause of tension between the people of Guadalcanal and settlers from other areas.[38]

Competition for land and employment resulted in the build-up of tensions over time, and in 1998 the Premier of Guadalcanal Province began to make divisive speeches calling for the return of Guadalcanal land "stolen from the people" and demanding compensation for the utilization of Honiara as the national capital. Guadacanalese militant groups then embarked on a deliberate campaign of harassment intended to chase settlers off the island. This campaign was directed primarily at Malaitan

[35] J. Fraenkel, *The Manipulation of Custom: From Uprising to Intervention in the Solomon Islands*, Victoria University Press, Wellington (2004), 49.

[36] Documentation of any kind on specific transactions is virtually nonexistent for the Solomon Islands.

[37] D. Paterson, "Conflicts Arising from Management and Use of Customary Land," Paper presented at the "Transforming Land Conflict" conference (2002); FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, 10–12 April 2002; T. T. Kabutaulaka, "Beyond Ethnicity: The Political Economy of the Guadalcanal Crisis in Solomon Islands' State, Society and Governance in Melanesia Project," Working Paper 01/1(2001).

[38] J. Bennett, *Pacific Forest: A History of Resource Control and Contest in Solomon Islands, c. 1800–1997*, The White Horse Press, Cambridge (2000), 382–383. See also E. Hviding and T. Bayliss-Smith, *Islands of Rainforest: Agroforestry, Logging and Eco-tourism in Solomon Islands*, Aldershot, Ashgate (2000).

settlers in villages on the Guadalcanal Plains and in the vicinity of Honiara. As Fraenkel notes, the resulting evictions on Guadalcanal might be seen as a repudiation of illegitimate land-usage rights.[39] Unfortunately, there were also legitimate transactions in land – customary or otherwise – and these, too, were swept up in the outbreak of violence:

> A lot of people from Malaita and others, living on the outskirts of Honiara city, many for two or three generations and had validly purchased land in custom or according to law. . .peacefully and lawfully residing in their lands, suddenly found themselves chased out by armed and ruthless gangs who showed no respect for the law.[40]

The Nature of the Intervention

Initially, the mass evictions on Guadalcanal were instigated by a group known as the Guadalcanal Revolutionary Army (which was subsequently known as the Isatabu Freedom Movement [IFM]). What began as a relatively localized conflict escalated throughout 1999 as the government refused to compensate Malaitan settlers for the loss of their property. When the Malaita Eagle Forces (MEF) emerged, it was "as much an armed pressure group aimed at demanding financial compensation from the state for the loss of Malaitan lives and property, as it was a rival militia intent on combating the Isatabu Freedom Movement."[41]

Broadly speaking, up to 2,000 Guadacanalese militants participated in the IFM, and at the peak of the tensions there were 3,000 Malaitan (MEF) combatants, of which 1,000–2,000 are thought to have been armed. At least 35,000 people (about 9% of the nation's population) were displaced, although some estimates place the number of internally displaced people (IDPs) closer to 60,000. By mid-1999, nearly all non-Guadacanalese people had fled to other provinces. Approximately 20,000 Malaitans were displaced, most of whom were temporarily processed in Red Cross evacuation centers in Honiara before being evacuated to Malaita. Some 12,000

[39] Supra, notes 35, 58ff.
[40] *Ulufa'alu v Attorney-General* [2001] SBHC 81 HC-CC (Constitutional) 195 of 2000 (9 November 2001).
[41] Supra, note 35, 7.

Guadacanalese people then fled Honiara and hid in rural areas, fearing reprisals by Malaitans.[42] Over time, this led to Honiara falling under the control of the MEF, with road blocks cutting it off from the rural areas, which were controlled by the IFM.

International involvement in the Tensions began as early as October 1999, when a Multinational Police Peace monitoring team arrived in Honiara, sponsored by the British Commonwealth with assistance from Australia and New Zealand and comprising police from Fiji and Vanuatu. However, the violence continued to escalate. In June 2000, the MEF drew on the large numbers of Malaitans within the Royal Solomon Islands Police (RSIP), and the "Joint Operations Force" seized control of key installations around Honiara, including the well-stocked national armory. The MEF now had effective control of Honiara, and demanded the resignation of Prime Minister Ulufa'alu, who was refusing to accommodate demands for compensation to Malaitan victims of the conflict.

On 15 October 2000, talks between militants led to an agreement to a ceasefire and the signing of the Townsville Peace Agreement (TPA). The TPA provided, among other things, for the compensation of conflict victims and the proposed development of areas affected by the violence and displacement of people.[43] An indigenous Peace Monitoring Council was charged with responsibility for implementing the peace with the assistance of an International Peace Monitoring Team.[44] This failed, however, to stem the tide of escalating violence and economic downturn. Militants continued to roam the streets of Honiara, looting businesses and demanding "compensation" for Malaitan property losses from the government. Splits occurred within the IFM with militants who had refused to sign the TPA calling themselves the "Guadalcanal Liberation Front" (GLF), and violence spread as rural Guadalcanal became the site of factional fighting.

[42] J. Schoorl and W. Freisen, "Migration and Displacement," in B. de Bruijn (ed.), *Report on the 1999 Population and Housing Census. Analysis*, Statistics Office, Honiara (2002); D. van Beest, (1999) "Ethnic Tension in the Solomon Islands: An Integrated United Nations Response," *UN Chronicle*, Fall 1999; Global IDP Database, *Solomon Islands: Population Profile and Figures*, http://www.internal-displacement.org/; W. Friesen, "Economic Impacts of the 'Ethnic Tension' in Solomon Islands," 3rd Biennial Conference on International Development Studies Network of Aotearoa, Massey University, New Zealand, 5–7 December 2002.

[43] Part Four, "Political and Social Issues," Townsville Peace Agreement, dated 15 October 2000.

[44] See Parts 2 and 6, Annexure II, Townsville Peace Agreement, dated 15 October 2000.

The GLF's control over the Weathercoast of southern Guadalcanal is often referred to as a "reign of terror," and toward the end of 2003, around 1,500 people fled the Weathercoast and sought refuge in and around Honiara after their villages were torched.

On 24 July 2003, the Regional Assistance Mission to the Solomon Islands (RAMSI) began. This Australian-led mission comprised personnel from Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Papua New Guinea, Samoa, Tonga, Tuvalu, and Vanuatu. Initially involving the deployment of approximately 1,800 army personnel, it now comprises several hundred civilian and military personnel. RAMSI's first task was to restore law and order, and its subsequent focus was in three areas: economic reform, rebuilding the machinery of government, and strengthening the legal and judicial sector. RAMSI has been clear that "issues of land use. . .and compensation" are issues of national concern, and not for RAMSI. Given the complexity of identifying what is "customary," and repeated statements by Australian officials that RAMSI is not trying to infringe on the Solomon Islands' sovereignty, it is not surprising that RAMSI officials have been adamant that land tenure is an issue to be resolved by Solomon Islanders.[45]

While land may not have been prioritized as part of the peace process, it has been on the agenda of AusAID (the Australian Government agency responsible for managing the Australian Government's official overseas aid program) for several years. The AusAID-funded Solomon Islands Institutional Strengthening of Land Administration Project (SIISLAP) commenced in January 2000 but was interrupted by the Tensions and began again in 2001. The SIISLAP has been focused on improving land administration by strengthening the management capacity of the Department of Lands and Surveys (DOLS) and increasing the public's confidence in land dealings.[46] The initial focus

[45] See DFAT, *Regional Assistance to the Solomon Islands FACT SHEET*, Australian Government Department of Foreign Affairs and Trade; J. Batley, "The Role of RAMSI in Solomon Islands: Rebuilding the State, Supporting Peace," paper delivered at the Peace, Justice and Reconciliation Conference, Brisbane, 31 March–3 April 2005; N. Warner *Moving Forward in Partnership: RAMSI, One Year On*, Australian Government Department of Foreign Affairs and Trade (2004).

[46] AusAID, "Aid activities in Solomon Islands," available at http://www.ausaid.gov.au/country/cbrief.cfm?DCon=5714_5074_8646_2331_4632&CountryID=16&;Region=SouthPacific (2005); and pers. comm. with SIISLAP staff.

has been on the 15 percent of land that has some form of registered title, comprising perpetual estate land and small areas of registered customary land.

The second phase of the SIISLAP, which commenced in 2004, has focused on increasing the security of TOLS and the establishment of a pilot for customary land registration in East Malaita. This appears to involve mapping the boundaries of customary land and implementing a system where potential investors and traditional owners must communicate through DOLS, rather than directly with one another.[47] Little information is presently available on this program, but Australia's focus on land tenure reform looks set to continue. In April 2006, the Australian Minister for Foreign Affairs launched a white paper on Australia's aid program. The white paper acknowledges the need to address land issues, and proposes finding a "middle way" that "essentially combines customary ownership with long-term leases that unlock the commercial value of land."[48] It establishes the Pacific Land Mobilisation Program, which will research the problems and prospects in land tenure in the Pacific and, where requested, will provide the resources for land tenure reform.[49]

In April 2006, Honiara and the capital of Malaita, Auki, were once again plunged into violence as riots broke out in response to the election of Snyder Rini as prime minister. Protesters accused Rini of using Chinese connections to bribe his way into office and responded with the burning of Chinatown. The riots represented the climax of decades of bitterness over increased immigration of ethnic Chinese, who achieved prominent positions in the economic and political fabric of the Solomon Islands. Like the Tensions, the riots brought the consequences of cultural differences and conflict over minimal access to resources into sharp focus. These connections are not lost on Solomon Islanders. One correspondent said that locals speak of "Stage Two" in the ethnic tensions – instead of Guadacanalese versus Malaitan, there is now Solomon Islanders versus Chinese.[50]

[47] Id., P. Davis, "Operation in Progress," *Eureka Street*, July–August (2004).
[48] AusAID, *Australian Aid: Promoting Growth and Stability*, AusAID, Canberra (2006), 36.
[49] Id., p. 37.
[50] Terry Brown, Anglican Bishop of Malaita, pers. comm., 19 April 2006.

Assessment and Application of International Standards

The Right to Housing

In the course of the Tensions some 20,000 Malaitans were evacuated to Malaita, where many lived in makeshift shelters without access to sanitation or clean drinking water. Several thousand IDPs sought refuge in Honiara, where they were living under plastic sheeting and palm-frond shelters at Tintinge, outside the capital.[51] Although there appears to be no available data on the extent of damage to housing and other infrastructure, it is known that vacated homes in Honiara were generally looted and then torched by militants, and that the homes of some 1,500 people were torched on the Weathercoast.

RAMSI's focus was on law and order, and programs to improve government functions. While the restoration of law and order allowed the return of IDPs, international involvement in the development of programs to rebuild damaged housing or provide further housing was limited and ad hoc. AusAID and UNDP did, however, support several organized return and resettlement movements in 2004. Many IDPs returned to find their homes and community infrastructure destroyed, and had to live in makeshift shelters covered by tarpaulin. AusAID also supported reconstruction efforts through the "Community Peace and Restoration Fund," which facilitated the construction of infrastructure such as schools, roads, and health clinics through community partnerships.

While the rush to occupy habitable housing was not as rapid or extensive as in East Timor, the market for housing in Honiara and the provincial capital did experience hyperinflation due to the influx of employees of private enterprise and international agencies. The extent to which this has exacerbated existing ad hoc housing arrangements is unclear, but it is indisputable that rising rental prices have contributed to the economic insecurity of small business operators and may have exacerbated squatting.[52] As was the case for East Timor, there was virtually no planned

[51] See, for instance, Internal Displacement Monitoring Centre, "Restoration of law and order by regional intervention force allows for the return of the displaced," http://www.internal-displacement.org; accessed 26 May 2006.

[52] M. Mamu, "Public Officers Face Housing Problems," *Solomon Star News*, 20 January 2006; M. Mamu, "Committee to Review Housing Problem Formed," *Solomon Star News*, 23 January 2006.

policy response to the effects of the Tensions on property destruction and the return of IDPs.[53] This lack of integrated property programming should thus be assessed in terms of the consequences as well as the causes of conflict. As with East Timor, a failure to address the housing, land, and property consequences of conflict renders the underlying causes of conflict more likely to re-emerge in future rounds of violence.

Restitution: The Right to Return to One's Home

Like East Timor, the Solomon Islands raise the question: Restitution or compensation for whom? The Tensions were rooted in controversy over rights to land, stemming from the competing claims made by the Guadacanalese that their rights as traditional owners of the land were being eroded, and the claims made by Malaitan settlers who were evicted from the land they had occupied for many years. While one approach to upholding the right of people to return to their homes would have involved the return of settlers to the homes from which they were evicted, this would restore the landholding pattern that existed immediately prior to the Tensions, which was a fundamental cause of the conflict. An alternative would have been to resettle IDPs in their island of ethnic origin and reinstate the rights of traditional owners; however, in Honiara and other urban and peri-urban areas, the existence of the cash economy means that migration and transactions with "outsiders" are now a fact of life.

The absence of a mechanism capable of providing legal clarity regarding the status of competing claims to land has contributed to the social conflict, and during the Tensions allowed the escalation of claims to compensation. The beneficiaries of compensation were often militia leaders or politicians rather than those displaced, and compensation was often "paid out under duress or under threat of a gun,"[54] instead of through the traditional means of community negotiation about appropriate levels of redress. Fraenkel describes how, during the Tensions, the boundaries of acceptable demands were repeatedly extended, and were exploited by the

[53] UNDP, *Humanitarian Assistance to IDPs in Solomon Islands*, United Nations Development Programme (March 2004).

[54] "Who's Footing the Solomon Islands' Compensation Payout?," *Pacific Magazine*, September 2001, available at: http://www.pacificislands.cc/pm92001/pmdefault.php?urlarticleid=0025; accessed 16 April 2006.

government, failed politicians, and militants.[55] The lack of a mechanism for responding to claims quickly and effectively meant that rather than bringing about greater social reconciliation, the national government's response to claims exacerbated social dislocation and fueled the growing crisis.

Tenure Security

In the Solomon Islands, as is the case in many other parts of the world, the inability to make conclusive determinations as to land ownership not only poses major problems for tenure security, but for civil security in general. As noted above, restoration of the landholding pattern that existed immediately prior to the Tensions would simply restore a fundamental cause of the conflict by returning settlers to land that the Guadacanalese perceive to be rightfully theirs. Yet a return to complete customary ownership is no longer possible, as the introduction of the cash economy in Honiara and other urban and peri-urban areas means that transactions with outsiders in customary land are now an unavoidable fact of life. The establishment of effective mechanisms for regulating this emerging land market is therefore essential to preventing and regulating future conflict. A comprehensive survey of potential regulatory mechanisms for customary land tenure has been set out elsewhere by Fitzpatrick.[56]

Access

Timber is one of the Solomon Islands' most important natural resources, accounting for about 50 percent of the nation's total exports in 1996. Most of the logging companies are foreign-owned, and issues of access to land, the management of logging activities, and the distribution of timber revenues are often highly contested at the local and national levels.[57] These issues were among the sources of tension between Guadacanalese and Malaitans before the Tensions, and were manifested again during the

[55] Supra, note 35.

[56] D. Fitzpatrick, "In Search of Best Practice Options for the Legal Recognition of Customary Tenure," *Development and Change*, Vol. 36, No. 3 (2005), 449–475.

[57] See, for instance, E. Hviding, "Contested Rainforests, NGOs and Projects of Desire in Solomon Islands," *International Social Science Journal*, Vol. 55, No. 4 (2003), 539–564; E. Hviding and T. Bayliss-Smith, *Islands of Rainforest: Agroforestry, Logging and Eco-tourism in Solomon Islands*, Ashgate, Aldershot (2000); J. Bennett, *Pacific Forest: A History of Resource Control and Contest in Solomon Islands, c. 1800–1997*, The White Horse Press, Cambridge (2000).

April 2006 riots. Addressing issues of access to land, cash incomes, and other resources therefore remain essential to ensuring lasting peace in the Solomon Islands. While mechanisms for regulating commercial forestry were not part of RAMSI's brief, longer term peacebuilding in the Solomon Islands requires regulations that control corruption and allow the payment of royalties to local landholders. As the following case study of Bougainville shows, however, these royalties must be paid in a manner that minimizes the risk of conflict within and among local landholding communities.

Discrimination

The grievances expressed during the Tensions were rooted in controversy over access to natural resources, corruption in government, the distribution of timber and other revenue, and the settlement of people from other islands on Guadacanalese land. These grievances were expressed through a heightened emphasis on micro-nationalism based on ethnicity and claims to *kastom*. Claims to restoration of land based on custom and ethnicity may answer some underlying causes of the violence, but they would conflict with international standards relating to nondiscrimination and freedom of (internal) movement. One of the most significant challenges facing the Solomon Islands is the need to balance its customary institutions with economic developments and demands for racial equality and freedom of movement.

Bougainville

The Nature of the Conflict

What is now known as the Autonomous Region of Bougainville (ARB) lies in the northeast of the island nation of Papua New Guinea. In 1988, after years of bitterness about environmental destruction and economic neglect, some Bougainvilleans formed the Bougainville Revolutionary Army (BRA) and forced the Australian-owned Panguna mine to close. This act, coupled with Bougainvillean demands for secession, sparked a major military confrontation with Papua New Guinean forces and resulted in a wave of human rights abuses. The nine-year conflict (1989–1998) resulted in the deaths of hundreds of soldiers and rebels

and between 10,000–20,000 deaths of civilians, either from fighting or from disease and deprivation.[58] While the Panguna mine was not the cause of the conflict, it was associated with differing perceptions as to the legitimacy of land rights, as well as issues of access to and control over resources, and these provided a catalyst for igniting pre-existing tensions.[59]

Geography, Economics, and Demographics

The area popularly known as Bougainville, previously known as North Solomon Province, is located approximately 900 kilometers northeast of Port Moresby, the capital of Papua New Guinea (PNG). It is situated in the far western tip of the Solomon Islands archipelago and is made up of two main islands, Buka in the north and Bougainville Island in the south, and numerous small islands and atolls. Bougainville Island is roughly 9,000 square kilometers in size, with a central backbone of steep-sided mountains. The west of the island is dominated by swamps while the east coast is lined with plantations. Buka is separated from the Bougainville Islands by a deep, narrow channel and is generally low-lying aside from the hilly southern region.

Prior to colonization, Bougainvilleans had no sense of common identity, and the region was made up of approximately nineteen different language groups, a further thirty-five dialects, and numerous independent village states.[60] Despite being geographically and ethnically much closer to the Solomon Islands, Bougainville became part of the German colony of New Guinea in 1899. In 1948, after Japanese occupation during World War II, the Australian Administration decided to join Papua with New Guinea for purposes of administrative efficiency. After the prohibition on indigenous people engaging in business was lifted in 1961, mainlanders increasingly migrated to Bougainville to work on plantations. The shift from subsistence gardening to cash cropping, combined with rapid population growth, resulted in increased competition for land and

[58] See Joint Standing Committee on Foreign Affairs, DFAT, *Bougainville: The Peace Process and Beyond*, The Parliament of the Commonwealth of Australia, Canberra (1999), 6, fn 10.

[59] Id.

[60] K. Hakena, "Peace in Bougainville and the Work of the Leitana Nehan Women's Development Agency," Paper presented at the Nonviolence and Social Empowerment Conference in Calcutta, India, 15–24 February 2001.

employment, including among those who had not traditionally had rights to land on Bougainville.

The people of Bougainville have a long history of opposition to the Port Moresby–based government. This opposition grew during the 1960s, when Australian mining interests began prospecting on Bougainville. Local people objected to the fact that geologists came on to their land without any consultation with the elderly women who held land on behalf of the matrilineal clans, and further resentment arose when Australian administrators informed them that, in contrast to customary law, under western law anything below the surface of the land, including minerals, belonged to the government rather than the titleholders of the land.[61] This conflict between rights to land under customary law and rights to land under the formal, colonial law helped to fuel Bougainvilleans' resentment toward mining activities.

When Conzinc Rio Tinto (CRA) began mining in the Panguna area in the early 1960s, it was based not on customary law but on the Bougainville Copper Agreement between CRA and the Australian Colonial Administration, which was subsequently ratified by the PNG House of Assembly in 1967. In the eyes of Bougainvilleans, the legal basis for the mine was dubious at best, and many opposed it. The Panguna mine rapidly became one of the world's largest gold and copper mines, accounting for more than 40 percent of PNG's exports and around 17–20 percent of government revenue. The PNG government held 19 percent of shares in the mine, with CRA owning 53 percent. The remainder was held by shareholders who were predominantly outside PNG.[62] The mine was a major employer of Bougainvilleans and led to the development of transport, health, education, and other infrastructure. Nevertheless, many Bougainvilleans felt left out of the distribution of the economic benefits, and their resentment was compounded by the significant social, economic, and environmental damage caused by the mine. Mining necessitated the relocation of many people, and while compensation was paid for dislocation and a small percentage of royalties went to the local landowners, some

[61] A. Regan, "Causes and Course of the Bougainville Conflict," *Journal of Pacific History*, Vol. 33, No. 3 (1998), 274; P. Howley, *Breaking Spears and Mending Hearts: Peacemakers and Restorative Justice in Bougainville*, The Federation Press, Annandale, NSW (2002), 25ff.

[62] R. J. May, *State and Society in Papua New Guinea: The First Twenty-Five Years*, UIN, Melbourne (2004), Chapter 13; BCL, Bougainville Copper Limited Annual Report 1998, 1.

Bougainvilleans felt that this was insufficient and that not all affected people received their due payment. Younger members of the local landholding group, in particular, felt that group elders were not distributing royalty payments in a fair manner.[63]

In the late 1980s dissatisfaction with the mine led to the emergence of the New Panguna Landowners Association (NPLA). The NPLA was a group of younger, more radical second-generation landowners, and in April 1988, it demanded 10 billion Kina compensation from BCL, a 50 percent share in company profits, localization of BCL ownership within five years, and greater environmental controls. Several months later, armed men held up the BCL magazine and stole a large quantity of explosives. In the following weeks, a militant secessionist group of youths known as the Bougainville Revolutionary Army (BRA) emerged from the NLPLA and began a campaign of sabotage and harassment of mine employees. Riot police were flown in from the mainland to restore order, but their methods – including abusing the population and destroying homes and villages – only worsened the situation. The Papua New Guinea Defence Force (PNGDF) was deployed in March 1989, but they too committed numerous human rights abuses. The conflict escalated, and ethnic stereotypes were revived, with the inhabitants of Bougainville taking sides according to whether they were "blacks" (the term applied by other Papua New Guineans to Bougainvilleans) or "redskins" (the pejorative Bougainvillean name for other Papua New Guineans). The mine was forced to close, and some 15,000–20,000 non-Bougainvilleans departed from Bougainville.[64] The massive migration of non-Bougainvilleans away from the mine area, plantations, and towns across the province led to ill will toward Bougainvilleans in other parts of PNG. Many feared retribution and left the mainland, but found no safety when they returned to Bougainville.

A state of emergency was declared in June 1989. The PNG Government imposed embargoes on the supply of goods and services (including

[63] See John Connell, "Compensation and Conflict: The Bougainville Copper Mine, Papua New Guinea," in *Mining and Indigenous Peoples in Australia*, John Connell and Richard Howitt (eds.), Sydney University Press (1991), 55.

[64] K. Claxton, *Bougainville 1988–98: Five Searches for Security in the North Solomons Province of Papua New Guinea*, Australian National University, Canberra (1998), 9; A. Regan, "Why a Neutral Peace Monitoring Force?" and "The Bougainville Conflict and the Peace Process," in *Without a Gun*, M. D. Wehner (ed.), Pandanus Books, Canberra (2001), 1–20.

medicines) to Bougainville, triggering a collapse in the economy and many deaths. The North Solomons Provincial Government was suspended, leaving a political and administrative vacuum that the BRA endeavored to fill, declaring the independence of Bougainville and creating the Bougainville Interim Government (BIG). With the common enemy (the PNGDF and police) off the island, many BRA groups turned their attention to "leveling" Bougainville, targeting non-Bougainvilleans, the wealthy, the well-educated, and those thought to be cooperating with the PNG Government. The conflict became increasingly complex, and no one was immune from harassment, imprisonment, torture, and even murder. By September 1990, this internal conflict allowed the PNG security forces to return to Bougainville, generally at the invitation of local leaders and with the support from militants who became known as the Bougainville Resistance Forces (BRF). The conflict continued to escalate as fighting intensified not only between the BRA and the PNG security forces, but also between BRA and BRF elements.

In 1989–1990 in Central Bougainville alone, over 6,000 village homes were destroyed by the PNGDF, resulting in the displacement of 24,000 people. As is the case for the Solomon Islands, available data are extremely limited, but it is estimated that by mid-1994, 60,000 Bougainvilleans (or a third of the population at the time) were in PNG-controlled "care centers" consisting of plastic tents and characterized by appalling conditions. Thousands more were in BRA "bush camps." Several hundred PNG security force members and similar numbers of BRA and BRF were killed, and it is estimated that several thousand Bougainvilleans died as a result of the blockade imposed by the PNG Government.[65] The conflict on Bougainville also resulted in increased insecurity elsewhere, as Bougainvilleans fled to the Solomon Islands, taking with them their trauma and their increased acceptance of violence as a means of resolving disputes.

The Nature of the Intervention

Throughout the 1990s numerous initiatives unsuccessfully sought to resolve the conflict. In 1997, another peace process tentatively commenced

[65] See M. Miriori, "Bougainville: A Sad and Silent Tragedy in the South Pacific," *Do or Die*, Vol. 5 (1996), 59–62.

with support from New Zealand and to a lesser extent Australia and the Solomon Islands. In July 1997, senior Bougainville leaders from all factions met and, under the *Burnham Declaration* of 18 July 1997, committed themselves to unity and reconciliation, and to work toward a peaceful settlement through negotiations with the PNG Government. A second meeting in October 1997 involved officials representing PNG and the Bougainville factions, and the *Burnham Truce* was signed on 10 October. The truce involved, among other things, agreement between the parties to respect and promote basic human rights and fundamental freedoms.[66]

In December 1997 an unarmed Truce Monitoring Group (TMG) was deployed, comprising 250 truce monitors from Australia, New Zealand, Fiji, Tonga, and Vanuatu.[67] The TMG was commanded by the New Zealand Defence Force and predominantly military in composition. Even before the truce, people began to leave care centers and return home, and once the TMG was in place the returns increased and economic activities such as copra and cocoa production resumed. The return of the population to their homes continued after the agreement to a permanent ceasefire with the *Lincoln Agreement on Peace, Security and Development on Bougainville* of 23 January 1998. This agreement recognized, among other things, the need for an elected "Bougainville Reconciliation Government" (BRG) by the end of 1998 and talks on Bougainville's future political status by the end of June 1998. Clause 11 of the Lincoln Agreement addressed the need for cooperative efforts to ensure the restoration and development of Bougainville, but nowhere in the agreement were land and property issues specifically addressed. The Lincoln Agreement and the April 1998 *Arawa Agreement Covering Implementation of Ceasefire* also provided for the TMG and its New Zealand command to be replaced by a Peace Monitoring Group (PMG) that was commanded by Australia. At its peak the PMG comprised 235 people from Australia, New Zealand, Vanuatu, and Fiji.[68] This was followed by the deployment of a UN observer mission in July 1998.

The year 1998 marked a shift in the peace process to discussion of the political issues that caused (or were likely to cause) division – disarming

[66] Clause 1, *The Burnham Truce*, 10 October 1997.
[67] Claxton, *Bougainville 1988–98*, 12–20.
[68] M. Wehner, "Introduction," in *Without a Gun: Australians' Experiences Monitoring Peace in Bougainville*, M. D. Wehner (ed.), Pandanus Books, Canberra (2001).

combatants, withdrawal of PNG security forces, policing arrangements, political structures, and Bougainville's long-term political status. However, once again housing, land, and property programs were not included in the peace operation planning. On 30 August 2001, a final peace agreement, the *Bougainville Peace Agreement*, was signed, which provided "for a gradual transition to autonomy and an eventual referendum on independence" for Bougainville, on the condition that the BRA disarms and the PNG Government amends the country's constitution to reflect that agreement. The referendum must take place within ten to fifteen years from the signing of the agreement.[69]

The PMG withdrew from Bougainville on 30 June 2003 and was replaced by the Bougainville Transition Team (BTT), which continued the peace-related activities of the PMG on a smaller scale. It withdrew on 31 December 2003, and some twelve months later the ARB came into existence when the Papua New Guinea Parliament passed constitutional amendments recognizing Bougainville as an autonomous region. Under the *Constitution of the Autonomous Region of Bougainville*, what lies beneath the land as well as that above is now regulated by customary law (Clause 23), and the ARB must develop land policies providing for the recording of land ownership and the protection of customary owners (Clause 44). The national Land Titles Commission (LTC) has not been active in Bougainville since the conflict, and will not engage in land reform or land administration unless it is requested to do so by the Bougainvillean authorities.[70]

International intervention in Bougainville has been characterized by a focus on weapons disposal programs, the promotion of confidence in the peace process, and facilitating the transition toward an autonomous government. Since 1997, the Australian aid program has contributed over $200 million to support Bougainville's peace process and post-conflict reconstruction,[71] but it appears that little funding has gone toward activities directed at addressing land tenure issues on Bougainville. Australia's assistance for the period 2004–2008 will continue to focus on the implementation of autonomy and the re-establishment of public administration,

[69] Clause 2, *Bougainville Peace Agreement*, signed 30 August 2001.

[70] Pers. comm., Joseph N. Kanawi Kiris, Chief Commissioner, Land Titles Commission.

[71] AusAID, *Australian Aid to Bougainville* (2005), available at http://www.ausaid.gov.au/country/png/bougainville.cfm;, accessed on 2 June 2006.

improvement in the delivery of essential services, and expansion of agricultural income-generating opportunities.[72] As is the case for the Solomon Islands, AusAID's "White Paper" marks an increased emphasis by Australian agencies on land tenure reform. It acknowledges the need to address land tenure issues and balance customary ownership with commercial realities. The Pacific Land Mobilisation Program will be established to provide support, when requested, for land tenure reform.

Assessment and Application of International Standards

The Right to Housing

Statistical data on Bougainville are very difficult to obtain, however it is clear that many thousands of village homes were destroyed, and that more than a third of the population was displaced. While people began to leave care centres and return home even before the Burnham Truce, the extent to which they were able to return to their homes and rebuild is unclear. No provision was made for housing issues in the planning of the TMG or PMG, and under the Arawa Agreement, the role of the PMG was confined to monitoring the ceasefire, promoting confidence in the peace process, and providing assistance in the implementation of the Lincoln Agreement. Australian officials made it clear that Australia's priorities were on the restoration of law and order, and on the development of physical infrastructure in the health, education, transport, and communications sectors.[73] They also emphasized that Australia could not, and should not, meet the entire development and restoration needs of the province.[74] Thus, while the aid programs of Australian and New Zealand included support for NGOs engaged in peace and restoration projects, there was virtually no planned policy response to housing issues. Even more concerning is the fact that Bougainville now appears to be autonomous in more ways than one – some of the largest nongovernmental aid and development agencies report that they know very little of what is occurring in Bougainville.

[72] Id.

[73] See, for instance, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Visit to Bougainville, 15–19 March 1999*; and Joint Standing Committee on Foreign Affairs.

[74] Id.

Restitution: The Right to Return to One's Home

Restitution and compensation were not mentioned in any of the peace agreements, and neither the TMG nor the PMG developed programs for restitution or compensation to people displaced by the conflict. The focus of the TMG/PMG was very much on monitoring peace and facilitating compliance with the terms of the agreements, and any restitution or compensation that occurred seems to have been facilitated by NGOs. Further, while rights to land and access to the benefits of the mine were a key cause of the Bougainvillean conflict, in contrast to the Solomon Islands Tensions discussed above, the violence and the destruction of property were ultimately directed at indigenous Bougainvilleans as much as they was against settlers. Providing restitution in this context is highly complex. Many Bougainvilleans had been relocated from their traditional lands to other areas, and while compensation was often paid to those dislocated and the owners of the land onto which they moved, the quantum of this compensation was a key source of disputation between Bougainvilleans and the CRA. In addition, as was the case in the Solomon Islands, settlers from other parts of PNG had settled on Bougainville, and in many instances their rights were dubious since they had been obtained from men, despite women being the customary landowners. While Clause 44 of the ARB Constitution requires that the land policies developed by the ARB comply with the right to protection from unjust deprivation of property enshrined in the national constitution, restitution or compensation efforts aimed at reinstating the pre-conflict landholding map may serve to entrench the underlying causes of the conflict.

The Right to Security of Tenure

While the Panguna mine owners had rights to land under formal law imposed during the colonial period, the conflict on Bougainville illustrates that this is insufficient to guarantee security of tenure where there is a conflict between formal law and customary law. The major source of tenure insecurity on Bougainville was (and is) the lack of consensus as to the applicable source of law for determining land rights, and the conflict of authority between customary and central government institutions.

The ARB Constitution now recognizes customary authority over land. Clause 23 brings the formal written law into line with customary law by recognizing that what lies beneath the ARB does not have sufficient

resources to record and regulate customary land tenure. Thus, at present, customary institutions appear to govern Bougainville land matters in their entirety, *de jure* and de facto, but it is unlikely that these institutions can in themselves respond effectively to the housing, land, and property problems caused by mass displacement and destruction in Bougainville.

As is the case elsewhere in Melanesia, changes occurring during colonial and post-colonial times have brought about immense changes in traditional social structures. Increased participation in the cash economy, the availability of education, and increased mobility have reduced social cohesiveness, and younger people in particular are less willing to accept customary authority. These social changes, along with the commodification of land seen in the Solomon Islands, have weakened traditional land management institutions. At the same time, of course, traditional institutions cannot simply be legislated away and periods of conflict can also act to undermine the state and enhance the status of traditional leaders. Thus in Bougainville communities certainly relied heavily on customary social organization and authority for general decision-making and dispute resolution. In some areas, this required more than adapting custom to modern circumstances – it required reviving it.[75] Building linkages between customary and state power is widely seen as crucial to developing sustainable state structures for Bougainville, but it remains to be seen whether customary structures are capable of resolving conflicts to the extent required to provide tenure security.

Opportunity to Access Natural Resources

The unequal distribution of benefits from natural resources was a key source of resentment against the CRA. The ARB Constitution seems to have addressed the contradiction between access to minerals under customary law and those existing under "Western law" by recognizing that what lies beneath the ground is also regulated according to custom. Nevertheless, in June 2006, PNG media reported that the president of the ARB, Joseph Kabui, had met with an executive of a mining company while on a trip to Canada. Within days, reports emerged of a plot to assassinate Kabui, motivated by resentment about his plans to resume mining on

[75] See A. Regan,"Bougainville: Beyond Survival," in *Cultural Survival Quarterly*, Vol. 25, No. 3, (2002).

Bougainville. Control over mining resources therefore remains a key source of conflict in Bougainville. More than customary rights to mineral resources is required. Regulations are required to ensure that those rights do not themselves lead to conflict through an even distribution and access to benefits.

Nondiscrimination

Simply recognizing customary rights to land and natural resources is not sufficient to ensure stability in Bougainville. Customary authority is often an autocratic and discriminatory form of power. There is also a tension between the concepts of individual rights and responsibilities, and communal rights and responsibilities. The strengthening of customary authority on Bougainville has also often been associated with discrimination against outsiders, both people from elsewhere in Bougainville and those from other parts of PNG.[76] In addition, while it is overly simplistic to state that customary land ownership is inherently and irredeemably discriminatory, it must be acknowledged that customary law does confer rights to land based on membership of a particular tribal group. As noted above, this raises questions as to how individuals can receive equal access to opportunities such as education and health care, since mining and logging royalties are provided to the customary land owners. If development on Bougainville proceeds in an uneven fashion, resentment over the unequal distribution of these benefits could lead to further conflict. Hence, again, the lesson is that land policy in peace operations must balance and respond to all aspects of international standards relating to land. In the case of Bougainville, recognizing indigenous rights to land alone is not enough. Further attention is also required to questions of nondiscrimination, tenure security, and equal opportunity of access to natural resources.

Overall Conclusions and Recommendations

In recent years, the Southwest Pacific region has been marked by violent conflicts in East Timor, Bougainville in PNG, and the Solomon Islands. International peacekeeping operations in these countries involved very different mandates and structures. Nevertheless, each operation

[76] Id.

experienced similar post-conflict property problems, including mass population displacement, widespread damage to housing and property, and a failure of government to address underlying land-related grievances. Each case raised the problem of adjudicating land disputes where there are competing claims to land based on multiple potential sources of law. Each also raised the problem of balancing claims for the preservation of custom and the rights of traditional landholders on the one hand, with those for nondiscrimination and the rights of settlers to tenure security on the other.

It is striking that the peace operations in each country largely took a hands-off approach to land and property issues. In East Timor and the Solomon islands, in particular, this failure to act has raised questions about the long-term effectiveness of these peace operations. Grievances regarding access to and control over land and other resources remain significant underlying sources of tension. Uncertainty and unresolved claims arising from housing destruction and population displacement continue to exacerbate these underlying causes of conflict. An important lesson is that sustainable peace operations must target the housing, land, and property issues that are central to the cyclical causes, and consequences, of conflict.

International standards provide a useful reference point for housing, land, and property programming. However, the case studies of East Timor, Bougainville, and the Solomon Islands demonstrate that these standards must be flexibly applied to meet the particular challenges arising in each post-conflict situation. For example, all three cases suggest that a focus on restitution alone would overlook historical patterns of land and resource-related grievances (in the Solomon Islands and Bougainville) and rights to housing and tenure security (in East Timor). Yet the cases also show that a failure to address claims to restitution or compensation through systematic programs can inflame tensions and induce escalating grievances prosecuted through violent action (in East Timor and the Solomon Islands). Thus we recommend HLP programming based on careful balancing of international standards relating to housing, restitution, tenure security, access to natural resources, and nondiscrimination. In East Timor, this would involve a combination of restitution, housing, and tenure security programs. In the Solomon Islands and Bougainville, it would include legal and institutional mechanisms for managing customary tenure in circumstances of natural resource exploitation and emerging land market transactions.

5

Housing, Land, and Property Restitution Rights in Afghanistan

Conor Foley

Introduction

Housing, land, and property (HLP) rights are undoubtedly some of most important challenges facing the government of Afghanistan, but in this specific case it would be wrong to assume that the solution to these problems lies simply in implementing a policy of "restitution." It is neither possible nor desirable to turn the clock back by restoring all land to "rightful owners."

Over the last forty years Afghanistan's various rulers have attempted to transform the country from feudalism, to communism, to an Islamic theocracy, to a neo-liberal free market economy. Different rulers have pursued different policies toward the HLP sectors, often based on the need to reward political supporters or allies.

Arable land is scare in Afghanistan and there is a considerable, and rapidly growing, landless population. Ownership and land use rights in Afghanistan remain starkly inequitable and it should not be assumed that there is a consensus about the "right to private property" in Afghan society. Indeed, if the root cause of the conflicts that wreaked such devastation in Afghanistan could be summarized in a single word, it would probably be "land."[1]

Frustration at the slow pace of land reform was a significant factor that led to the ousting of King Zahir Shah by his cousin, General Mohammed Daoud, in 1973 and eventually to the seizure of power by the communists in 1978. The sweeping land reform measures that the communists introduced

[1] Liz Wily, *Land Rights in Crisis, Restoring Tenure Security in Afghanistan*, Afghanistan Research and Evaluation Unit, March 2003.

on assuming power provoked a conservative backlash that plunged the country into civil war and then, after the intervention of the Soviet Union in 1979, a national liberation struggle. The anarchy into which Afghanistan descended after the *Mujahedin* captured Kabul in 1992 manifested itself in battles for territory and land-grabbing by local warlords.

The *Taliban*'s "tough on crime, tough on the causes of crime" policies initially proved popular in Pashtun areas, where they were often greeted as liberators. They also created the statutory framework for a restitution policy. Despite appearances to the contrary, the current government has largely relied on this framework to bring some order to the extremely chaotic state of land relations that currently exists.

This chapter discusses the main causes of HLP disputes in Afghanistan today and examines the attempts that have been made to tackle the problem at an institutional and policy level. It starts with a description of the mandate of the UN assistance mission to Afghanistan and describes why this has failed to prioritize housing, land, and property rights. It then briefly describes some of the main causes of these problems in Afghanistan, the legal protections given to HLP rights in constitutional and statutory law, and how the courts actually uphold these rights in practice.

The chapter also looks at the interaction between Afghanistan's formal legal system and its traditional customary mechanisms. A basic understanding of *Sharia* and Afghan customary law is critical to understanding how HLP rights are dealt with in practice. This chapter concludes that *policies of restitution must be pursued alongside those of social reform*. These should aim to strengthen both state and customary mechanisms in line with the standards laid down by international human rights law and Afghanistan's own constitution. The limits to what can be accomplished centrally should also be acknowledged and practical responses need to be developed at a community-based level.

The UN Assistance Mission in Afghanistan

The United Nations Assistance Mission in Afghanistan (UNAMA) was established in March 2002 through UN Security Council Resolution 1401.[2] It replaced a smaller long-standing UN Special Mission in

[2] UN Security Council, Resolution 1401, S/RES/1401 (2002), 28 March 2002.

Afghanistan led by the Special Representative of the Secretary General (SRSG), Lakhdar Brahimi. UNAMA's original mandate was aimed at supporting the process outlined in the Bonn Agreement of December 2001. Resolution 1401 also gave the SRSG "full authority . . . over planning and conduct of all United Nations activities in Afghanistan."[3]

UNAMA is a political mission, directed and supported by the UN's Department of Peacekeeping Operations. It has some 1,000 staff, the vast majority of whom are Afghan nationals. Its main office is in Kabul, with eight regional offices around the country and several suboffices. UNAMA's current mandate is to "work towards the establishment of strong and sustainable Afghan institutions."[4] Priorities include "strengthening Afghan institutions and building the capacity of the Afghan Administration at all levels, including the development of institutions of good governance, of law and order, and of security. Emphasis is also given to increasing employment and cash for work schemes, which provide income to families."[5]

A conscious decision was made early on to use disproportionately fewer international and more national staff in UNAMA than in other UN missions. Ostensibly this was intended to "build the capacity" of existing Afghan national institutions.[6] However, since UNAMA is notorious for "poaching" local staff from other organizations, this claim should be treated with some scepticism.[7] It is more likely that it was simply taken on grounds of cost, and this is an important factor to remember when considering what could realistically have been accomplished by the mission.

[3] The structure and functions of UNAMA are drawn from United Nations, Report of the Secretary-General – The Situation in Afghanistan and its Implications for International Peace and Security, A/56/875-S/2002/278, 18 March 2002.

[4] Id.

[5] See the UNAMA website, www.unama-afg.org, 4 June 2006.

[6] Id.

[7] It is common to find UNAMA drivers and low-level administrative staff who are qualified teachers, doctors, engineers, or other professionals, but can earn better money for the UN than in their previous jobs. The effects of this policy have been catastrophic, particularly on Afghanistan's civil service. The perception that the UN and other international organizations are siphoning off resources that should be used to rebuild Afghanistan is also leading to increasing anger, which spilled into serious violence in June 2006. See, for example, Rachel Morarjee, "What Has Afghans So Angry?" *Time*, May 30, 2006.

UNAMA's mandate is renewed annually and this has allowed for some adaptation of its work. In March 2006 the mandate contained six main elements: providing political and strategic advice for the peace process; providing good offices; assisting Afghanistan's government toward implementation of the Afghanistan Compact; promoting human rights; providing technical assistance; and continuing to manage all UN humanitarian relief, recovery, reconstruction, and development activities in coordination with the government.[8]

UNAMA was originally given special responsibilities in the areas of national reconciliation (supporting the work of the Special Commission on the Emergency *Loya Jirga*), human rights (monitoring, reporting, investigating violations, and recommending corrective action), rule of law (supporting the Judicial Commission established by the Bonn Agreement), the role of women (supporting women's rights and participation in society), and humanitarian affairs (coordinating UN relief, recovery, and reconstruction efforts).[9] In establishing UNAMA, the Security Council Resolution stressed that:

> [F]ocussed recovery and reconstruction assistance can greatly assist in the implementation of the Bonn Agreement and, to this end, *urges* bilateral and multilateral donors, in particular through the Afghanistan Support Group and the Implementation Group, to coordinate very closely with the Special Representative of the Secretary-General, the Afghan Interim Administration and its successors . . . . while humanitarian assistance should be provided wherever there is a need, recovery or reconstruction assistance ought to be provided, through the Afghan Interim Administration and its successors, and implemented effectively, where local authorities contribute to the maintenance of a secure environment and demonstrate respect for human rights.[10]

Human rights were to have been integrated into all aspects of the mission, and a senior human rights coordinator was placed in the office of the

[8] Id.

[9] *Rebuilding Afghanistan: The United Nations Assistance Mission in Afghanistan*, Future of Peace Operations Policy, Henry L. Stimson Center, Peace Operations Backgrounder, June 2002.

[10] UNSC Res. 1401, paras 3 and. 4.

SRSG. This would both coordinate UNAMA's human rights work and act as a focal point for the Afghan Independent Human Rights Commission and other UN agencies. Human rights officers were also meant to have been placed in all of UNAMA's regional offices. In practice, however, delays in recruitment meant that there have rarely been more than three of these international officers in post in the country simultaneously and the coordinator's position is vastly under-resourced. UNAMA's Rule of Law section has faced similar problems of recruitment and resources, and, although some police and penal affairs advisors have been deployed, these efforts have been modest.

Given the scale of the human rights problems facing Afghanistan, and the lack of capacity of UNAMA's human rights component, it is perhaps not surprising that HLP rights issues have not received the priority that they deserve. Donors, including the Italian and U.S. governments, have funded a variety of judicial and security sector reforms, but, as will be described below, these efforts have been plagued by political wrangling and divisions both between international agencies and Afghan government officials.[11] As a result, as will be described further below, international aid to the justice sector in Afghanistan has largely been dysfunctional.

The UN High Commissioner for Refugees (UNHCR) has, however, taken a proactive stance on HLP issues, including supporting the establishment of a network of information and legal aid centers by the Norwegian Refugee Council (NRC). About 90 percent of the caseload of these centers relates to HLP rights.[12]

Land Disputes in Afghanistan

The controversy that surrounds land rights is probably one of the main reasons why neither UNAMA nor the government of Afghanistan has yet to develop a coherent policy on land reform. The problem of land rights cannot be dealt with in isolation from tackling Afghanistan's other

[11] J. Alexander Their, *Re-establishing the Judicial System in Afghanistan*, Center on Democracy, Development and the Rule of Law, Stanford Institute for International Studies, September 2004.

[12] *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan, 2003.

problems. Indeed, attempts to impose solutions from above may actually be counterproductive. One of the best things that can be said about the UNAMA's "light footprint approach"[13] is that at least it probably has not made things worse. Nevertheless, there is a pressing need to develop a clearer legal framework governing HLP rights as part of a holistic strategy of strengthening the rule of law and social justice. This task is particularly urgent due to the return of millions of landless Afghan refugees and displaced persons.

The main causes of HLP disputes in Afghanistan can be summarized under the following headings:

- *Conflict:* Afghanistan has experienced almost thirty years of almost continual conflict, including prolonged periods of civil war and two foreign interventions, which have caused millions of people to flee from their homes.
- *Regime changes:* Successive governments have violently replaced one another and different regimes have pursued different land policies, often based on rewarding their own supporters through favorable land allocations.
- *Unclear ownership:* The incomplete land registration system, the large number of missing title deeds, and the fact that disputed land has often been sold many times over make it very difficult to determine who owns what.
- *Reliance on customary documents and mechanisms:* Many land and property transactions take place without being officially approved by the courts, using customary documents or traditional dispute resolution mechanisms, such as *Shura* and *Jirga*.
- *Land shortage:* Only 12 percent of the land area of Afghanistan is suitable for arable farming. A further 45 percent is currently being used as pastureland by both settled and nomadic farmers, but tenure arrangements over pastureland are often unclear and disputes are frequent.
- *Landlessness and secondary occupation:* A large number of people in Afghanistan have no land, and when they return back from exile they

[13] Scott Leckie, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework*, UNHCR, Legal and Protection Policy Research series, PPLA/2005/01, March 2005, p. 18, footnote 25.

sometimes occupy other people's land, or government-owned land, because they have nowhere else to go.

- *Tribal and ethnic disputes:* Competition for scarce resources, such as land and water, is often linked to ethnic or tribal tensions or to other political conflicts.
- *Corruption:* There are numerous reliable reports that members of the judiciary and executive organs are abusing their positions for personal or political interests, or due to pressure exercised by other powerful members of society.
- *Lack of a rule of law:* Even where the courts, public authorities, or customary dispute-resolution mechanisms issue fair decisions, there is no guarantee that these can be enforced. A large number of powerful commanders, and their supporters, consider themselves to be "above the law," and the lack of an effectively functioning legal system means that many people rely on the use of force to settle disputes.

Historical Context

Afghanistan contains a mixture of ethnic groups, the largest of which are Pashtuns, who make up around 40 percent of the population. Pashtuns have traditionally dominated Afghanistan's political life. Indeed, with the exception of Mohammad Nader Khan, a Tajik, who briefly ruled Afghanistan from 1929 to 1933, modern Afghanistan was always ruled by Durrani Pushtun kings up until the establishment of the First Republic in July 1973.

Afghanistan's early rulers pursued a policy of "*Pashtunisation*" as a means of extending their control throughout the country by settling Pashtun colonists in areas where other ethnic groups – whose loyalty was considered to be suspect – predominated. From the 1930s onward, governments also began to expropriate land for large-scale development projects, such as the construction of dams and irrigation canals in an attempt to "green the desert." Both policies involved the expropriation of large tracts of land from their original inhabitants.[14]

[14] Liz Alden Wiley, *Putting Rural Land Registration in Perspective: The Afghanistan Case*, Afghan Research and Evaluation Unit, Kabul, April 2004.

A statutory law was enacted in the 1930s concerning the circumstances in which private land could be confiscated by the government, but this contained the catch-all phrase that expropriation could be justified for "all other projects that benefit the public in general."[15]

The most ambitious attempt to establish a register of land ownership was carried out by the Land Survey and Statistics Law 1965, which created a Department for Cadastral Survey to conduct a nationwide land survey.[16] The aim of this survey was to "acquire land statistics of the country, to maintain a land register and to organize tax affairs."[17] It was intended to bring together the civil, religious, and customary legal frameworks governing landholding norms into a single state-controlled framework. It was also hoped that, by achieving greater certainty about land ownership, the system would make it easier for landowners to use their land as collateral for loans. The records established by this process would cancel all prior documents relating to the land.[18]

A Cadastral Survey Department was established to create a listing of all properties based on surveys and mappings and to include the coordinates of each property and its ownership and legal status. Mobile teams were sent around the country to survey "all useable land in Afghanistan whether it is of private or public ownership."[19] Tax declaration forms were also distributed to all landowners and they were required to complete them, in quadruplicate, attested by witnesses and by the chief of the village, and return them to a declaration office, which would issue a receipt.[20]

However, the register was never completed, due to the costs involved. Only one-third of all landholdings and one-fifth of the total arable land in the country were surveyed, and no title deeds were ever issued.[21] In an effort to cut costs and speed up the process, the authorities abandoned the establishment of a cadastral-based register and instead relied on a "self-reporting" system in which owners of land, or government-appointed representatives, were asked to declare the size of their holdings. The exercise was also used to considerably expand what was to be formally

[15] Land Appropriation for Public Welfare 1935, Article 2.
[16] Land Survey and Statistics Law 1965, Articles 13–17.
[17] Id., Article 1.
[18] Id., Article 15.
[19] Id., Article 13.
[20] Id., Articles 1–4.
[21] Supra, note 1.

defined as "government-owned" land, much of which had previously been regarded as communal.[22]

President Daoud's First Republican Constitution of 1977 limited the right to land ownership to the provisions of a Land Reform Law and stated that: "Private property and enterprises, based on the principle of non-exploitation, shall be regulated by Law."[23] The state undertook to buy private land above the specified ceiling[24] and to re-distribute it to the poor and landless, but little land was actually purchased. When the communists seized power they imposed a sharp reduction in the landholding ceiling. No one was allowed to own more than 30 *Jeribs* of land, and any excess was to be expropriated without compensation.[25] Failure to register land would result in its confiscation, and those who destroyed their land, or other property, faced heavy fines or imprisonment.[26] The 1980 Constitution made it clear that private ownership would be limited and subject to government control.[27]

These policies provoked a considerable backlash and were a significant factor in the subsequent revolt against the regime. The attempted land reform policy – which had never really been implemented in much of the country – was abandoned by President Najibullah in 1987 and the right to private property was restored in a new constitution.[28] Presidential decrees stated that compensation would be paid for any seized land that could not be returned to its original owners.[29]

In 1992, the Mujahedin seized Kabul and President Rabbani drafted a new constitution, proclaiming Afghanistan to be an Islamic State. The new constitution also guaranteed the right to private property,[30] but this provided little protection in the anarchy that followed as Afghanistan

[22] Land Survey and Statistics Law 1965, Article 55.
[23] 1977 Constitution, Articles 14 and 15.
[24] Id., Article 36.
[25] Land Reform Decree No. 8 1980, Articles 3 and 9.
[26] Id., Articles 31, 32, and 33.
[27] 1980 Constitution, Articles 17, 19, 20, and 22.
[28] 1987 Constitution, Articles 29 and 30.
[29] See Decree on Selling of Apartments, Gazette Issue 668, 31.3 1367 (21 June 1989); Decree on Exemption of Tax Penalty on Farmers and the Owner of the Land, Gazette Issue 679, 15.9.1367 (6 December 1989); Decree on the Return of Properties of the Returnees Which Are Under the Control of Government, Gazette Issue 715, 15.2.1369 (5 May 1991); and Decree to Return Houses, Apartments Which Are Under the Control of Government to the Owners, Gazette Issue 725, 1.7.1369 (23 October 1991).
[30] 1992 Constitution, Articles 48, 65, 67, and 74.

descended into civil war. Rival warlords bombarded Kabul, reducing much of it to rubble, and the damage inflicted on the city was far greater than that suffered under the Soviets. Many people were driven from their land or coerced into handing over their property deeds or ownership documents. Popular revulsion against this state of lawlessness helped to pave the way for the rise of the Taliban, who captured Kabul in 1996.

The Taliban also pursued an aggressive policy of *Pashtunisation*, treating other ethnic groups, particularly the Hazaras, as "inferior races." Thousands of Hazara civilians were systematically murdered when the Taliban captured Mazar-i-Sharif in 1998, at Robatak Pass in 2000, and Yakawlabg in 2001. Tajik civilians also faced forced displacement in the Shomali valley and Taloqan during this period. The Taliban's attempts to reverse centuries of social and economic development, their complete neglect of welfare programs, and their anti-women policies, together with splits and corruption within the ruling elite soon alienated most Afghans.

The Taliban dispensed with the constitution and the civil law and created "Islamic courts," which were to apply *Sharia* directly. They also issued a series of edicts regarding land relations that will be discussed further below, as these provide the legal framework of the present government's "restitution" program.[31]

Current Challenges

In the introduction to its National Development Strategy (I-AND), published in 2006,[32] the government of Afghanistan quotes the ninth-century Islamic scholar Ibn Qutayba to illustrate the concept of what it refers to as the 'Circle of Justice':

> There can be no government without an army,
> No army without money,
> No money without prosperity,
> And no prosperity without justice and good administration.[33]

[31] See Law on Land, Decree No. 837; Law on Land under Decree No. 57, Taliban Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000; and Expropriation Land Law, Official Gazette 794, September 2000.

[32] Afghanistan, National Development Strategy, *An Interim Strategy For Security, Governance,* Economic Growth & Poverty Reduction, Summary Report (I-ANDS), 13 February 2006.

[33] Id., p. 1.

Many countries have experienced conflicts, but the drawnout nature of Afghanistan's suffering together with the scale of the destruction and the way in which peace was finally brought to most of the country does give it some unique features. As the National Development Strategy report states:

> From Sawr 1357 (April 1978) until the signing of the Bonn Agreement on 14 Qaws 1380 (5 December 2001) conflict killed over a million Afghans, most of them civilians; over a million Afghans were orphaned, maimed or disabled; a third of the population was driven into exile as refugees, and many more were displaced from their homes; the villages where most of the population lived were devastated; and much of the country's educated class was forced into exile. Much agricultural land and pasture had been mined and was therefore unproductive. Fragile systems for managing the country's scarce supplies of water were devastated. Most basic infrastructure was destroyed, including roads, bridges, irrigation systems, and electric power lines, and that which remained was not maintained. Afghans were unable to use many schools and clinics, many of which had degenerated into crumbling structures, unsuitable for their intended purposes. One generation or more lost the chance for education. The printing of worthless money to fund militias sparked hyperinflation, which reduced the value of salaries to almost nothing. Demoralized government staff received neither genuine salaries, training to meet new challenges, nor the leadership and equipment they needed to do their jobs. Licit agricultural production fell by half.[34]

The framework for the present governance arrangements in Afghanistan were agreed at a United Nations–sponsored conference held in Bonn, Germany, after the fall of the Taliban in 2001. The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement) was signed on 5 December 2001. The Bonn Agreement created a very general governance framework and established an Interim Authority, which would govern the country until an Emergency *Loya Jirga* could convene and select a Transitional Authority. This met in June 2002 and established the

[34] Id., p. 6.

Afghanistan Transitional Administration to govern the country until a new government could be sworn in following national elections. Presidential elections took place in October 2004, and President Hamid Karzai was inaugurated on December 7 of that year. A new parliament was elected in September 2005.

The Bonn Agreement specified that a Judicial Commission be established to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions.[35] The 1964 Constitution was applied for the transitional period. The Bonn Agreement stated that existing laws could remain in force provided they were not inconsistent with the agreement itself, the 1964 Constitution, or international legal treaties to which Afghanistan is a party.[36]

A Presidential Decree on 5 January 2002 officially ordered the abolition of all "decrees, laws, edicts, regulations and mandates, which are inconsistent with the 1964 Constitution and the Bonn Agreement."[37] The Ministry of Justice was assigned responsibility to study all legal documents that were issued before this date and check them for consistency. Proposals for changes to the law should then be brought to the government for approval.[38] This did not mean that all laws issued during the Taliban, or earlier regimes, were abolished, rather, only those laws deemed by the Ministry of Justice to be inconsistent with the 1964 Constitution and the Bonn Agreement. A subsequent Presidential Decree assigned the task of carrying out a "comprehensive program for reform of the law" to the Judicial Reform Commission.[39]

The Bonn Agreement also envisaged the creation of an Afghan Independent Human Rights Commission (AIHRC),[40] which was established by Presidential Decree in June 2002.[41] The 2004 Constitution solidified

[35] The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, II Legal framework and judicial system, Article 2.
[36] Id., Article 1.
[37] Decree No. 66 on the Abolishing of all decrees and legal documents enacted before 22 December 2001.
[38] Id., Article 2.
[39] Decree No. 153 on the formation of a Judicial Reform Commission and its duties, 2 November 2002, Article 3.
[40] Bonn Agreement, Section III, Interim Administration, Article 6.
[41] Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, 6 June 2002.

AIHRC's role as an independent human rights institution for the country.[42] AIHRC's responsibilities include human rights monitoring, investigation of violations, and the development of domestic human rights institutions. AIHRC can also refer persons whose fundamental rights have been violated to legal authorities and assist in defending their rights. AIHRC has played a valuable role in mediating many HLP disputes.

Housing, land, and property rights were not specifically addressed in any of the international resolutions or framework agreements that created governance institutions in Afghanistan, presumably because it was felt that this could better be done at a national level. As stated above, the international community has channeled its support through the Judicial Reform Commission and AIHRC. It is unlikely that the external imposition of a top-down mechanism to deal with the HLP restitution rights would have been successful in an Afghan context. However, the government of Afghanistan can be criticized for failing to deal with this challenge itself.

Housing, Land, and Property Rights in Afghanistan

Article 40 of Afghanistan's 2004 Constitution specifies that:

> Property is immune from invasion.
> No person shall be forbidden from acquiring and making use of a property except within the limits of law.
> No person's property shall be confiscated except within the provisions of law and the order of an authorized court.
> Acquisition of personal property is permitted only for securing public interest, in return for prior and just compensation according to law.
> Inspection and disclosure of private property shall be carried out only in accordance with the provisions of law.

This provision is in line with Afghanistan's obligations under international law and is supported by a number of other constitutional provisions. These include a prohibition of any kind of discrimination and guaranteed

[42] 2004 Constitution, Article 58.

equality before the law;[43] a guaranteed right to privacy and the prohibition of "search-and-entry" without a warrant;[44] the rights to liberty and a fair trial;[45] and the prohibition on torture and other forms of ill-treatment or compulsion.[46] Crime is a personal action and no one can be imprisoned or punished for the crimes of someone else.[47] The ways and means of recovering a debt must be specified in the law, and no one can be imprisoned or deprived of his or her liberty simply for being in debt.[48] Every Afghan is entitled to travel within the territory of his state and settle anywhere except in areas prohibited by the law. Similarly, every Afghan has a right to travel outside of Afghanistan and to return to Afghanistan according to the provisions of the law.[49]

Article 14 of the Constitution also specifies that:

> The state shall design and implement within its financial resources effective programs for development of agriculture and animal husbandry, improving the economic, social and living conditions of farmers and herders, and the settlement and living conditions of nomads.
>
> The state shall adopt necessary measures for housing and the distribution of public estates to deserving citizens in accordance within its financial resources and the law.

Taken together, along with the international treaties to which Afghanistan is a party – particularly the International Covenant on Civil and Political Rights[50] and the International Covenant on Social Economic and Cultural Rights[51] – this provides considerable formal protection to

[43] Id., Article 22.
[44] Id., Article 38.
[45] Id., Articles 24, 25, 26, 27, and 31.
[46] Id., Articles 29 and 30.
[47] Id., Articles 26 and 27.
[48] Id., Article 32.
[49] Id., Article 39.
[50] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976. Ratified by Afghanistan April 1983.
[51] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. Ratified by Afghanistan April 1983.

Afghans against the forced or unlawful eviction from, or deprivation of, their property and a legal right to obtain its restitution. [52]

Land and Power

These constitutional developments have, however, taken place alongside a much more basic type of regime change in which the United States backed one side against another in a civil war. The conflict was partly fought on ethnic grounds, in that the Taliban were an almost exclusively Pashtun force while the Northern Alliance was a loose grouping of Tajik, Uzbek, and Hazara-based Mujahedin militias. Many Pashtuns did oppose the Taliban, and Afghanistan's conflicts have never been purely ethnically based. Nevertheless, the means by which the United States chose to intervene to overthrow the Taliban decisively influenced the nature of the post-war political settlement.

"Operation Enduring Freedom" (OEF) was launched by the United States after 11 September 2001 with the objective of killing or capturing Osama Bin Laden and overthrowing the Taliban regime that was sheltering him.[53] It essentially consisted of providing military and financial support to the Northern Alliance, bombing the Taliban's forces from the air, and bribing individual militia commanders to switch sides.[54] One consequence of this was that when the Taliban fled they left a complete vacuum, which was often filled by local Mujahedin warlords and commanders. The initial reluctance of the U.S. government to directly involve U.S. troops in a ground war or subsequent "nation-building" may have kept U.S. military casualties low, but the long-term costs have been considerably higher.

An estimated 60,000 Pashtuns fled northern Afghanistan in December 2001, as the Northern Alliance advanced, and most of these remain displaced from their homes.[55]

[52] See: Conor Foley, *A Guide to Property Law in Afghanistan*, Norwegian Refugee Council and the UN High Commissioner for Refugees, 2005.
[53] See Bob Woodward, *Bush at War*, Simon and Schuster, New York, 2003.
[54] Id.
[55] Afghanistan: Focus on Returns and Reintegration in the North, IRIN Humanitarian News, UNOCHA, 18 June 2003.

U.S. forces were eventually deployed to hunt down the remnants of Al Qaeda and the Taliban in the Pashtun-dominated south and east of the country. They continued to provide direct military and financial support to any anti-Taliban militias that they could find, and this decision particularly alienated Pashtuns, who saw a return of many of the deeply unpopular Mujahedin warlords that the Taliban had driven out.[56]

Another problem was that Pashtuns were virtually excluded from the new administration. Although the president, Mohamed Karzai, is a Pashtun, most members of his first new administration were not. Critically, a number of key positions were taken by a small group of Tajiks from the Panjshir valley, the dominant grouping in the Northern Alliance. Most of these Mujahedin fighters had formerly been commanders under the charismatic General Ahmad Shah Massoud, and they constituted themselves into a powerful "inner circle" within the government. Internal power struggles within the new administration and the reluctance of the international community to fill the security void meant that the writ of authority of the incoming administration did not extend much beyond the outskirts of Kabul. As President Karzai noted:

> When the Interim Administration was established, the state system was in a complete state of disarray. The political, economic, social and cultural infrastructure of the country was totally destroyed. Different parts of the country were ruled by various armed factions and had their own styles of administration. The [National] Administration system was dismantled. Roads were in a state of disrepair. There were no health services and the status of the education system was of most concern. The government treasury was empty and public funds and property had lost their value. In such a worrying situation, the Interim Administration took control of political leadership.[57]

An International Security Assistance Force (ISAF) was established, but this remained confined to Kabul until 2004, when a limited force was also deployed in the northern town of Kunduz. The security vacuum

[56] See Afghanistan: *The Problem of Pashtun Alienation*, International Crisis Group, August 2003.

[57] Quoted in I-ANDS, 2006, p. 7.

has been partially filled by the formation of Provincial Reconstruction Teams (PRTs), which consist of uniformed soldiers accompanied by civilian staff. Each PRT operates under military command "with the aim of extending the authority of the Afghan central government and helping to facilitate development and reconstruction by contributing to an improved security environment."[58] However, these are substantially smaller than the security force required and they have been criticized for blurring the lines between military and humanitarian action. Aid workers were systematically targeted for murder and kidnapping, and this forced many organizations to withdraw from parts of the country, which deprived people of much-needed humanitarian assistance.[59] Some PRTs have been involved in mediating disputes on HLP rights, but this issue has not been addressed systematically.

ISAF forces have been, belatedly, deployed in the south and east, which remain the most dangerous parts of the country.[60] The initial failure to deploy an effective international peacekeeping force allowed local Mujahedin commanders to consolidate their positions and also led to a resurgence of the Taliban insurgency from the summer of 2003.[61] As late as 2004 it was estimated that more than half of Afghanistan's provincial governors and military commanders were self-appointed.[62] Recruitment for a newly created Afghan National Army (ANA) has since advanced considerably and a Disarmament, Demobilization and Reintegration (DDR) has made some progress in demilitarizing some of the country. The government has attempted to separate the military and administrative functions of provincial administrators and has increasingly appointed professional governors and commanders.

By early 2006, the government claimed to have demobilized and disarmed about 62,000 combatants,[63] although in many cases these were simply

[58] Foreign and Commonwealth Office website, Afghanistan, http://www.fco.gov.uk/Countries and regions/Afghanistan, 20 January 2005.

[59] See, for example, Conor Foley, "Caught in the Cross-Fire," *The Guardian*, 7 May 2004; and "The Terrible Cost of Saving Lives," *The Guardian*, 25 August 2004.

[60] See http://www.fco.gov.uk/Countries and regions/Afghanistan.

[61] See, for example, Luke Harding, "Taliban Are Back – And with a Murderous Vengeance," *Observer*, 8 June 2003.

[62] See Liz Alden Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research & Evaluation Unit, Kabul, February 2004

[63] Quoted in I-ANDS, 2006, p. 9.

absorbed into the security forces of provincial governors and commanders. It also announced that it had launched a further program for the Disbandment of Illegal Armed Groups (DIAG) to disarm and reintegrate an estimated 100,000 more former combatants.[64] It estimated that around 1,800 militias and illegal armed groups, tied to local power holders, still exist. These illegal groups are often better equipped than the security forces.

Although the government is spending around 17 percent of its gross domestic product (GDP), it acknowledges that it has not been able to restore the rule of law to much of the country.[65] Its national development strategy states that: "The army and police are still developing the capacity to exercise a legitimate monopoly over the use of force in Afghanistan."[66] In other words, the "circle of justice" referred to above does not yet exist.

Almost all observers agree that restoring HLP rights in Afghanistan can only be done in the context of strengthening security, restoring the rule of law, increasing aid and investment, and rebuilding governance institutions. It is simply impossible to deal with the issue in isolation, and creating new laws, commissions, and other institutions that focused solely on this issue would probably be counterproductive. Both the government and the international community would be better advised to strengthen and reform the mechanisms that already exist.

Land and Justice

Afghanistan remains one of the poorest countries in the world. Thirty-eight percent of rural households are short of food at least part of the year. Malnutrition is widespread. Half of all school-age children do not attend school. Life expectancy is only forty-four years, and child, infant, and maternal mortality levels are among the highest in the world. Fewer than 1 percent of households have safe or sanitary toilet facilities. Only 6 percent have access to public electricity power grids. Afghanistan has the lowest female literacy rate in the world.[67]

[64] Id.
[65] Id., p.10.
[66] Id.
[67] Id.

The production, processing, and trading of opiates currently account for around half of Afghanistan's GDP.[68] Nearly four-fifths of this income goes to traffickers, not farmers, but over 2 million people, in a population of about 25 million, rely directly on the opium economy. The growth of the drug industry has led to the criminalization of much of the Afghan economy. Even those sectors that do not benefit directly from the industry may benefit indirectly from the spin-offs that it brings to construction, trade, transport, and other activities. Much of the drug industry is controlled by warlords who use their power to seize land, levy tributes, and control access to credit and markets.

Afghanistan's tax base is very low because even the legal sectors of the economy are often informal or conducted at the subsistence level. Imports outstrip licit exports by a factor of eight to one.[69] However, many of the border crossings are under the control of local warlords, who do not pass on the import taxes that they levy to Afghanistan's central government.[70] Afghanistan raises a lower percentage of resources through taxation than any other country in the world.[71]

There is still not an adequate legal and regulatory framework necessary for the government to function effectively. Most of the country remains essentially lawless. The courts are barely functioning and, even in the areas that they control, the authorities are unable to protect basic human rights. Corruption is rife, people are routinely subject to arbitrary detentions and mistreatment, and often denied the right to a fair trial. Many governors and commanders maintain private jails in which people are imprisoned on a purely arbitrary basis.[72]

In the years immediately after the overthrow of the Taliban, much of the aid to Afghanistan went toward humanitarian relief. As well as the destruction caused by 30 years of war, Afghanistan had suffered from a prolonged drought, which displaced hundreds of thousands from their land. The country also faced a huge task in attempting to reintegrate millions of

[68] Id.
[69] Id., p. 11.
[70] See Barry Berak, "Warlordistan," *The New York Times Magazine*, 1 June 2003. Ishmael Khan, for example, the former Governor of Herat, is believed to have raised around US$1 million a day through a customs levy on trucks crossing the Iran and Turkmenistan borders.
[71] I-ANDS, 2006, p. 10.
[72] Amnesty International, Afghanistan, *Crumbling Prison System Desperately in Need of Repair*, AI Index: ASA 11/017/2003, 8 July 2003.

returning refugees and displaced persons.[73] Unfortunately, many donors failed to live up to their initial promises to help reconstruct the country. By June 2003, the Asia Development Bank reported that only a small proportion of the $5.1 billion pledged at the Tokyo Conference had been received.[74] Meanwhile, on a visit to London, President Karzai revised this need upwards to between $15 and $20 billion.[75]

Currently less than a quarter of the aid given to Afghanistan is given through government channels.[76] This makes it difficult for the government to plan the development and reconstruction effort. Official salaries are extremely low and many private, humanitarian, and nongovernmental organisations (NGO) pay considerably better than the state sector, which makes it difficult for the government to recruit and retain professional managerial staff. Conversely, donors are reluctant to fund the government directly due to concerns about official corruption and mismanagement. According to a World Bank report published in 2004, "bribery to police, judicial services, municipal and other sector Ministry staff is almost a daily affair," particularly in relation to land issues.[77] In 2005, Transparency International rated Afghanistan 117, out of 152, on its corruption perception index.[78]

The government has enacted legislation to provide the basis for effective public administration and private-sector–led growth in Afghanistan. According to Afghanistan's National Development Strategy, several laws and decrees have been enacted to provide an enabling environment for development of the private sector and address the entrenched illicit economy.[79]

[73] David Turton and Peter Marsden, *Taking Refugees for a Ride, the Politics of Refugee Return to Afghanistan*, Afghanistan Research and Evaluation Unit, December 2002.

[74] Press Release, Asia Development Bank, 6 June 2003.

[75] IRIN, 18 June 2003.

[76] I-ANDS, 2006, p. 9.

[77] World Bank, Poverty Reduction and Economic Management Sector Unit South Asia Region, *Afghanistan: State Building, Sustaining Growth, and Reducing Poverty, A Country Economic Report*, Report No. 29551-AF, June 29, 2004.

[78] Transparency International, *Corruption Perceptions Index 2005*, www.transparency.org.

[79] I-ANDS, 2006, pp. 8–9. This lists the following: the Banking Law of Afghanistan, 1383 (2004); the Private Investment Law, 1382 (2003); and the Customs Code, 1384 (2005) provide the environment for a liberal economy. The Public Finance and Expenditure Management Law, 1384 (2005); the Revenue Law, 1384 (2005); and the Income Tax Law, 1384 (2005) provide the framework for the collection and use of national revenue. The Civil Service Law, 1384 (2005), strengthens public administration reform, and laws such as the Law on the Organization and Jurisdiction of Courts, 1384 (2005), and the Juvenile Justice Code, 1384 (2005), strengthen the justice sector. The Anti Narcotics Drugs Law, 1383 (2004); the Law on Campaign against Money Laundering, 1383 (2004); and the Law on Campaign against Bribery and Corruption, 1383 (2004).

According to a report by the International Commission of Jurists (ICJ), based on research conducted in 2002, however, there are real problems in disseminating these new laws:

> Not a single court visited in the course of the mission in either Kabul or Mazar-e-Sharif had access to or a collection of Afghanistan's main statutory laws. Even the Ministry of Justice and the University of Kabul do not hold complete sets of Afghanistan's statutory laws and regulations. . . . None of the judges interviewed expressed any significant interest in education or training or the provision of statutory materials to which none of them had access. Invariably, judges referred to copies of the Holy *Qur'an* and stated that it contained all the laws that were needed.[80]

This may be a slight exaggeration. The Ministry of Justice does have a reasonably complete set of statutory laws and copies of the Official Gazette. The Civil and Criminal Codes, which are the main handbooks for provincial and district courts, are also fairly widely available.[81] Nevertheless, it is probably difficult for judges to keep up with the rate at which new laws are being issued and old ones repealed.

Afghan law requires all judges to hold a degree from either the Faculty of Law or the Faculty of Sharia, to have completed the one-year legal professional training, and be aged between 28 and 60.[82] However, many sitting judges do not hold the necessary qualifications and have exceeded the specified age limit.[83] A report compiled by the UNAMA in 2004 stated that only a third of prosecutors and judges are educated to university levels and over half of the judicial staff working in Kabul has no official legal training.[84] Many Afghan judges graduated from religious schools and do not have any training in constitutional or statutory law. Although the UN

[80] Dr. Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, The International Commission of Jurists, November 2002.

[81] See, for example, Rob Hager, *Detailed Report – Badakhshan Mission*, for Afghan Research and Evaluation Unit and the World Bank, April 2003.

[82] Law of the Jurisdiction and Organization of the Courts of Afghanistan of (Muslim Year) 1346 (1967), Article, 75.

[83] Supra, note 80.

[84] *Human Security and Livelihoods of Rural Afghans 2002–2003, A Report for the United States Agency for International Development*, Feinstein International Famine Center, Tufts University, June 2004.

Development Programme (UNDP) and some international NGOs have provided some training to judges, there is not a fully developed national training program.[85]

There is also widespread confusion about the status of the statutory law. Frequent forcible regime change over the last thirty years has led to great legal instability, as new governments have repealed or annulled the laws of their predecessors. As a result, judicial decisions are often issued with judges unable to cite the apposite provisions of the constitution or statutory law, instead relying on their own memory of what the law says or their own conceptions of justice, which are often based on customary practices.

Housing, Land, and Property Restitution Laws

In fact, the main legislative framework governing the restitution of HLP rights is the Law on Land Management Affairs enacted by the previous Taliban government in 2000. This law is explicitly aimed at restoring land to those who lost it after 1978. According to the law: ' "Lands which were occupied forcefully from their owners or their children in accordance with the Communist regime" after 1978 should be dealt with in the following ways:

- If the original owner possesses valid documents and the land has not been distributed to a new owner under subsequent land reforms, then it will be returned to the claimant or to his or her children.[86]
- If the land was re-distributed to someone else, then the current occupant will compensate the original owner at present-day prices or return the land together with the value of all lost harvests.[87]
- If the land has been retained by the state, either for agricultural or urban development purposes and structures have been built on the land, then the state must fully compensate the original owner, but is not required to return the land.[88]

[85] The International Rescue Committee developed a training course on international human rights law for judges and public officials. The Norwegian Refugee Council has also conducted training on property law.
[86] Law on Land Management Affairs, Article 31.
[87] Id.
[88] Id.

- If the land was distributed to a person who has subsequently sold the land to another, then the current occupant may claim costs from the person who sold him the land, when returning the land to the original owners.[89]
- If structures were built on the land, then the original owner should compensate the occupant for the value added; however, if an agreement cannot be reached and the value of the structures is equal to the value of the land, the occupant should hand over the building to the original owner.[90]
- If the shape of the land was changed in a way that reduced its value, then the occupant must compensate the original owner.[91]
- If the original owner is absent, an authorized court may appoint a legal representative to secure the property in the owner's name.[92]
- Property that was occupied illegally during this period will also be restored to its rightful owners – whether that be private individuals or the state.[93]

The Law on Land is largely based on the Afghan Civil Code, and before discussing the specific legal and policy initiatives taken by the present government of Afghanistan, and the international community, it is important to place these in the context of Afghanistan's legal system and the plurality of state, religious, and customary laws that govern HLP rights.

According to Afghanistan's Constitution, the courts are required to apply constitutional law first, then statutory law, then Sharia law, and finally customary law.[94] Customary law may only be applied when none of the above provisions can be applied. According to the Constitution: "Whenever no provision exists in the constitution or the laws for a case under consideration, the court shall follow the provisions of the *Hanafi* jurisprudence within the provisions set forth in this Constitution and render a decision that secures justice in the best possible way."[95] According

[89] Id., Article 32.
[90] Id.
[91] Id.
[92] Id., Article 34.
[93] Id., Article 35.
[94] 2004 Constitution, Article 130.
[95] The Civil Law of the Republic of Afghanistan, Kabul, Afghanistan, 1977, Article 1(2).

to the Civil Code: "Where there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic *Sharia*, the court issues a verdict in accordance with the public convention, provided the convention does not contradict the provisions of the law or principles of justice."[96]

Up until the 1960s, Afghanistan essentially had a dual judicial system in which religious courts handled areas such as criminal law, family and personal law while the official courts handled issues such as those relating to commerce, taxation, and civil servants. The 1964 Constitution created a unified judicial system, assembling the disparate parts of the old system into one hierarchical structure with a Supreme Court at its apex. It also created a unified system of laws and gave precedence to state law.

Afghanistan's Civil and Penal Codes were formalized in 1977 and consist of a series of books and chapters of selected Islamic jurisprudence assembled into two separate volumes. The Civil Code contains the most detailed provisions with respect to HLP rights. It has 2,416 articles and is divided into a series of topics.[97] The section on property rights is the largest of these and includes guidance on the handling of contracts and mortgages; rights of possession; severing of joint rights; inheritance and marriage rights; and procedures for leasing, purchase, renting, and sale of property.[98] The code distinguishes between "moveable property" – such as money, livestock, and equipment – and "immovable property" – such as land, houses, and commercial buildings.

The Civil Code takes precedence over religious jurisprudence and "in cases where the law has a provision, the practice of religious jurisprudence is not permitted."[99] However, since the Afghan Civil Code is largely based on Sharia, this issue is rarely a pressing one. Sharia is a set of rules based on

[96] Id., Article 2.

[97] These include the legal definition of a person; civil status; residence; citizenship; family; marriage; children's rights and child care; wills and inheritance; endowments; the formation of companies, charitable associations, and other institutions; contracts; fraud; compensation; loans, deposits, credit, and debt; ownership documents and other forms of proof; transfers of ownership, including sales, rental agreements, leasing, and donations; labor law and work regulations; insurance; bail; mortgages; and land and property rights.

[98] Id., Articles 1554–2416.

[99] Id., Article 1.1.

Islamic scripture and jurisprudence potentially applicable to all forms of legal interaction. Its main sources are as follows:[100]

- The *Qur'an*: the revealed word of Allah, transmitted verbatim to the Prophet Muhammad through the Angel Gabriel. The *Qur'an* sets out general principles to guide the life of the Muslim community, rather than a detailed set of guidelines, and only a small amount of its content relates to law and jurisprudence.
- *Sunna*: the practice of the Prophet – what he said and did. The *Sunna* is recorded in the *Hadith*, first by the prophet's original companions and subsequently by their successors. There are six fundamental collections of *Hadith* from six authoritative companions, but in total there are literally hundreds of thousands of them. *Hadith* is subject to human error, so degrees of accuracy vary.
- *Ijma* is the consensus of the community. *Ijma* is not a source of the same authority as *Qur'an* or *Sunna*, because it is not divine. *Ijma* was essentially bound when the classical texts were finalized between the tenth and thirteenth centuries, so different schools have competing *ijma*.
- *Ijtihad* is the method by which the principles established by the *Qur'an*, *Sunna*, and *ijma* are extended and applied to the solution of problems not expressly regulated therein. Human legal reasoning is permissible only where the *Qur'an* or the *Sunna* is either silent or ambiguous. Reforms through legal reasoning cannot be justified solely on the grounds of social necessity and must find a basis in divine will.
- A *fatwa* is an opinion or ruling on a point of law in response to a specific question. *Fatwa* can only be issued by a mufti. *Fatwa* are produced as the output of a process of legal reasoning (*ijtihad*) based on the *Qur'an*, *Sunna*, and the classic law/*fiqh* textbooks produced by each Muslim school.

Although Afghan civil law and Islamic law are not completely interchangeable, they overlap to a very considerable extent. The role of Sharia

[100] Matt Stephens, "Islamic Law in Indonesia," unpublished paper for the World Bank Justice for the Poor project, July 2002.

law in relation to HLP (immoveable property) rights was explicitly recognized in the 1923[101] and 1931[102] Constitutions and again in 1987[103] and 1990.[104] Under the Taliban, Sharia was made the only source of law. In practice, the close links between the Afghan Civil Code and Islamic jurisprudence mean that the courts have continued to deal with most land and property issues in a similar way despite frequent and violent changes of governments, land policies, and constitutions in Afghanistan's recent history.

Most HLP rights disputes in Afghanistan today tend to be solved using either Sharia-based civil law or Afghan customary law. Unfortunately there are a great deal of misconceptions about both Sharia and Afghan customary law, which has made it difficult for the international community to understand how these should be applied in safeguarding HLP rights.

Afghan Customary Law

The role of customary practice is officially recognized as the third source of law in the Afghan Civil Code.[105] This is particularly the case in relation to land and property as the Civil Code specifies: "In regard to rights of possession and ownership and other objective rights, the law of the locality shall be applicable where the property is located."[106] The code further states that: "What is proved by time, until no reason to the contrary exists, shall be valid."[107]

Customary law is an expression of aspects of Afghanistan's history, politics, society, and identity. This has led to the adoption of definite attitudes on what constitutes legitimate behavior on issues ranging from the gender divisions of labor and what men and women wear, to land inheritance and marriage practices.[108] Failure to abide by customary law is considered to be

[101] 1923 Constitution, Article 21.
[102] 1931 Constitution, Article 16.
[103] 1987 Constitution, Article 29.
[104] 1990 Constitution, Article 67.
[105] Civil Law of Afghanistan, Article 2.
[106] Id., Article 26.
[107] Id., Article 3.
[108] Adam Pain, *Understanding Village Institutions: Case Studies on Water Management from Faryab and Saripul*, Afghan Research and Evaluation Unit, 2004.

shameful and immoral, bringing the highest form of condemnation from the community. The Jirga or Shura is the informal institution in Afghan society that enforces customary law and dictates proper social relationships at the village, tribal, and intertribal levels.

The role and importance of customary law increased in Afghanistan due to the almost complete breakdown of the official institutions of law and order during the conflict over the last twenty-five years. With the official court system barely functioning in many areas, people increasingly used customary law and traditional mechanisms to resolve disputes. Afghans continue to rely on customary law because it is cheaper, faster, and more accessible to them – particularly given the high levels of illiteracy in many areas – than the official court system.[109] Customary law is well established in the country and its rules are well known and perceived to be legitimate. Customary law places a great emphasis on restorative justice and the need for compromise, so it is an effective mechanism for conflict resolution. The institutions created by customary law are also less susceptible to bribery and corruption and its decisions are widely perceived as fair. According to a report by Amnesty International:

> The emphasis on informal, non-judicial dispute resolution mechanisms is partly a reaction to the imposition of foreign models of justice that were perceived by Afghans as being unable to properly serve the interests of justice. The pre-existing lack of confidence in formal justice mechanisms, compounded with recent delays in rebuilding the formal judicial system, means that there is currently a strong reliance on informal justice systems in many areas.[110]

The relationship between customary law, interpreted and enforced through Shuras and Jirgas on the one hand, and formal courts on the other, varies by region. In some parts of Afghanistan judges instruct parties, particularly in relatively minor disputes, to attempt to mediate a settlement using a Jirga or Shura and will even refuse to hear a case until these attempts have been exhausted. In other parts of the country judges

[109] Ali Wardak, "The Tribal and Ethnic Composition of Afghan Society," *Afghanistan: Essential Field Guides to Humanitarian and Conflict Zones* (Second Edition), edited by Edward Girardet and Jonathan Walter, Geneva, Crosslines Ltd., 2003.

[110] *Afghanistan, Re-Establishing the Rule of Law*, Amnesty International, AI Index: ASA 11/021/2003, 14 August 2003.

do not give any official recognition to these customary mechanisms.[111] Most courts in Afghanistan have appellate jurisdiction, so anyone not satisfied with a decision reached through mediation can still take their case before a judge. It should also be noted that the law department of the Ministry of Justice (*hoquq*) also operates its own out-of-court mediation for civil disputes at the provincial level. The *hoquq* is empowered to summon contesting parties, or request the police to do so on its behalf, and attempt to effect a settlement. Where no settlement can be reached the case is referred to the courts.

Attempts to codify customary law have had limited success because it changes with time. Customary law is generally not written but is passed down from generation to generation by tribal elders who often do not know how to read or write. *Pashtunwali* (Pashtun customary law) is one of the more elaborate operating laws, and dominates the norms in Pashtun areas. *Pushtunwali*'s primary themes govern male behavior and regulate disputes relating to land, women, and honor.[112] Similar rules are also used in non-Pashtun areas, and it is claimed that other ethnic groups often rely on the jurisprudence of *Pashtunwali* customary law.[113]

The Jirga and Shura play a central role in interpreting customary law to resolve disputes and make collective decisions about the affairs of traditional Afghan society.[114] Outside observers sometimes confuse Sharia with Afghan customary law because the concept of the Shura or Jirga is also considered a very important part of Islamic society. References to the concept of consulting a gathering of knowledgeable people can be found in both the *Qur'an* as well as in *Hadith*. However, Jirgas are not religious bodies. Although they often include religious leaders, who base their opinions on Islamic principles of justice, these are not likely to be scholars and often only have a working knowledge of what could be termed "folk Islam."[115]

[111] Id., citing Nangahar and Herat, respectively.
[112] Larry Goodson, "Perverting Islam: Taliban Social Policy toward Women," *Central Asian Survey*, 20(4), 2001.
[113] Id. See also L. Carter and K. Connor, *A Preliminary Investigation of Contemporary Afghan Councils*, Peshawar, ACBAR, 1989.
[114] Ali Wardak, *Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan*, University of Glamorgan, nd.
[115] Id.

One important distinction between Afghan customary law and Islamic legal principles is in the treatment of women, particularly in relation to HLP rights. Some of the most serious punishments in Afghan *Pashtunwali* are reserved for violations of *Namos*, which translates roughly as the "status, chastity, purity, virtuousness, and nobleness of the female members of the family." Under Afghan customary law it is the duty of all men to safeguard the *Namos* of the female members of his family. *Namos* can also be seen as an obligation to protect home, land, and country from aggression. A violation of a woman's honor is treated as a violation of the family, clan, or tribe's honor. However, this concept does not recognize women as possessing individual rights and it is not uncommon for a woman to be killed by male relatives to uphold the honor of the family.[116]

By contrast, the individuality of a woman is an important principle of the Islamic religion.[117] Islam approaches women directly, rather than through the agency of Muslim men, and women may embrace Islam through their independent will. To deny the right of a woman to become a Muslim, even against the wishes of her family, would clearly be contrary to a basic tenet of Islam. A woman who becomes a Muslim must also personally accept the obligations and duties that this entails. A woman is rewarded or punished before God on the basis of her own actions. No man is allowed to plead or intercede for a woman, nor is he held responsible for her actions and their consequences.[118]

Islam does not provide different moral codes for men and women, and both are expected to observe the general religious standards relating to personal conduct, social dealings, and moral behavior.[119] Islam assumes that women will participate in public life and calls on them to show solidarity with the community of believers, to wage *jihad* with them,

[116] F. Faqir, "Intrafamily Femicide in Defence of Honour: The Case of Jordan," *Third World Quarterly*, 22(1), 2001.

[117] Dr. Hassan al-Turabi, "On the Position of Women in Islam and in Islamic Society," 1973, see http://www.islamfortoday.com.

[118] "For, on the Day of Judgement, every one of them will come to Him singly" (Maryam, 96). Quoted by Dr. Hassan al-Turabi, "On the Position of Women in Islam and in Islamic Society," 1973, see http://www.islamfortoday.com.

[119] For God has proclaimed, "And the believers, men and women, are allies, of each other, enjoining the right and forbidding the wrong, establishing prayer, giving alms and obeying God and his messenger. As for these God will have mercy on them, God is Mighty and Wise" (Tawba, 71). Quoted by Dr. Hassan al-Turabi, "On the Position of Women in Islam and in Islamic Society," 1973, see http://www.islamfortoday.com.

and to promote the well-being of their society. Historically, Islamic law also gave Muslim women economic independence much earlier than Christian European legal systems. Women could own property in their own names and dispose of it in any manner.[120] Sharia generally provides for an equitable role for women in the economic life of Muslim society and there is no reason why women cannot be equal to men in the workplace.[121] Although Shariah does specify that male heirs should receive larger shares of an inheritance than female heirs, this is not necessarily incompatible with international human rights law and also needs to be seen in the context of the rights, roles, and responsibilities allocated to woman and men under Islamic law.

Afghan customary law, by contrast, frequently denies the right of women to own housing or land. While ownership of land by widows does exist, daughters on the whole are deemed to have surrendered their rights to their brothers, particularly when they marry.[122] This often leads to widows being stripped of their HLP rights on the death of their husbands or being pressured into marrying one of his relatives. One specialist on land rights has argued that the objective of this practice is less to deprive a sister of owning land than to prevent land being lost to another family through her.[123] This is a frequent practice in many different rural societies, both Muslim and non-Muslim, and reflects a deep-seated concern of land-poor peasant farmers. However, the denial of HLP rights to women contradicts Sharia and shows how customary law in Afghanistan ignores Islamic law and human rights law when it is deemed necessary.

There is no doubt that customary law as interpreted by Shuras and Jirgas has a crucial role in mediating land disputes and settling property claims. The official court system lacks the capacity and credibility to handle the vast number of claims that currently exist. Jirgas and Shuras

[120] Christina Jones, *The Status of Woman in Islamic Law*, June 14th, 1998 in Göttingen, Germany.

[121] While it is true that *Sharia* provides that men should receive a larger share of an inheritance, this needs to be seen in the context of the respective rights, roles, and responsibilities of men and women in the family. It should also be noted that Afghanistan's civil code is based on *Sharia*, and so the criticism that is often made of this distinction is best directed at the official legal system.

[122] The legal aid centers managed by the Norwegian Refugee Council have registered a number of such cases.

[123] Supra, note 1.

are virtually cost-free and, given the chronic lack of resources available to the courts, it is sensible for most of these cases to be dealt with through customary law. Most Afghans also prefer to use Jirgas and Shuras to resolve their claims, and it is now widely recognized that customary law has a place in the Afghan legal system. At the same time it is clear that Jirgas and Shuras have their limitations and are no substitute for the official courts.

As noted above, customary law may only be applied where there is no provision in the state or Islamic law.[124] Customary law is also not allowed to contradict the provisions of the law or principles of justice.[125] Article 1 of Afghanistan's 2004 Constitution defines the country as an Islamic state and Article 3 states that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam."[126] The 2004 Constitution also specifies that the state shall abide by the United Nations Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights (UDHR).[127] It follows from this that customary law can never be used as a pretext to violate the fundamental rights set down in Afghanistan's Constitution and its international human rights obligations.

Nevertheless, customary law does play a valuable role in mediating minor civil disputes, particularly on HLP issues, where the knowledge, experience, and trust of the local community helps to settle disputes. Given the current state of land relations in Afghanistan, this is an extremely important task. As the World Bank has noted: "Experiences elsewhere suggest that resolving land tenure issues can be complex and controversial, and for this reason it may be prudent to carry out more research in the area and for the Government to adopt an incremental and learning by doing approach that involves local communities, before

[124] Civil Law of Afghanistan, Article 2.
[125] Id.
[126] 2004 Constitution, Article 3.
[127] Id., Article 7. Afghanistan has ratified the following international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social Economic and Cultural Rights (ICESCR), the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC) – including both Optional Protocols.

scaling up. International experience suggests that building on the best traditional practices can be an effective way to move forward."[128]

UNHCR has similarly concluded that "it is important to also recognise the pivotal role that traditional and tribal mechanisms play in solving disputes. Rather than viewing them as a substitute to the official legal channel, one should look at them as being complementary. These practices are by large in conformity with human rights standards. In that respect, one should think of the '*Shuras*' and '*Jirgas*' as being dynamic institutions susceptible to change, which allows for the rectifying of practices that may seem incompatible. It is therefore recommended that the UN agencies study these successful and effective models with the purpose of identifying entry points for the international community to provide support."[129] UNHCR has been active in intervening in HLP disputes and often uses customary law mechanisms to mediate settlements. UNHCR also supports a number of nongovernmental organizations, including the Norwegian Refugee Council, which regularly mediate settlements to HLP disputes using customary law.

HLP Rights and Legislative Reform

As described above, the need for a coordination mechanism for reconstruction of the judicial system was foreseen in the Bonn Agreement, which created the Judicial Reform Commission (JRC) for this task. The government of Italy agreed to take the lead in strengthening the judicial and penal systems and administration of justice and aiding the Afghan authorities to coordinate activities in the sector.

The Italian justice project has funded some limited reconstruction of courts and prisons, paid the salaries and expenses of the JRC though the UN Development Program (UNDP), and run training courses for judges and prosecutors undertaken by the International Development Law Organization (IDLO). The JRC produced a Master Plan for its proposed program of work in January 2003, but this led to a semi-public squabble between the Italian and U.S. governments, with the former accusing the

[128] World Bank, 2004.
[129] UNHCR, *Land Issues within the Repatriation Process of Afghan Refugees*, 1 September 2003.

latter of failing to consult it about some of the projects.[130] The JRC has also fallen victim to "turf wars" between the Supreme Court, the Ministry of Justice, and the Office of the Prosecutor General and has failed to give the lead that many were expecting. Relationships soured to such an extent that the Italian government tried, unsuccessfully, to have the JRC disbanded.

The U.S. government is also funding the Asia Foundation and Management Systems International (MSI) to provide technical assistance to the JRC and the AIHRC, which has mainly consisted of seconding foreign experts to help draft laws and provide training. MSI and Ronco were also contracted to build several court facilities. While such initiatives are welcome, one former UN official noted that donors often seem to prefer "the delivery of concrete assets, like buildings and numbers of individuals trained" rather than the more difficult and time-consuming task of rebuilding genuine national judicial institutions.[131]

The issue of HLP rights can obviously not be tackled in isolation from Afghanistan's other problems. However, this does not mean that the development of a policy toward HLP rights can be indefinitely postponed. In September 2003, a report by UNHCR concluded:

> UNHCR recognises that land-related problems are often one of the most serious issues threatening the stability of Afghanistan, and that the reorganisation of the land tenure system in Afghanistan is a priority that merits the attention of the authorities, international community, and donor governments. It will thus continue to advocate, together with other UN agencies, for prioritising this issue on the national agenda, and for assisting the authorities in identifying the key problems and devising practical and effective solutions. UNHCR is fully aware that the solution for this problem will take several years at best, and that given the pressing needs of refugees and internally displaced persons wishing to return immediately, there is a need to devise *ad hoc* and local solutions to these intricate and delicate problems, without however creating facts on the ground that could be damaging to the overall land tenure issue in Afghanistan.[132]

[130] J. Alexander Their, *Re-establishing the Judicial System in Afghanistan*, Center on Democracy, Development and the Rule of Law, Stanford Institute for International Studies, September 2004.

[131] Id.

[132] Id.

The first legislative attempt to tackle the issue came in the Decree on Dignified Return of December 2001. This specified that, "returning Afghan nationals, who were compelled to leave the country . . . . will be warmly welcomed without any form of intimidation or discrimination"[133] and "the recovery of movable and immovable properties . . . . will be effected through relevant legal organs."[134] The decree also specified that, "UNHCR and other relevant international agencies will be allowed to monitor the treatment of returnees to ensure these meet recognized humanitarian law and human rights standards, and to ensure that commitments contained in this decree are implemented."[135] This decree has provided an important legitimacy for UNHCR Protection Officers and NRC's legal counsellors to intervene in HLP disputes.

In view of the high number of disputes over HLP rights involving returning Afghan refugees and displaced persons, a Special Property Disputes Resolution Court (Special Court) was established in August 2002.[136] A subsequent decree created a new court in November 2003 in an attempt to resolve some of the weaknesses in the functioning of this court.[137] In February 2004, another decree was issued, allowing anyone who was dissatisfied with a judgment of the first Special Court to have their cases reopened if they obtain permission from the Supreme Court and Office of the President.[138]

The Special Court is tasked with "looking after returned refugees in Afghanistan and addressing their complaints, so as to hasten the process of resolving property disputes."[139] Property disputes covered under the decree include and are limited to those that took place in the absence of the owners from the date 7th *Saur* 1357 (27 April 1978).[140] Cases may be brought either directly by the parties to a dispute or through a referral by

[133] Decree on Dignified Return 2001, Article 1.
[134] Id., Article 7.
[135] Id., Article 8.
[136] Decree 136, Presidential Decree on the Establishment of Land & Property Disputes Court, Circular Letter No. 4035 dated 19.6. 1381.
[137] Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Disputes Resolution Court, Date: 1382/9/9 or 30 November 2003.
[138] Decree 112, February 2004.
[139] Decree 89, Article 1.
[140] Id., Article 6.

"relevant governmental authorities."[141] Cases involving the government may not be heard before the Special Court and must be "reviewed in accordance with relevant laws and with the authority of the relevant court."[142]

The Special Court has experienced a number of practical problems and its work has been strongly criticized by some observers, including the Norwegian Refugee Council's legal counsellors.[143] It was reported, in May 2005, that the Chief Administrator of Afghanistan's Supreme Court was preparing a decree to abolish this court and redistribute all pending cases, which suggests that this initiative has not been considered successful.[144] It should also be noted that the Special Court has never had exclusive jurisdiction over land and property cases involving refugees and returnees, and most of these continue to be dealt with at the district and provincial levels through ordinary courts and through Afghan customary law.

Another policy initiative has been the creation of a Land Titling and Economic Restructuring in Afghanistan (LTERA) by the Emerging Markets Group and USAID.[145] The objective of the LTERA land titling and registration project is

> to assist the Government of Afghanistan to secure property registration, simplify land titling procedures, and clarify the property rights legal framework to assure cost effective land administration that will support equitable economic growth, improve land use efficiency and equity, enable low-cost land transactions, protect the rights of the poor, and improve livelihoods.[146]

The LTERA published a report based on an analysis of some existing laws relating to HLP rights in July 2005. This concluded that Afghanistan's land tenure situation is "chaotic" and that there is a need for two new land

[141] Id., Article 10.
[142] Id., Article 11.
[143] See, for example, Jennifer Escott, *A Report on Afghanistan's Special Property Dispute Resolution Court*, Norwegian Refugee Council, September 2005.
[144] Id.
[145] Dr. Yohannes Gebremedhin, *Legal Issues in Afghanistan Land Titling and Registration*, USAID/Emerging Markets Group, July 2005.
[146] Id.

laws: one on land registration and the other on the adjudication of disputes. It also recommended that the legal authority for land mapping, surveying, and related activities should be set on a clearer footing.[147] However, the research on which this report was based can best be described as "slight" and its conclusions are certainly open to challenge. Given the history of attempted top-down reform described in this chapter, and the inability of the government to even disseminate its new laws to its own courts, it is reasonable to question whether the proposed new laws would even be worth the paper that they are printed on.

In November 2005, the Justice Sector Consultative Group, which contains representatives of both the government and the international community, established an umbrella working group on land issues to consider the issue of legal reform further. Two subgroups were also established, one chaired by the Ministry of Agriculture and one by the Ministry of Urban Development and Housing, to look at rural and urban land issues, respectively. As described above, UNDP has also been assisting the JRC to provide some direct support to Afghanistan's judiciary.[148] It is, however, probably unrealistic to expect the international community to devote many more resources to HLP issues, given the scale of its other challenges.

The Government of Afghanistan has also proposed a land registration process on a number of occasions. In the National Development Framework, produced by the Afghan Assistance Coordinating Authority (AACA) in conjunction with the Government of Afghanistan, in 2002, it was stated that:

> There is a need for a programme to produce a nationwide land registry and to settle disputes between individuals and groups over land. Such a registry would allow for the use of land as collateral for entrepreneurial activities . . . Uncertainty over land ownership will hinder investment from the private sector as well as the ability of individuals to use land as collateral . . . a credible system to resolve land disputes and provide certainty is urgent.[149]

[147] Id.

[148] UNDP, *Democracy and Civil Society Empowerment Program*, Afghanistan Country Office, 31 October 2005.

[149] Afghan Assistance Coordinating Authority, the National Development Framework, Government of Afghanistan, Kabul, April 2002.

Four years later, in its National Development Strategy (I-AND), the government announced that:

> A process for registration of land in all administrative units and the registration of titles will be started for all major urban areas by Jaddi 1385 (late 2006) and all other areas by Jaddi 1387 (late 2008). A fair system for settlement of land disputes will be in place by Jaddi 1386 (late 2007). Registration for rural land will be under way by Jaddi 1386 (late 2007).[150]

Determining the ownership of land has been seen as a key task for successive governments of Afghanistan and attempts to develop a national land registry have been pursued over several decades, despite the interruptions of revolution, war, and foreign invasion. This model could be used as the basis for a similar initiative today, although some observers question the practicality of such top-down approaches given both the scale of the problems that Afghanistan faces and the current lack of capacity of the government and the international community to tackle these problems.[151] Afghans sometimes say that "we are rich in laws, but poor in enforcement" and a cynic might add that the country is also becoming "rich"' in working groups and international consultants.

Land Grabs, Forced Evictions, and Restitution

An analysis of the decrees relating to HLP rights issued by the present government also shows that its main concern has been a much more defensive one: to stop land-grabbing by warlords, and others, and to attempt to capitalize on the market value of land to boost its own sources of income.

In April 2002, a decree regarding the nondistribution of intact and uncultivated land "firmly directed" all government ministries and other governmental institutions that: "They shall not distribute any State-owned land for building houses or for any other purposes."[152] In May 2003, the

[150] I-ANDS, 2006, p. 14.

[151] This opinion has been expressed to the author on a number of occasions by both Afghan and international experts on land rights issues in Afghanistan.

[152] Decree 99 of the Head of the Transitional Government, Regarding Non-Distribution of Intact and Uncultivated State-Owned Land, 4/2/1381 *HJ* (24 April 2002).

government ordered its ministries to "take necessary measures to return properties of the Ministry of Defence (MOD) that are occupied by others."[153] The MOD was also required to produce a separate report on the necessary operations needed for it to reacquire its property and submit this to the president.[154] In September 2003, a decree was issued which specified that: "The High Commission for City Development is the only competent authority for deciding on and executing any evaluations and studies on town plans or on the distribution of plots of lands for houses and high-rise buildings."[155] This decree formally stipulated that such decisions are not within the authority of the vice president.[156]

In April 2003, the government decreed that: "Government properties that are being illegally occupied by persons because of their power and influence should be confiscated."[157] The decree also stipulated that: "All provincial governors in the country must repossess any government properties occupied illegally as soon as possible and return such properties to the rightful governmental departments in which they belong."[158] If there is any dispute ongoing between the government and any person over real property, it should be followed up by the *Qazaya Dawlat* (the Office of Government Cases in the Ministry of Justice) and sent to the courts for fair judgment.[159] "All provincial governors must report their operations regarding judicial and legal proceedings to the protection section of Affairs Controlling Department. The courts, prosecutors, police departments and municipality departments must cooperate in the implementation of this decree."[160]

Another decree issued in 2004 stated that: "State authorities and persons who use their power or personal influence, or by use of threat, fear or by use of weapons, to possess the lands of others must be punished in accordance with the law as the case may be in addition to the appropriation of

[153] Decree No. 17 of the Head of the Transitional Government, Regarding the Return of Immovable Properties to the Ministry of Defence, 2/30/1382 *HJ* (20 May 2003).
[154] Id.
[155] Decree 3860 of the Head of the Transitional Government Regarding the High Commission for City Development, 16 September 2003.
[156] Id., Articles 2–5.
[157] Decree 362 of the Head of the Transitional Government, Regarding the Illegal Occupation of Government Property, 1382/1/19 or 08 April 2003, Article 1.
[158] Id., Article 2.
[159] Id., Article 3.
[160] Id., Article 4.

land and compensation for loss."[161] In September 2002, a decree was issued that allowed foreign investors to lease land and property for short-, medium-, and long-term periods and made other provisions. In 2003, the government declared: "all real property in the possession, custody or use of Ministries or other Government organs" as state land.[162] Such land could be transferred to and registered by potential private investors at market rates. Foreigners have traditionally been forbidden from acquiring land and property in Afghanistan, but the 2004 Constitution permits them to now lease it.[163]

The ban on land distribution remains in effect. However, the rapid return of so many refugees and other displaced persons to Afghanistan in recent years has placed it under great strain. UNHCR has noted that many Afghans are unable to return to their homes or land because these have been occupied by secondary occupants.[164] Conversely, others have been displaced by the return of people claiming to be the original owners, and so land problems continue to generate fresh conflicts and new displacement.

The 2004 Constitution directs the state to: "adopt necessary measures for housing and distribution of public estates to deserving citizens in accordance with its financial resources and the law."[165] However, distributing state-owned land is complicated by a number of factors, including proper identification of what parcels are indeed owned by the government, whether the distribution requirement refers only to the central government or to provincial and local governments as well, and how best to select the beneficiaries of such distributions. Moreover, the terms of the distributions need to be considered carefully, including whether outright ownership will be conferred to the beneficiaries or whether the distributions will be subject to certain restrictions and other matters. Given the general freeze on the allocation of state-owned land, there are also limited ways in which landless returnees and others may have public land allocated to them.

[161] Decree No. 83 of the Head of the Transitional Islamic State of Afghanistan with Regard to Properties (Imlak), 18-8-1382, Article 14.
[162] Legal Decree for Transfer of Government Property (8/1382) 2003, Article 1.
[163] 2004 Constitution, Articles 41 and 42.
[164] *Land Issues within the Repatriation Process of Afghan Refugees*, UNHCR, Office of the Chief of Mission, Protection, Kabul, September 1, 2003.
[165] 2004 Constitution, Article 14.

To respond to these needs, some uncoordinated efforts were undertaken in 2003 and 2004 by some local authorities to distribute state-owned land.[166] The distribution took place without central government authorization or central coordination, and there were a number of problems with the process. Provincial authorities were not able or willing to distinguish state land from private land[167] and funds were not available to pave roads or build infrastructure, which were necessary to make the land useable. Allegations of official corruption also marred the process. Beneficiaries with family, tribal, and political links to local authorities were allegedly prioritized and land was sometimes claimed by powerful commanders and then re-sold to ordinary Afghans for exorbitant sums of money.

In January 2004, a High Commission for Urban Development was established and tasked to identify state-owned land for residential and commercial purposes. Decisions on distribution were coordinated between the Ministry of Urban Development and Housing and the provinces. Various attempts have been made by UNHCR, and the relevant government departments, to ensure that this new system is able to allocate land to returning refugees and displaced persons on a fair and equitable basis. This is mainly carried out through monitoring and advocacy on individual cases by UNHCR, the Norwegian Refugee Council, and other international agencies.

Another major problem is that the law concerning evictions is often not followed. According to a decree issued by the government in April 2003: "If there is any dispute ongoing between the government and any person over real property, it should be followed up by the judicial department (*Qazaya Dawlat*) and sent to the courts for fair judgment."[168] No evictions should be carried out until the legal status of those occupying the land or property has been clarified. However, human rights monitoring groups and legal aid organizations have received numerous reports that people continue to face arbitrary evictions from their homes.[169]

This issue was considered in detail by a government-appointed commission following the destruction of a number of houses in the Shirpour

[166] Principally in Herat, Jalalabad, and Bamyan.
[167] In Bamyan, for example, private land was distributed.
[168] Decree 362 of the Head of the Transitional Government, Regarding the Illegal Occupation of Government Property, 1382/1/19 or 08 April 2003, Article 3.
[169] *Land Disputes in Eastern Afghanistan*, NRC, 2004.

District of Kabul in September 2003.[170] The commission found that the people had been occupying these houses illegally as the houses were on government-owned land and had been built outside the framework of the Master Plan. Nevertheless the commission concluded that the government had acted illegally as it had violated their constitutional right to private property by evicting them from their homes without a court order.[171]

The evictions were also condemned by the UN Special Rapporteur on the Right to Adequate Housing, who stated that: "the way in which the forced evictions took place, including excessive use of force, amounted to serious human rights violations according to international human rights law."[172] The Special Rapporteur also noted that he had heard widespread reports of official corruption by the courts and police. "Accounts of corruption were received particularly from women, and in the words of one of them 'more money is changing hands in the court houses, than at the money exchange.'" He also reported that most people believe that, even where the courts give fair judgments, the police are powerless to implement them without the permission of local commanders and warlords.[173] The Special Rapporteur recognized:

> the complexity of housing and land rights in Afghanistan will necessitate working at all levels of the system: from combating corruption and inefficiency in the judiciary and governmental and provincial institutions, to coming to grips with land occupation to the detriment of the poor and the landless by commanders and other powerful members of the establishment, to arresting land speculation and to the provision of essential services, including water and sanitation to the large proportion of the Afghan population living in extreme poverty. Although the challenge and the complexity of issues involved seem daunting, the Special Rapporteur was encouraged by the emerging realization during and after his mission by governmental and non-governmental actors alike of the importance of addressing housing, land and property issues as an integral part of

[170] Draft Report of the Shirpour Commission, unpublished, no date.
[171] Id.
[172] Statement of Mr. Miloon Kothari, Special Rapporteur, on adequate housing as a component of the right to an adequate standard of living, UN Commission on Human Rights, Sixtieth Session, 30 March 2004, Agenda item 10, UN Doc. E/CN/.4/2004/48/Add 2, 4 March 2004, paras 63 and 64.
[173] Id., paras 33 and 34.

> security and sustainable development strategies. The report also shows individual innovative and successful initiatives that have been launched which can be further developed to contribute to the implementation of the right to adequate housing.[174]

The biggest single project to address HLP rights is the Norwegian Refugee Council's information and legal aid project, which is supported by UNHCR and a number of other donors. This was set up to assist returning refugees and displaced Afghan nationals in Afghanistan and Pakistan in 2003.[175] HLP disputes are by far the biggest single type of cases registered by these centers in Afghanistan and the lawyers at these have helped tens of thousands of people to regain their land. Cases have been taken using both the official legal system and Afghan customary law. The project has also conducted training for Afghan judges and published a Guide to Property Law in Afghanistan and a number of specific briefings related to land disputes.

Other humanitarian organizations, including UN Habitat and a number of international NGOs, have linked their delivery of humanitarian assistance to the creation of broadly based Shuras, Jirgas, and village councils.[176] This concept has been strengthened and institutionalized through initiatives such as the National Solidarity Program (NSP), which describes itself as "the largest people's project in the history of Afghanistan."[177] The virtue of these initiatives is that they work with existing community-based structures, rather than trying to bypass them, and they provide practical immediate help to people while also strengthening their capacity to solve their own problems in the future.

Conclusions: Send Money, Guns, and Lawyers

Afghanistan needs a sustained financial commitment by the international community. It needs better security, through the deployment of an

[174] Id., Executive summary.

[175] *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan 2003.

[176] See, for example, *Responding to the Challenges of an Urbanising World*, UN Habitat Annual Report, 2005.

[177] See National Solidarity Program, "The Largest People's Project in the History of Afghanistan," http://www.nspafghanistan.org.

effective international peacekeeping force and the building up of an effective national police and army. It also needs legal and governance reforms to ensure that human rights and the rule of law are fully upheld, as a vital part of the process of disarmament, political reform, and social reintegration. In the absence of such basic building blocks, it is difficult to draw too many "lessons learned" or specific recommendations about how the UN could or should have tackled HLP rights differently in Afghanistan.

The "circle of justice" referred to above recognizes that all of these issues must be tackled simultaneously and in a holistic manner for any of the proposed reforms to be successfully implemented. The apparent failure of the Special Property Disputes Resolution Court (Special Court) to deal with HLP disputes affecting refugees and returnees also shows the dangers of looking at this issue in isolation. Rather, the issue of HLP rights should be considered as one central, but interlinked component of a process of nation-building.

Perhaps a central lesson from Afghanistan is that a one-size-fits-all approach to HLP restitution is rarely likely to be successful at the national level. It is essential, instead, that those involved in designing and implementing HLP rights programs have a clear understanding of the cultural, social, and political contexts in which they are working.

Reforms also need to be based firmly on the people of Afghanistan's own conceptions of what constitute "rights" and "justice." Afghanistan's 2004 Constitution, which was agreed to following at least an attempt at a genuine consultation, provides a good basis for this and should be built upon. Afghanistan has a long and proud history of resisting foreign invasion, and western policy-makers should learn from the previous failures of their British and Soviet counterparts about the dangers of attempting to impose external social reforms from above.

There are, however, a number of community-based initiatives, described above, which are helping to rebuild the rule of law, and upholding individual rights. There is also an urgent need for capacity-building the judiciary, as part of an overall package of security sector reform. This should be accompanied by initiatives to strengthen "community justice" initiatives though working with Shuras and Jirgas at the village level. Since this is by far the cheapest, fastest, and least corrupt method of bringing justice to the people, programs should be developed that prioritize using these institutions to uphold HLP rights.

6

Peacekeeping and HLP Rights in the Great Lakes Region of Africa

Burundi, Rwanda, and DR Congo

Chris Huggins

Introduction

A variety of recent studies have revealed complex relationships between control over land (and land-based resources) and conflict. Combatants involved in conflict within states – by far the most significant kind of conflict today – often claim that unequal access to land is one of the causes of the violence. During conflict, land access is affected not just for belligerents, but for entire communities, who become targets of violence due to the "ethnicization" of conflict. And in post-conflict situations, the land and shelter needs of returning internally displaced populations (IDPs) and refugees must be carefully managed in order to avoid dangerous disputes and further violence. The types of interventions in the housing, land, and property (HLP) sector that are necessary and feasible change as the country emergences from conflict toward a more stable period of reconstruction.[1]

This chapter looks specifically at Burundi, Rwanda, and the Democratic Republic of Congo (DRC; formerly Zaire). The three case-study countries are at different stages of post-conflict recovery, and a brief overview of recent events in the region follows.

[1] FAO, 2005, *Access to Rural Land and Land Administration after Violent Conflicts*, FAO, Rome, 8.

An Overview of Recent Conflicts in the Great Lakes Region

Events in the core countries of the Great Lakes region have long been characterized by cross-border events and political "domino effects."[2] Due to constraints of space, the following section summarizes and simplifies recent events. Readers are therefore referred to other sources for more detailed accounts.[3]

Like Rwanda, which it borders to the north, Burundi is composed of three socio-ethnic groups, the Hutu (who form the majority), the Tutsi, and the Twa, who are a marginalized group representing less than 1 percent of the population.[4] Before colonialism, the country was monarchical. The customary political system was highly organized and hierarchical, with patron–client relations as the main structuring element. Control over land was largely the prerogative of the monarchy and its instruments of administration. The extent to which the system was exploitative is a source of much controversy, with Hutu politicians claiming that they were kept in a state of oppression, whilst the Tutsi emphasize the stability of the system and argue that relations were generally harmonious. The customary governance system was legitimized by occupying powers, first Germany and then by the Belgians, after World War I. Colonialism also exacerbated ethnic divisions.

As in neighboring DRC, preparations for independence by the Belgian authorities were rushed and inadequate. After independence in 1962, Burundian politics became increasingly unstable and characterized by ethnic competition and violence. Control over the state by elite Tutsi became more entrenched in 1965, when the Hutu prime minister was assassinated and an abortive coup was severely repressed by the army.

Successive military-controlled regimes concentrated political power and associated patronage networks within a small elite group from the Tutsi minority, who imposed repressive and exclusive policies to sustain

[2] The Great Lakes region is generally held to include Burundi, the Democratic Republic of Congo, Rwanda, and Uganda as "core countries." Each of these countries, with the exception of Uganda, is considered in this chapter.

[3] See, for instance, Rene Lemarchand, 1996, *Burundi: Ethnic Conflict and Genocide*, Woodrow Wilson Center and Cambridge University Press, New York; Clark, John F. (ed), 2002, *The African Stakes of the Congo War*, Fountain Publishers, Kampala.

[4] Pre-colonial population estimates suggest that, similar to Rwanda, the country's population is roughly 85% Hutu, 14% Tutsi, and less than 1% Twa.

their hold on power. There was violent resistance by Hutu armed groups and ethnic massacres, which in turn triggered retaliatory pogroms marked by acts of genocide.[5] When in 1972 Hutu militants attacked and killed thousands of Tutsi civilians, a murderous army- and government-led retaliation systematically targeted educated Hutu. As many as 200,000–300,000 people were killed, in an act described by the UN as "genocidal repression."

The period 1976–1987 was relatively free of major violence, but in 1988/89 thousands died in Hutu extremist attacks and army retaliation against civilians in the north of the country. A peace process resulted in the first ever democratic elections in 1993, which were won by a Hutu. He was assassinated by Tutsi elements of the military just months later, plunging the country into another cycle of violence that was to last almost ten years.

Following the August 2000 signing of a peace agreement in Arusha, Tanzania, a transition period successfully laid the groundwork for democratic elections, in June 2005. However, throughout this period and to date, a sole rebel group, the National Liberation Forces (*Forces Nationales de Libération*, or FNL), has refused to participate and has continued to attack civilians and government positions. The 2005 elections were won by the former rebel group the National Council for the Defense of Democracy-Forces for the Defense of Democracy (*Conseil National pour la Défense de la Démocratie-Forces pour la Défense de la Démocratie*, or CNDD-FDD) of which the president, Pierre Nkurunziza, is a member. Since the signing of the peace agreement, thousands of Burundian refugees in neighboring countries have spontaneously returned to the country, leading to complex human rights challenges.

The DRC is a vast country, and has long been seen as a bottomless source of natural resources, including rubber, copper, cobalt, diamonds, gold, timber, and others. The extraction of these resources has, ever since the time of King Leopold II, been accompanied by a horrifying degree of violence and ruthless exploitation.

Land access has been a controversial issue in parts of the DRC for decades. Many land-related problems have their roots in the interaction between the colonial regime and customary governance structures. The Belgian colonial administration utilized existing rural political structures,

[5] Reyntjens, F., 1996, *Burundi: Breaking the Cycle of Violence*, Minority Rights Group, London.

which in many parts of the country were markedly stratified and patriarchal.[6] Under these systems, access to land was granted on a communal basis – according to membership in an ethnic group – and was controlled by a hierarchical administration.[7] The Belgians modified the existing order by reinterpreting and codifying customs (thereby taking away some of the pragmatism and flexibility, which is their hallmark) and by imposing a categorization of ethnic identity that also "rigidified" the somewhat fluid local realities[8]. The modifications to custom gave some chiefs far more power, and in other cases the concept of a chief was imposed on communities that were based on less hierarchical norms.[9]

In parallel to the customary systems of land access, the colonial power introduced a "modern" system through which European settlers could apply to the state for land, to establish plantations. As in other countries, the regime often assumed that any uninhabited land was "vacant land" – failing to recognize customary rights of use exercised over land, or the land reserves customarily controlled by local leaders.[10]

The colonial government did next to nothing to prepare the country for independence, and, unsurprisingly, the result was civil unrest. Following the assassination of Patrice Lumumba with the complicity of Western governments, President Mobutu ruled for over thirty years (1965–1997) and managed to reduce the country (then called Zaire) to a corrupt, impoverished shell of a nation. When the extent of economic collapse became so grave that he could no longer maintain his patronage network, Mobutu introduced a policy of *geopolitique*, a form of ethicized local governance, in order to manipulate local ethnic rivalries and prevent political opponents from building alliances against him.

[6] The generalized description in this paragraph applies to many parts, but by no means the entirety, of the Eastern DRC. The country has over 400 different ethnic groups, each with slightly different customary norms and practices.

[7] See K. Vlassenroot and C. Huggins, 2005, "Land, Migration and Conflict in Eastern DRC," in C. Huggins and J. Clover (eds.), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, African Centre for Technology Studies/Institute for Security Studies, Pretoria, 122.

[8] See J. Pottier, 2005, " 'Customary Land Tenure' in Sub-Saharan Africa Today: Meanings and Contexts," in C. Huggins and J. Clover (eds.), supra, note 7, 61.

[9] Id.

[10] S. Leisz, 1998, "Zaire Country Profile," in J. Bruce, *Country Profiles of Land Tenure: Africa, 1996*, Research paper no. 130, Land Tenure Centre, University of Wisconsin, 1998.

In the Kivu Provinces in the eastern part of the country – parts of which border Burundi, Rwanda, and Uganda – one of the main ethnic factors in local politics concerns the status of the Kinyarwanda-speaking communities (generally known locally as *Banyarwanda* or "people of Rwanda"). Some members of these communities have roots in the DRC that go back more than 100 years; others are more recent arrivals. The claims of these communities to land and political power were contested by other ethnic communities who claimed "indigenous" status. Because *Banyarwanda* often had limited claims to land through customary systems (controlled by "indigenous" chiefs), they tried whenever possible to buy land on the market.[11] Competition for land became intense. The situation was exacerbated by the limitations of the Land Law of 1973, which declared all land property of the state and attempted to integrate the traditional rural order into the urban-controlled modern political system. Protection for customary ownership rights was to be provided by a Presidential Decree, but this decree was never issued, resulting in a state of extreme tenure insecurity.[12]

The *Banyarwanda* became a convenient scapegoat for politicians and chiefs trying to draw attention away from the fact that they had mismanaged local affairs and sold customary land. The result was ethnic violence, which first erupted in North Kivu in March 1993. Soon after this violence had ended, the East was shaken by the influx of a million Hutu refugees, plus the ex–Armed Forces of Rwanda (ex-FAR) troops and *Interahamwe* militia from Rwanda, after the genocide and the victory of the Rwanda Patriotic Front (RPF) in June 1994. Ethnic violence spread to South Kivu in 1996, when the ethnic-Tutsi Banyamulenge population was targeted after hate-speeches by local politicians.

Political leaders in Kigali were outraged to see massive humanitarian support flooding into the camps for Rwandan refugees in eastern DRC. These camps were controlled by members of the former genocidal regime, who were training for continued war against the RPF. In October 1996, the *Alliance des Forces Démocratiques pour la Libération du Congo/Zaire* (AFDL) declared the start of what became known as the first Congolese rebellion. The ADFL included elements of the Ugandan and Rwandan

[11] Supra, note 7.

[12] See Aide et Action pour la Paix, 2004, "Ce Qu'il Faut Connaître sur le Sol en Droit Congolais," *Etude Juridique* no. 1, Goma, 3–4.

armed forces, and was firmly controlled from Kigali and Kampala. One of the first acts of the AFDL was to attack the Rwandan refugee camps, dismantling the training operations of the Hutu extremist opposition and simultaneously massacring tens, and possibly hundreds of thousands of Rwandan civilians. By May 1997, the AFDL had swept to power in Kinshasa, forcing Mobutu into exile and placing Laurent Kabila in the presidency.

However, facing domestic hostility against what was widely perceived as a foreign movement, Kabila soon turned against his former backers. In August 1998, another rebel group, the *Rassemblement Congolaise pour la Démocratie* (Rally for Congolese Democracy – RCD) was formed in East DRC, again backed by Rwanda and Uganda. Its attempts to take Kinshasa by force failed, and the movement splintered into factions. The East was reduced to a number of rebel fiefdoms, interspersed with areas controlled by local ethnic militia known as "mai-mai."

Across eastern DRC, rebel groups and mai-mai militia fought, looted, raped, and murdered. With almost 4 million dead due to war-related causes, the Congolese conflict is the world's deadliest since World War II. The first peace agreement for the DRC, the Lusaka Peace Agreement of 1999, was followed by others, and with the subsequent establishment of a transitional government, there is optimism for the future. Meanwhile, areas such as North and South Kivu Provinces and Ituri Territory remain potentially volatile.

Whereas Burundi had continued to be controlled primarily by a small clique of elite Tutsi, the pressure for independence in Rwanda caused the Belgian colonial government to switch its support from the Tutsi (who dominated almost all positions of power) to Hutu political leaders. Amidst violence against Tutsi-dominated elites, the "social revolution" of 1959 ushered in more than three decades of single-party rule. Post-independence governance came to be characterized by exclusionary state policies based on ethnic division (with a quota system being put in place to control opportunities available to Tutsi) and regionalism. In response to attacks by Tutsi refugees in neighboring counties, members of the local administration encouraged the massacres of Tutsi on several occasions before a *coup d'etat* by Juvenal Habyarimana in 1973. The early 1980s were peaceful, but toward the end of the decade, an economic slump and increasing internal dissent added to international pressure to establish multiparty

politics. Meanwhile, Tutsi refugees who had demanded the right to be able to return home were told by Habyarimana that Rwanda was "like a glass of water, full to the brim" – with no more land available. Much of the land left behind by exiled Tutsi had been re-allocated by the government to land-hungry households.

In October 1990, the Rwandan Patriotic Front (RPF), dominated by Rwandan Tutsi in exile, invaded the country from Uganda. Hundreds of thousands of people were displaced as the war continued. Political campaigns became characterized by ethnic polarization, and virulent anti-Tutsi propaganda was broadcast on private radio and published in journals and magazines, while militia forces carried out violent attacks against Tutsi civilians with impunity. In 1993, Habyarimana signed the Arusha Peace Accords with the RPF, but failed to implement many of the power-sharing conditions. A plan for the genocide of the Tutsi had been formulated by a small group of military leaders and politicians. A small contingent of UN troops was present in the country to monitor the peace process. Decision-makers in the UN were warned of the plan for mass killing, but ignored the warnings.

On 6 April 1994, on the return journey from peace talks in Tanzania, the presidential jet was shot down by unknown assailants, killing all on board, including Habyarimana and the president of Burundi.[13] Within the hour, roadblocks had been mounted in Kigali and the killing had begun.[14] A number of analysts have shown that the desire to gain or defend access to land influenced some participants in the genocide, and Hutu extremists warned that returning Tutsi were planning to take control of Hutu properties. Three months later, somewhere between 500,000 and 1 million Tutsi and "moderate Hutu" had been killed, while thousands of others had been raped, brutalized, tortured, threatened, and robbed.[15] The international

[13] The rocket attack on the jet has long been assumed to be the work of Hutu extremists. However, increasing evidence continues to emerge that links the RPF with the attack. See, for example, Human Rights Watch, April 2006, "The Rwandan Genocide: How It was Prepared," Human Rights Watch Briefing Paper, 15.

[14] See G. Prunier, 1996, *The Rwanda Crisis: History of a Genocide, 1959–1994*, Fountain Publishers, Kampala; Human Rights Watch/Alison Des Forges, 1999, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, New York.

[15] The term "moderate Hutu" is used here due to convention but is problematic, especially because it suggests that any Hutu who were not targeted were by definition "extremist." The exact number of dead is difficult to estimate; the Government of Rwanda states that 937,000 people were murdered.

community had done little to halt the genocide, which was finally brought to an end by the military victory of the RPF in June 1994. Some of the remnants of the *interahamwe* and ex-FAR based in eastern DRC managed to infiltrate and attack the northwest of the country during the late 1990s, and vicious counterinsurgency measures were taken by the RPF that resulted in thousands of civilian deaths, destruction of homes and crops, and the forcible regrouping of the population in camps.[16] Throughout the late 1990s, civilians were arrested by soldiers or police on suspicion of involvement in genocide, and detained without trial in appalling conditions in prisons or police stations.

The extent of the crisis in HLP rights can only be imagined when one considers that, at the peak of the Great Lakes crisis in August 1994, there were 4.9 million refugees and IDPs in the region.[17] Having briefly outlined some aspects of the recent conflicts in the region, we can now look at HLP issues in each country in turn.

Housing, Land, and Property Questions in Burundi

The scope of the HLP question in Burundi is extremely broad, encompassing not just the rights of hundreds of thousands of IDPs, refugees, and other vulnerable groups, but also very difficult institutional and geographical contexts: a country approaching the demographic bursting point, a highly corrupt and malfunctioning land registration system, and a new and inexperienced government facing multiple challenges. Therefore, responses to the immediate and acute housing, land, and property challenges must be combined with a comprehensive and dynamic means of addressing the chronic systemic aspects.

Population densities generally range from 230 to 278 persons/square kilometer but are as high as 800 persons/square kilometer in some parts of Ngozi Province, for example.[18] Some 95 percent of Burundi remains under customary tenure. Plots have become fragmented as fathers

[16] See Amnesty International, September 1997, *Rwanda: Ending the Silence*, London.

[17] UNHCR Reintegration and Local Settlement Section, 1999, *External Evaluation of the UNHCR Shelter Programme in Rwanda 1994–1999*, Geneva, 21.

[18] See: J. Oketch and T. Polzer, 2002, "Conflict and Coffee in Burundi," in J. Lind and K. Sturman (eds.), *Scarcity and Surfeit: The Ecology of Africa's Conflicts*, Institute for Security Studies, Pretoria; and CARE/APDH/Global Rights, 2004, "Enquete Qualitative Sur La Situation des Conflits Fonciers dans le Province de Ngozi, Burundi," Bujumubura, 4.

subdivide land amongst their sons (rarely, if ever, their daughters) and the average plot size per household is around half a hectare, with 80 percent of the population owning less than 1.5 hectares. While it is difficult to measure the rate of landlessness accurately, it is high with some 15 percent of the entire population characterized as landless, and with perhaps half of the minority Batwa ethnic group having no land at all of their own.[19]

In the past, land disputes have been mediated by a customary institution of Hutu and Tutsi "wise men," termed "*Bashingantahe*"[20] Over time, the institution was undermined, by the Catholic Church and Tutsi-dominated political parties that tried to either control or marginalize it. Since coming to power, the ruling CNDD-FDD party has effectively removed the legal powers of the *Bashingantahe*, establishing instead an elected "hill council" (*conseil de colline*) to manage local problems. The local administrative law establishing the hill council does state, however, that they should collaborate with the *Bashingantahe* in the mediation of disputes.[21] In practice, this has meant that the *conseil de colline* and the *Bashingantahe* are in competition with one another over roles and responsibilities, a competition that has strong intergenerational undertones.

The 1986 Land Tenure Code requires all land transactions to be registered with the state. In reality, registration is too costly for the average household. The legitimacy of the system has also been undermined by corruption and favoritism at all levels. Unsurprisingly, then, land disputes constitute some 80 percent of all cases in the formal justice system, which has a reputation for corruption and is overburdened. Many people prefer to have cases mediated by the *Bashingantahe* instead. The resulting decisions are often compromises between legal and customary norms.

Since the transition period, efforts have been underway to develop a new land law. Instead of a radical change, the ministry with responsibility

[19] D. Jackson, 2003, Twa Women, Twa Rights in the Great Lakes Region of Africa, Minority Rights Group, London.

[20] See: T. Dexter and P. Ntahombaye, May 2005, "Le Role des Systems Non-Formels de la Justice dans la Consolidation d'un Etat de Droit en Situation Post-Conflit: Le cas de Burundi," Centre for Humanitarian Dialogue, Bujumbura; M. van Leeuven and L. Haartsen, August 2005, "Land Disputes and Local Conflict Resolution Mechanisms in Burundi," CED-CARITAS, Burundi; and Louis-Marie Nindorera, 1998, "Keepers of the Peace: Reviving the Tradition of Bashingantahe in Burundi," *Online Journal of Peace and Conflict Resolution*, 4(1), www.trinstitute.org/ojpcr.

[21] Article 37 of Loi N 1 / 016 du 20 avril 2005 portant organisation de l'administration communale.

for land issues has opted to modify and add to the existing law. While consultants involved argue that consultations were held around the country, others have noted that these involved information-gathering, rather than real debate and consultation.[22] There is concern that the draft is seen as a *fait accompli* by many in government.[23]

The Impacts of Population Displacement

One-sixth or more of the population has been displaced inside or outside of the country due to conflict, including a government policy of forcible "regroupment" in camps.[24] From a peak of 800,000 in 1999, the number of IDPs had dropped to almost 117,000 living in camps by mid-2005.[25] While most IDP camps were built on unoccupied state land, some were constructed on the land of others, generally without compensation of any kind. Some members of the Burundian civil service have argued that the state is not liable for any possible compensation claims (using the argument that the camps arose spontaneously and the state had no choice but to support them).[26] While most IDPs have no major problems in accessing their land, it is possible that some female heads-of-household, particularly widows, will have difficulties claiming their land rights, due to customary inheritance regimes.[27]

Before the peace process began, there were more than a million Burundian refugees, according to UNHCR estimates. Since then, some 300,000 refugees have returned to Burundi, but up to three-quarters of a million still live in Tanzania. The HLP claims of these refugees, especially those who left following the crisis in 1972, are often complicated. In many instances, the land they once owned has been allocated to others by the government of Burundi; in others, relatives have sold the land to third

[22] Interviews with lawyers and members of civil society, Bujumbura, 22–24 March 2006.
[23] Id.
[24] International Crisis Group, 2003, *Refugies et Deplaces Burundais: Construire d'urgence un Consensus sur le Repatriement et la Reinstallation*, Brussels/Nairobi.
[25] Internal Displacement Monitoring Centre, 2006, *Burundi: Still No End to Displacement, Despite Political Progress*.
[26] Comments of participants in "Forum Sur Le Problematique Fonceiere au Burundi," organized by Global Rights/Ministry of Natural Resources in March 2006.
[27] Prisca Mbura Kamungi, Johnstone Summit Oketch and Chris Huggins, 2005, *Land Access and the Return and Resettlement of IDPs and Refugees in Burundi*, African Centre for Technology Studies/Institute for Security Studies, Nairobi/Pretoria, 235.

parties, or distributed the land amongst themselves according to inheritance practices. Their situation is complicated by the "prescription period" of thirty years specified in the Land Law, which states that if someone has used a plot of land uninterrupted for thirty years, the plot legally becomes theirs.[28] The only exception to this is if the plot was acquired through "*mauvais fois*," for example, with the knowledge that it belonged to someone else, or through corruption. The interpretation of this clause is all-important, especially given the way that an essentially discriminatory state allocated land to third parties. Of course, the technical and financial capacities of local authorities to resolve such problems are limited, and disputes take a lot of time to resolve. In 2005, some 84 percent of returnees reported they did not have proper shelter.[29]

The Arusha Peace Agreement

The Arusha Agreement of August 2000 is a particularly comprehensive document, which recognizes the importance of land issues.[30] While many felt that civil society was, as usual, excluded from the process, organizations such as the Burundi Women Refugee Network were granted observer status.[31] This resulted in the inclusion in the agreement of a clause on the rights to land and inheritance for women.[32]

Protocol IV of the Arusha Accords on Reconstruction and Development is of most relevance. The term *sinistrés* is used in the text to refer to a range of vulnerable groups, including those who had been forcibly "regrouped" into camps during the war, or those IDPs who were "dispersed" across the country. Article 8 of Protocol IV states that property rights shall be guaranteed for all men, women, and children; compensation shall be payable in case of expropriation, which shall be allowed only in the public interest; all refugees and/or *sinistrés* must be able to recover their property,

[28] Article 29 of the Land Law, Republique du Burundi, *Loi Portant Code Foncier Du Burundi*, Loi No 1/008, Bujumbura, 1 September 1986.

[29] C. De Lune, 29 March 2006, "Burundi: Helping Former Refugees Settle in at Home," UNHCR press release.

[30] See R. Kitevu and J. Lind, April 2001, "Enhancing the Arusha Agreement: Environmental Aspects of the Burundi Peace Process," *Econ-Conflicts Policy Brief* 1(2).

[31] See http://www.womenwarpeace.org/burundi/burundi.htm.

[32] E. Stensrud and Gorill Husby, *Resolution 1325: From Rhetoric to Practice*, CARE Norway, PRIO, 7.

especially their land; if recovery proves impossible, they must receive fair compensation and/or indemnification; and a register of rural land, the promulgation of a law on succession, and, in the longer term, a cadastral survey of rural land shall all be implemented. The agreement also called for a sub-commission on land to be established, to examine all cases of land owned by old caseload refugees and state-owned land, and to examine disputed issues and allegations of abuse in the (re)distribution of land and to rule on each case.

The accords provided for the creation of the *Commission Nationale de Réhabilitation des Sinistrés* (CNRS), which was mandated to facilitate the return of the refugees and IDPs, to address land-related issues including allegations of abuses during the (re)distribution of land, and to rule on individual cases according to specific principles.[33] The CNRS was established in February 2003. In a separate protocol, and also of great relevance for HLP rights, the agreement refers to the importance of strengthening the *Bashingantahe*, the local dispute mediators.[34]

Despite the prioritization of HLP issues in the accords, some observers have argued that, "the focus on mechanisms for resolving individual cases" has served to distract attention and funding away from a larger, more holistic policy debate on HLP issues involving all key stakeholders.[35] Indeed, civil society organizations that are attempting to open up debate on the fundamental aspects of the existing land law are finding it difficult to make headway on key issues, with many in government pushing a "business as usual" agenda that is unlikely to benefit the rural poor. Critics caution that the emphasis on ethnicity in the political system – for example, through the creation of an ethnic quota system – obscures the fact that access to political power and access to land are linked, and there is a risk of perpetuation of injustice unless the wider systemic issues are addressed. As we shall see, even individual cases have not been rapidly and systematically addressed by the CNRS.

[33] Ntampaka, C. 2006, *La question fonciere au Burundi. Implications pour le retour des refugies, la consolidation de la paix et le development rural*, FAO, Rome, 25.

[34] Arusha Peace and Reconciliation Agreement for Burundi, Arusha, 28 August 2000, Protocol 2, Chapter 1, Article 9(8).

[35] A. Hurwitz, K Studdard, and R Williams, 2005, *Housing, Land, Property and Conflict Management: Identifying Policy Options for Rule of Law Programming*, International Peace Academy, 10.

Peacekeeping in Burundi Post-Arusha

The Arusha Agreement provided for an international peacekeeping force.[36] In 2003, the Africa Mission in Burundi (AMIB) – the first full-scale AU peacekeeping operation in Africa – was established.[37] It had funding problems and was not expected to intervene systematically in terms of protection of HLP rights. The AMIB was deployed in April and was in-country for just over a year.

The United Nations Mission in Burundi (known by its French acronym ONUB) was established in 2004 by Security Council Resolution 1545, under Chapter VII of the Charter of the United Nations. The Security Council has extended the mandate of ONUB several times. Almost 5,500 soldiers were deployed in the country at the peak of operation, but in November 2005 the Government of Burundi requested that the peacekeeping operation be gradually scaled down and that its mandate be adjusted. The number of troops was therefore scaled down to about 3,000 in December 2005.[38] At the time of writing it was planned that from the beginning of 2007, a new civilian mission, called BINUB, will be deployed. It is likely that BINUB's mandate will include capacity building to assist government institutions to tackle the "root causes" of the conflict, as well as support to government attempts to reintegrate refugees and IDPs.[39] These both offer potential possibilities for action on HLP issues.

Resolution 1545 mandated the ONUB to take on the traditional peacekeeping roles, and in addition, the ONUB was mandated to monitor human rights issues and "to complete implementation of the reform of the judiciary and correction system, in accordance with the Arusha Agreement." The legal system, which has for years been highly corrupt and at the lower levels is choked with land disputes and other cases, urgently requires support. But this support has not been adequate. Despite the comprehensive nature of the Arusha Accords, and the emphasis placed on the importance of legal and other mechanisms for the resolution of

[36] Article 8 of Protocol V.
[37] Id.
[38] UN SC Resolution 1650 (2005).
[39] See http://www.un.org/Depts/dpko/missions/onub/background.html, accessed on 29 August 2006.

land and property disputes, the ONUB did not provide for support for legal or other kinds of approaches to the mass of HLP problems. Surprisingly, the initial field visit to plan the establishment of the ONUB did not involve personnel specialized in judicial and legal reform.[40] This is in contrast to other recent peacekeeping missions such as UNMIL/Liberia, MINUSTAH/Haiti, and ONUCI/Côte d'Ivoire, which all included rule of law (ROL) expertise in mission planning assessment teams.[41] It is also contrary to the provisions of the 2000 "Brahimi Report," which stressed the need for adequate resources to be allocated for rule of land and human rights work, both within DPKO headquarters and on peacekeeping operations.[42]

With only a few international ROL positions authorized for the ONUB, and no National Professional Officer positions, the ROL branch was unable to tackle HLP issues.[43] No planning guidance was provided to improve strategic and programmatic focus, and indeed personnel from other branches of the UN have commented that the work plans of the Rule of Law and Civil Affairs branch (ROLCA) were never made evident. This apparent vagueness of purpose was exacerbated by a failure of the ROLCA branch to present its work to the local information exchange forum.[44] UN staff were therefore unsurprised when it was the first section (after the election unit) to be slashed.[45]

The Human Rights branch of the ONUB, by contrast, was relatively large and well-funded. A total of sixty-five Human Rights Monitors are posted in remote rural areas, and both they and the ONUB Military Observers report on land conflicts when they become violent. However, despite identifying the symptoms of a widespread, chronic problem, the lack of systematic ROLCA support to the judicial sector or local dispute resolution mechanisms has meant that the *causes* of such conflict are not tackled by the UN.

[40] S. Carlson, 2006, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study*, UN-DPKO, 8.
[41] Id.
[42] The Report of the Panel on United Nations Peace Operations of 21 August 2000 (A/55/385 – S/2000/809) cited in id., 8.
[43] Interview with UN staff, March 2006, and id.
[44] Staff member, personal communication, April 2006.
[45] Id.

In conjunction with the UNDP, FAO, and the Office of the High Commissioner of Human Rights, and in collaboration with the Government of Burundi, ONUB did fund a one-day conference on "The Impacts of Land Conflicts on Food Security and Human Rights" in February 2006. The conference was attended by UN staff, representatives of diplomatic missions, and local and international NGOs. However, the findings of the workshop have not been mainstreamed into ONUB programs.[46] Indeed, the final recommendations of the workshop were aimed at the government and "international organizations," with no specific role identified for UN agencies.[47]

Interviews with Burundian NGOs and UN staff suggested that relations between the ONUB and civil society have been at times problematic. According to NGO personnel, "they wanted to do everything at once: food security, human rights, land conflicts, whatever you mentioned, they would be enthusiastic about."[48] Despite this enthusiasm, the ONUB seemed to lack an effective decision-making mechanism for funding and working with NGOs. The result was that many NGOs would, at the request of the ONUB, provide project ideas and proposals, but would not receive feedback.[49] It was also far from clear how the ONUB was going to collaborate with potential partner organizations, due to the minimal staffing levels at the ROLCA.

Added to this was the uncertainty over how long the ONUB was actually going to be operational. The Government of Burundi soon tired of the ONUB's efforts at coordination not just within the UN system, but also of NGOs and government projects funded through the UN. To some observers, it did not make sense for a temporary mission, with a relatively small presence on the ground except for the military contingents and human rights observers, to be so ambitious. In the view of ONUB staff, however, the government was keen to end the ONUB's activities as soon as possible in order to minimize scrutiny of its dubious treatment of political opponents and alleged corruption.[50]

[46] Personal communication with UN staff, May 2006.
[47] OHCHD, 2006, "La Question Foncière," Collection Droits de L'Homme, Bujumbura. Accessed online at http://www.unburundi.org/FRENCH/hr/hr_10.html, August 2006.
[48] Interview with Burundian civil society member, Kigali, 27 April 2006.
[49] Interview with Burundian civil society member, Kigali, 27 April 2006.
[50] Interview with ONUB staff member, Addis Ababa, 19 August 2006.

Government Responses to the Return of Refugees and Settlement of IDPs – CNRS

Given the limitations of ONUB, the main responsibility for tackling HLP issues of returnees and IDPs lies with UNHCR. It has attempted to fulfil its mandate through support to government institutions as well as civil society organizations. It is therefore crucial to examine what was, until the beginning of 2006, the main government agency responsible: the CNRS.

The Arusha Accords specified that it was to be an independent commission; however, in practice, it was placed under the institutional control of the Ministry of Resettlement and Reinsertion of IDPs and Repatriates (MRRR). The committee established to monitor the implementation of the Arusha Accords stated that this political compromise breached the spirit of the accords, and speculated that this could become an obstacle to donor funding.[51] While both institutions were in agreement that the MRRR had responsibility for fundraising for the CNRS, which would implement programs, both organizations claimed that they were responsible for policy-making.[52] This added to the tensions caused by the different political allegiances of their respective directors.[53]

A global plan of action was presented by the CNRS to potential donors in October 2003, but very little funding was forthcoming.[54] In the end, UNHCR was the only donor to provide significant funding, although, according to CNRS personnel, ONUB did provide a single staff member to assist the commission to elaborate and implement the global plan. Prior to the elections, the donor community seemed to be in a dilemma over how much funding they could commit to a transitional government that had serious capacity problems and which might privilege communities associated with the more powerful political groups.[55]

[51] Interviews in Bujumbura, May 2004 and March 2006; and International Crisis Group, 2003, *Refugies et Deplaces Burundais: Construire d'urgence un Consensus sur le Repatriement et la Reinstallation*, Brussels/Nairobi.

[52] S. Hocklander, K. Jenkins, M. Larson, and J. Ramos-Romero, 2004, *No Going Back? Repatriation, Reintegration and Youth in Burundi*, George Washington University, Washington, DC, 22

[53] Id. See also supra, note 27.

[54] Interview with former member of the CNRA, Bujumbura, 24 March 2006.

[55] J. Clover, 2005, *Burundi Beyond the Transition? The Challenges of a Return to Peace*, Institute for Security Studies, Africa Watch Briefing Paper, Pretoria, 7.

Posts at the CNRS were given to members of the dominant political parties, which at times undermined the quality of management and technical expertise. The ex-rebel groups are largely composed of people who had been living "in the bush" or in exile for years, and therefore had difficulty benefiting from higher educational opportunities.[56]

In March 2004, the CNRS developed methodological guidelines designed to result in a systematic approach to land disputes. However, most refugees remained largely unaware of the procedures involved.[57] The issue was not only one of dissemination of procedures: CNRS did not adequately involve representatives of refugees and IDPs themselves in the preparation of the guidelines and the formulation of procedures. Many stakeholders also felt that the CNRS was not communicative enough, and had a lack of presence "on the ground," with much activity being focused in the capital.[58] Some returnees, receiving little or no help, moved into IDP camps in order to receive assistance from international agencies. The CNRS ran out of funding at the start of 2006.[59] In late March, a National Commission for Land and Property was formally established to take over its functions. It has a three-year mandate to create and administer uniform mechanisms at the local level to address land conflicts arising from repatriation. It is currently receiving financial support from the Government of Burundi, the UNDP, and the New York–based UN Peace Building project, as well as useful technical assistance from the Dutch Development Cooperation. The commission appointed provincial representatives in early 2007 and is currently developing a strategic plan, a one-year action plan, and guiding principles for population resettlement. The commission has twenty-three staff and includes some women representatives and one representative from the Batwa indigenous group.

[56] In Burundi, training and scholarship opportunities have in the past been monopolized by a clique (mostly Tutsi) associated with the inner circles of power and, perhaps most of all, the mass killing (often termed "selective genocide") of more than 200,000 educated Hutu by the army in 1972. Educational opportunities in the refugee camps in Tanzania were far better than in Burundi, but do not of course continue to tertiary level. See supra, note 52, 5.

[57] Interview with JRS staff, Bujumbura, May 2004.

[58] Interview with UN personnel, Bujumbura, 24 March 2006.

[59] Interview with Eliphat Gahera, former vice-president of the subcommission on land, Bujumbura, 22 March 2006.

Civil Society Responses to HLP challenges

Since the late 1990s, awareness has risen amongst national and international actors of the importance of the land question, particularly the HLP rights of returning refugees and IDPs. A number of organizations have become involved in the issue. Their actions, though highly varied, can generally be categorized as follows:

(a) *Problem analysis and general awareness-raising*, for example, through publishing case studies on land problems. Local NGOs L'Observatoire de l'Action Gouvernementale and CENAP, for example, have conducted important studies.

(b) *Analysis of the existing land law and/or the new draft land law, and awareness-raising and advocacy:* World Vision produced a summary of the current land law in the national language, while donor-funded radio stations such as Studio Ijambo and Radio Esanganiro have produced programs on land issues.[60] Global Rights and CARE have both facilitated conferences bringing together a wide range of stakeholders, and published on land issues.[61]

(c) *Strengthening of local dispute-resolution capacity*, often through training programs for existing local institutions or establishment of new institutions. These include, for example, the Catholic Peace and Justice Commissions that have been installed across most of the country, the local peace commissions created by ACORD and MIPAREC, and the Councils of Leaders put in place by Search for Common Ground. Local legal clinics have been established by organizations such as Ligue Iteka and the Association des Femmes Juridiques.[62] Some, like CED-CARITAS and Ligue Iteka, have been able to compile and analyze information on the prevalence and types of land conflicts in the country. Support for the Bashingantahe, including training on the land law, has been provided by a number of organizations including Africare and CARE, while

[60] Interview with Radio Ijambo journalist, Bujumbura, 22 March 2006.
[61] See Global Rights, 2005, *The Long Road Home: Burundi's Land Crisis*, Washington DC.
[62] M. van Leeuwen and L. Haartsen, 2005, *Land Disputes and Local Conflict Resolution Mechanisms in Burundi*, Bujumbura, CED-CARITAS, 13.

other forms of institutional support have been funded or proposed by the UNDP and the EU.[63] Not all of the training programs have gone smoothly, due to the conflicts between the Bashingantahe and the Conseils des Colline. During a workshop for both institutions in Bujumbura in early 2006, a section of the Conseillers des Collines rejected the idea of training both elected and nonelected leaders together.

(d) *Direct material support to vulnerable populations* affected by land and housing problems has also been provided by a variety of NGOs.

Impacts of Non-Governmental Efforts

Despite all this activity, it remains to be seen whether the fairly high number of individual efforts by national and international NGOs represent a concerted critical mass that can effectively use the necessary combination of support and pressure on the Government of Burundi to ensure the issues are taken forward. There have been several reasons for this, most notably the fact that during the transition period, political energy was channeled toward the 2005 elections as well as the difficult institutional environment, with responsibility for various aspects of HLP rights scattered across a range of ministries. In addition, while civil society groups collaborate well on an informal level, they have not yet formed a formal network, and hence lack a coherent advocacy statement on HLP issues. This means that the impact of their work tends to be diffused.

Since the elections, the Government of Burundi has not always demonstrated a willingness to work with stakeholders, preferring instead to move ahead with the draft land law despite minimal consultation.

In addition, some concerns have been raised that many interventions focus primarily on the needs of returning refugees and IDPs, and do not consider them as a part of a wider, chronic set of land problems, especially affecting other vulnerable parts of the population (e.g., widows, orphans, and the very poor).[64] Also, short-term donor funding cycles do not respond

[63] Interviews with UN staff, Bujumbura, 23–24 March 2006. See also, supra, note 52.
[64] Supra, note 62.

well to the longer term challenges of reconstruction.[65] It remains to be seen how the new Land Commission, set up to replace the CNRS, will operate, and how BINUB will support this institution.

It was clear from conferences held during 2006 that there is a lack of agreement on key issues such as applicability of the Pinheiro Principles (with some seeing restitution as impracticable) or the importance of IDPs as a group affected by HLP problems. There are a considerable number of people within government and the civil service who favor a "business as usual" approach, and who are hostile to attempts to seek restitution for lost property rights. However, some international actors detected more openness from several concerned government ministries in 2007 and expressed more optimism that civil society groups and international specialists would be able to influence the drafting process.

Housing, Land, and Property Rights in the Aftermath of the Rwandan Genocide

The Arusha Peace Agreement

The Arusha Agreement of 1993 moved away from the Organisation of African Unity's traditional reliance on the "summit" approach toward a longer process of negotiations over technical details. A key issue in the negotiations – as well as the usual issues of political power-sharing and military integration – was the return of the Tutsi refugees who had left the country since 1959 as a result of massacres and discrimination. After a good deal of negotiation, it was agreed that refugees could return and settle anywhere, as long as they did not encroach on the land rights of others.[66] Given the conditions of land scarcity and the allocation of refugees' lands to others since 1959, the agreement further specified that the government would identify vacant land for settlement.[67]

The key clause in terms of HLP rights in Rwanda, which has been a source of controversy ever since, discussed the rights of refugees who had

[65] Supra, note 52, 26.

[66] Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons, 9 June 1993, Article 2.

[67] Id., Article 3.

been out of the country for more than ten years, who were in fact the majority of the refugees:

> The right to property is a fundamental right for all the people of Rwanda. All refugees shall therefore have the right to repossess their property on return. The two parties recommend, however, that in order to promote social harmony and national reconciliation, refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people. The Government shall compensate them by putting land at their disposal and shall help them to resettle. As for estates which have been occupied by the Government, the returnee shall have the right for an equitable compensation by the Government.[68]

The agreement also specified that these refugees should be housed in villages, rather than in the traditional dispersed settlement patterns.[69] The article on the land rights of the refugees has been described as violating international laws.[70] In practice, it has been only partly followed in Rwanda, and "old case" refugees have accessed land through various mechanisms, discussed further below.

Implementation of the Arusha Agreement and the Establishment of UNAMIR

In response to the progress of the Arusha Peace Accords and the findings of a United Nations reconnaissance mission to Rwanda from 19 to 31 August 1993, the secretary-general recommended to the Security Council the establishment of a United Nations Assistance Mission for Rwanda (UNAMIR), mandated to facilitate the establishment of a transitional government, monitor demobilization and integration of troops, and contribute to a safe environment for national elections. While the UN peacekeeping operation was meant to be on the ground within thirty-seven days of the signing of the agreement, it took an additional three weeks for the

[68] Id., Article 4.
[69] Id., Article 28.
[70] L. Jones, "Summary of and Comments on Draft Policy for National Land Reform," 6. Accessed online on 11 May 2006. at http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/jonessum.rtf.

necessary UN resolution to be passed and another two months before the force actually arrived. In the meantime, the climate of insecurity in the country had heightened and extremists had been able to train and plan unhindered. President Habyarimana delayed the establishment of a transitional government. The RPF also violated the accords, bringing more troops and arms into Kigali than was allowed.[71]

A force of 2,548 military personnel was authorized. However, in the face of horrific, nationwide violence against Rwandan civilians, this was reduced on 21 April to 270 military personnel. The UN, ignoring force commander General Dallaire's warnings and assessments, was affected by the partisan interests of former Habyarimana allies, while some member states such as the United States feared a "Somalia-style" confrontation with hostile armed forces that could lead to more peacekeepers dying. The UN response was inappropriate, ineffective, and contrary to the advice and wishes of the force commander. In the face of genocide, the UN preferred to go down the usual route of intervention in civil war: working toward a ceasefire. Efforts at the Security Council to provide a real response to the killing were systematically blocked by the United States, the United Kingdom, and other western powers.[72]

After the Genocide

The RPF established military control over most of the country in July 1994. The interim government, the armed forces, and the *Interahamwe* militia fled into neighboring Zaire (now the DRC). Ordinary Hutu were encouraged to flee through anti-RPF propaganda or simply forced to leave.[73]

The international response to the aftermath of genocide was deeply unpopular in Kigali. Between April and December 1994, US$1.29 billion was allocated to the Great Lakes region, of which only some US$372 million were allocated for use in Rwanda.[74]

[71] Human Rights Watch, April 2006, "The Rwandan Genocide: How It Was Prepared," HRW Briefing Paper, 11

[72] Many useful sources exist: see, e.g., Human Rights Watch/Alison des Forges, 1999, *Leave None to tell the Story: Genocide in Rwanda*, Human Rights Watch, New York; L. Melvern, 2000, *A People Betrayed: The Role of the West in Genocide in Rwanda*, Zed, London; and African Rights, 1995, *Death, Despair and Defiance*.

[73] Interview with Rwandan human rights activist, Kigali, January 2006.

[74] Laurent, et al., External Evaluation of the UNHCR Shelter Programme in Rwanda 1994–1999.

The human rights field operation for Rwanda (HRFOR) was the first field operation to be undertaken under the auspices of the UN High Commissioner for Human Rights and to be administratively supported by the UN's Human Rights Office in Geneva.[75] In August 1994, the UN High Commissioner for Human Rights had finalized an agreement with the government authorizing the presence of 147 monitors. Their responsibilities included carrying out investigations into violations of human rights and humanitarian law; monitoring the ongoing human rights situation; cooperating with other international agencies to facilitate the return of refugees and displaced persons and the rebuilding of civil society; implementing programs of technical cooperation in the field of human rights; helping Rwanda to rebuild its shattered judiciary; and providing human rights education to all levels of Rwandese society.

In its guidelines, the HRFOR emphasized civil and political rights but noted that economic, social, and cultural rights were also significant.[76] Emphasis on HLP rights was evident in the memorandum of understanding between UNHCR and HRFOR on returnee monitoring, which stated that UNHCR would be responsible for following up on specific problems with local authorities, while HRFOR would have a monitoring role. The memorandum of understanding (MOU) read in part that:

> Monitoring and follow-up of information sharing should pay special attention to trends in each commune regarding the pattern of restitution of land, time frame, implications for those returnees pursuing their claims, availability or absence of alternative solutions, including developments on land allocation for old caseload and survivors of the genocide.[77]

[75] D. Millwood (ed) *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda.

[76] HRFOR, 1996, *Field Guidance Manual*. Cited in S. Leckie, March 2005, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework*, UNHCR Department of International Protection.

[77] UNHCR/HRFOR, 1996, "'Appendix I to Chapter XI: Memorandum of Understanding (MOU) No. 5 Between HRFOR and UNHCR Rwanda on Returnee Monitoring," Kigali. Accessed online on 21 May 2006 at http://www.law.wits.ac.za/humanrts//monitoring/chapter11-appendix1.html.

There were delays in getting human rights monitors into the country – however, by May 1995, HRFOR was composed of 114 staff in 11 field offices. The recruitment procedures and training at HRFOR have been criticized. At the start of the mission shortcomings were exacerbated by lack of adequate funding and support. Failures were blamed on an ambiguous and overly broad mandate, poor leadership, lack of coordination between field staff and headquarters, and squabbling between different UN divisions and agencies. In practice, HRFOR was unable to concentrate on the rights of refugees and IDPs due to its staffing issues and broad mandate.

Meanwhile, due to insecurity in the refugee camps in Zaire and the activities of extremists there, the UN had started to develop possible responses, including the potential deployment of a UN peacekeeping force to the camps. However, there was practically no interest from potential troop-contributing countries. In January 1995, the Zairian Government and UNHCR signed an agreement committing the Government of Zaire to deploy 1,500 military and police security personnel to the camps in North and South Kivu Provinces. This proved inadequate to appease Kigali.

In April 1995, RPF troops violently closed an IDP camp at Kibeho, killing thousands of civilians.[78] Once again, UNAMIR and the international community had shown themselves unable to protect civilians in Rwanda, this time because of their inability to stand up to the government. By June 1995, the Government of Rwanda had requested the UN to reduce the number of UNAMIR personnel and to limit its activities. The Government of Rwanda finally informed the secretary-general that it did not agree to an extension of UNAMIR's mandate beyond its expiration on 8 December 1995 on the basis that, as a peacekeeping mission, UNAMIR did not respond to Rwanda's priority needs. However, some elements of the mission did continue working in the country, with a much-curtailed range of responsibilities, until March 1996.

Refugee Return

Immediately following the RPF victory, hundreds of thousands of Tutsi refugees from surrounding countries (notably Uganda, Burundi, and the

[78] S. Kleine-Ahlbrandt, 2004, *The Protection Gap in the International Protection of Internally Displaced Persons: The Case of Rwanda*. Graduate Institute of International Studies, Geneva, Working Paper 04/01.

DRC, then called Zaire) repatriated to Rwanda. They are generally known as the "old caseload" and numbered more than 600,000 by the late 1980s.[79] Some 2 million Hutu had left the country in mid-1994. Many returning Tutsi refugees occupied the abandoned houses of those who had fled, and started to cultivate abandoned fields. In the northeast of the country, some military and political leaders of the RPF took control over large swathes of ranchland, without any legal basis. At this point, land occupation was best described as "chaotic." The UN was not involved in either monitoring or managing the land issues resulting from refugee return. Most problems were being addressed by the traditional *gacaca* dispute-resolution mechanism.[80]

Until late 1996, the repatriation of the Hutu refugees from neighboring countries had been proceeding at an extremely slow rate. The UN operation in the refugee camps in eastern DRC had failed to make an appreciable difference to the militarized nature of the settlements. The Rwandan and Ugandan governments ensured the start of the military campaign, in October 1996, of the Alliance des Forces Démocratiques pour la Libération du Congo/Zaire (AFDL). Refugee camps were attacked, and tens of thousands of Rwandan civilians, including women and children, were killed by the AFDL and Rwandan troops.[81] This violence prompted the flight of at least 600,000 Rwandan refugees into Rwanda in November 1996; in December, the Tanzanian government imposed an ultimatum on the refugees sheltering there to return as well.

The result was a sudden influx of about 1.3 million "new case" refugees over a period of a few weeks.[82] Returning to Rwanda under a cloud of suspicion, and with much of the population traumatized, some returning new case refugees were afraid to try to reclaim their rights. Returnees caught up in land disputes were vulnerable to accusations of genocide, and extra-judicial killings were not uncommon.

[79] Government figures claimed a million returnees, but a joint survey by the UNFPA and the Government of Rwanda in 1996 acknowledged that overestimation had occurred.

[80] Prof. Laurel Rose, personal communication, 25 May 2006.

[81] A. Baare, D. Shearer, and P. Uvin, with C. Scherrer, 1999, *The Limits and Scope for the Use of Development Assistance Incentives and Disincentives for Influencing Conflict Situations*, OECD, Paris, 9, and interviews in Kigali, May 2006.

[82] Human Rights Watch, 2001, *Uprooting the Rural Poor*, Washington, DC. Accessed online on 21 May 2006 at http://www.hrw.org/reports/2001/rwanda/index.htm#TopOfPage.

In November 1996, the UN High Commissioner for Human Rights called for the number of HRFOR monitors to be increased to 300, stating that HRFOR had insufficient resources to deal with the mass influx of Rwandan refugees into the country.[83] This request was not granted by the UN. These challenges were exacerbated by the constraints to the justice system: By early 1995, there were only 200 magistrates in the entire country, compared to 1,100 before the war.[84]

In 1997, the High Commissioner for Human Rights stated that:

> violations of property rights take the form of illegal occupation of property and lead to arbitrary arrests and detentions as a result of malicious accusations and to land disputes ending in murder... Regions already having problems with land disputes... According to the statistical data for housing reconstruction established by UNHCR in April 1996, there were 32,958 occupied houses in this prefecture and 45,872 hectares of occupied fields.[85]

The limited number of human rights monitors meant that the outcomes of these disputes were not fully investigated and documented. The difficult relationship with the Government of Rwanda hindered HRFOR's ability to influence policy decisions.

Government Approaches to the Restitution of Housing, Land, and Property Rights

The Arusha Accords stated that vacant lands should be found to house the "old case" refugees. As there was little existing arable "vacant land," the government opened up public lands, such as Akagera National Park, for resettlement, as well as communal areas managed by district authorities.

Two other mechanisms for ostensibly improving land use were initiated by the government. The first, "land sharing, " was pioneered in Kibungo

[83] IRIN, "IRIN Update Number 32 on Eastern Zaire, 11/20/1996," accessed online on 21 May 2006 at www.reliefweb.int.

[84] C. Mburu, "Challenges Facing Legal and Judicial Reform in Post-Conflict Environments: Case Study from Rwanda and Sierra Leone," paper presented at World Bank/Government of Russia Conference, "Empowerment, Security and Opportunity through Law and Justice," St. Petersburg, July 2001, 11.

[85] UNHCHR, January 1997, "'Report on the Situation of Human Rights in Rwanda," Geneva.

Province but was also implemented, less systematically, in other provinces. Essentially, if two households or individuals claimed a single plot, the parcel was to be split equally between them. Those with large plots would give up land for others, retaining about a hectare. However, the modalities of how sharing was to be done were not fully elaborated, and the policy was not supported by law.[86] Unsurprisingly, then, the results of land sharing differed from place to place.[87] Genocide survivors tended to refuse to share land, and most in practice were not forced to obey. However, genocide orphans who were less able to stand up against the policy have had land taken from them.[88]

In a sense, the concept of land sharing was a pragmatic solution to a difficult problem. Of course, the extent to which the exercise was equitable depended on the wisdom of the local authorities. Many people affirm the continuing widespread dissatisfaction over the way the process was managed. In Kibuye, a University of Rwanda study found that over half of all land conflicts were due to "post-sharing grudges." In Kibungo:

> problems of land sharing abound ... These include corrupt practices of accumulation of land parcels by some local leaders; imposing on people unconsensual criteria of land sharing; acceptance of bribes by local leaders in order to use favouritism in the allocation of land; local leader's favouritism towards cronies and friends in parcel allocation; arbitrary distribution of land without regard to former occupancy; and unnecessary uprooting of people to distant places by local leaders in the name of land sharing.[89]

The long-term impacts of such problems on "reconciliation" are a cause for concern. The second major mechanism utilized by the government was to extend an "emergency" shelter policy of constructing villages, known in Kinyarwanda as *imidugudu*, into a more widespread settlement policy. In 1998, some 700,000 people were forcibly displaced and told to regroup

[86] Although there is a popular belief that a set of written principles guided the land-sharing process, key government institutions are unable to provide copies, and it seems that they may never have existed. Interviews in Kigali, August 2005.

[87] Gasarasi and Musahara, 2004, *The Land Question in Kibungo Province*. Centre for Conflict Management, University of Rwanda, 5.

[88] Interviews with orphaned genocide survivors in Kigali, May 2006.

[89] Supra, note 87, 6.

in *imidugudu*. In the northwest, where the RPF was fighting a war against "infiltrators," this was part of a counterinsurgency strategy. In other parts of the country it was more obviously linked to a development strategy and a desire for increased social control and surveillance. The imposition of the policy nationwide was characterized by a number of major problems. First, local authorities instructed those who were unwilling to move to destroy their own houses in order to force them to move into the new ones. Secondly, many people gave up some land for construction of the *imidugudu*, but have never received compensation. Thirdly, the relocation meant that many people were further from their fields, making cultivation more difficult, especially for women who have particular security concerns. Production seems to have declined as a result. Fourthly, many occupants of *imidugudu* lacked access to any land at all – studies from the late 1990s found that around 50 percent of inhabitants of *imidugudu* had access to land.[90]

International agencies, notably UNHCR, were heavily involved in the implementation of the policy. UNHCR built some 96,000 houses between 1996 and 1999. In addition to the fact that some people were forced to destroy their own permanent homes in order to move into unfinished or sometimes substandard houses in *imidugudu*, there were a number of other limitations to the program. In terms of UNHCR support, the following problems were observed:

- Understaffing led to "imperfect" planning assumptions and limited implementing and monitoring activity, and a lack of capacity building.
- There was a lack of forward planning and clear objectives for the program.
- In some sites, beneficiaries were not allocated agricultural land.
- Site selection and location was left to the local authorities, and UNHCR supported these choices despite being aware of the unsuitability of some settlements.
- Beneficiaries were asked to participate in the construction of their houses, which meant that in some cases the most vulnerable were left with unfinished houses.

[90] Human Rights Watch, *Uprooting the Rural Poor*, Washington, DC, 2001. Accessed online on 21 May 2006 at http://www.hrw.org/reports/2001/rwanda/index.htm#TopOfPage.

- Construction guidelines, which contained recommendations on sustainability, were not translated into Kinyarwanda, and so were rarely followed.
- Imported corrugated iron was used for roofing, whereas clay tile would have been more durable and locally produced.
- The tight calendar for house construction negatively influenced the quality of the construction and its sustainability, and time spent by beneficiaries in construction was time taken off farm work. As a result, food security was compromised.[91]

International pressure (and a related lack of donor funds) essentially put a stop to the program, though limited new construction continues with government funding. The workability of *imidugudu* remains a controversial topic, and opinion is divided, even amongst Rwandan NGOs. The same evaluation of UNHCR's support to the program concluded that:

> UNHCR works as an emergency orientated agency. This is compatible with temporary shelters but incompatible with a sustainable housing construction programme. What is acceptable at the heart of an emergency is no longer so in post-emergency situations. UNHCR should clearly state what it is undertaking as well as clearly identify the limits of its involvement.[92]

In many ways, the lack of widespread violence following the repatriation of the "new case" refugees is remarkable, and government policies are partly one of the reasons for this short-term success. However, these policies have stored up problems for the future. In particular, the government has failed to acknowledge the extent of the problem of land expropriation for *imidugudu*, which was often done without compensation. Staff of the Ministry of Land, Environment, Forests, Water, and Mines (MINITERE) have claimed that compensation for expropriation was made through "local arrangements."[93] Despite this optimistic official version of events, the reality is somewhat different. When asked who was to blame for causing land conflicts in a nationwide survey, local people answered that the

[91] Supra, note 74, 13–16.
[92] Id., 24.
[93] Interview with international NGO personnel in Kigali, November 2005.

government was first (29.9% of respondents), the rich were second (14.8%), and local authorities third (13.7%).[94]

HRFOR was unable to continue to monitor the implementation of the *imidugudu* program and other human rights issues. Relations between Kigali and the UN-OHCHR became worse.[95] In mid-1998, when the HRFOR mandate was due to be renewed, the government demanded that its mandate be altered to exclude monitoring activities.[96] This would have left HRFOR as a capacity-building operation, which OHCHR refused to accept. HRFOR closed in July 1998.

The Present Day: Refugee Repatriation and Human Rights Monitoring

The issue of repatriation in Rwanda remains significant to date. Some Rwandan Hutu refugees who had been in Uganda till 2003 have for the last two years lived in a temporary camp in the northeast of Rwanda. Despite promises that they would be provided with access to land, by early 2006 nothing had been done.[97] UNHCR continues to receive complaints from other returnees that they do not have access to land, and the agency often has difficulty accurately assessing the veracity of such claims, due to the funding crunch that the Rwandan UNHCR office is currently experiencing.[98]

International agencies seem to have overlooked much of the complexity of the resettlement of Rwandan returnees, preferring an "airbrushed" version of events.[99] This is probably not completely due to a wish to accommodate the government position; it is also due to problems with institutional memory resulting from high rates of staff turnover and an

[94] S. Haba and C. Bizimana, 2005, *Assessment of the Implementation Process of the New Land Policy*, Kigali, LandNet Rwanda.

[95] G. Khadiagala, May 2004, *Governance in Post-Conflict Situations: the Case of Rwanda*, UNDP/ Chr. Michelsen Institute, Bergen, 7.

[96] OHCHR, 16 July 1998, "Office of High Commissioner for Human Rights Regrets Lack of Agreement on New United Nations Presence in Rwanda," Geneva. Accessed online on 21 May 2006 at www.reliefweb.int.

[97] Interviews with local NGO staff in Kigali, February 2006.

[98] Interviews with UNHCR personnel in Kigali, February 2006.

[99] See, for example, UNHCR Inspection and Evaluation Service, 1998, *The Problem of Access to Land and Ownership in Repatriation Operations*, Geneva.

inability to uncover the truth, given the high level of government monitoring and control over society.

An ambitious land law came into force in September 2005, which represents potential risks as well as opportunities. As noted above, it failed to provide compensation for those who lost land as a result of the reintegration of returnees. Everyone in Rwanda recognizes land rights as a key issue, and a number of international NGOs have supported studies or opinion surveys on land and property rights. The FAO has also commissioned a study on the issue, and funded a recent conference. Recently, UNDP and UNEP also became interested in the problems.[100] However, it is less clear whether organizations will be willing to support the expensive and politically sensitive work of systematic monitoring of the implementation of the land law at the grassroots level. The government remains hostile to criticism. Many donors are unwilling to look deeply into controversial questions. As in neighboring Burundi, the extent of land scarcity in Rwanda means that it is a hidden time bomb. The trial phase for the demarcation, adjudication, and registration of plots was scheduled for certain parts of the country in early to mid-2007, and national-level implementation will not take place for some time yet. We must wait to see whether international support for Rwanda results in this most important of issues being addressed in an honest and conflict-sensitive way.

Peacekeeping in the Eastern Democratic Republic of Congo (DRC)

Since 1999, the DRC peace agreements have focused on power-sharing arrangements during the transition period, the withdrawal of foreign belligerents (such as the Ugandan and Rwandan armies), and actions to be taken against those armed groups who refused to come to the negotiating table.[101] Unlike the Arusha Accords for Burundi, for example, the peace agreements for the DRC were not comprehensive in the sense of creating a new vision for governance and addressing HLP rights. This is despite the importance of HLP issues as both a cause and a sustainer of conflict and

[100] H. Musahara, 2006, *Environment and Poverty Reduction in Rwanda: An Assessment*, UNDP/UNEP, Kigali/Nairobi.

[101] Notably the Lusaka Peace Agreement of 1999, the Pretoria Accord, the Sun City Agreement of 2002, and the Global and All-Inclusive Accord signed in April 2003.

misery. In Masisi, North Kivu, for example, some 40 percent of returning IDPs and refugees have difficulties in accessing land.[102]

MONUC's Mandate

The Mission de l'Organisation des Nations Unies en République Démocratique du Congo (MONUC) was established by Security Council Resolution 2191 of 24 February 2000, which authorized the deployment of up to 5,537 military personnel. The resolution also authorized appropriate civilian support staff in the areas of human rights, humanitarian affairs, public information, child protection, political affairs, and medical and administrative support. MONUC's main tasks were, in summary: to monitor the implementation of the Ceasefire Agreement and investigate violations of the ceasefire; to develop an action plan for the overall implementation of the Ceasefire Agreement including the comprehensive disarmament, demobilization, resettlement, and reintegration of all members of all armed groups, and the orderly withdrawal of all foreign forces; to facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups; and to deploy mine action experts to coordinate mine action activities.

By 2003, military strength had been increased to 10,800 by Resolution 1493, which also introduced Rule of Law (ROL) activities as a general part of the mandate. In addition, the resolution gave MONUC the right to use force in order to protect civilians under imminent threat of violence, under a Chapter VII peacekeeping mandate.

In October 2004, through Resolution 1565, the Security Council revised the mandate of MONUC, dropping any reference to ROL activities. In October 2005, the UN extended the mandate until September 2006.[103] By 31 January 2006, MONUC had deployed 16,820 total uniformed personnel, supported by 856 international civilian personnel, 1,419 local civilian staff, and 471 United Nations Volunteers. This sounds like a large number until one realizes that the DRC is the size of Western Europe, or 213 times the size of Kosovo, with a population of 56 million. In contrast, Sierra Leone, with a

[102] Interview with Norwegian Refugee Council staff in Nairobi, 1 June 2006.
[103] Irin News, 31 October 2005, "DRC: UN Security Council Extends Mandate of UN Mission," Nairobi.

population of 6 million, had a peacekeeping force of 16,000.[104] Elections in 2006 led to the victory of Joseph Kabila, who had been serving as president during the transitional period. The elections were conducted without widespread violence, but there was some fighting in Kinshasa between forces loyal to Kabila and his nearest rival, Jean-Pierre Bemba. Voting patterns revealed the political differences between the East and West of the country.

Following heavy fighting in late 2006 between dissident militia leader Laurent Nkunda and government forces, supported by MONUC, in North Kivu Province, a peace deal was brokered in early 2007. Time will tell if this peace agreement will lead to increased stability in the volatile province, which is particularly affected by land disputes of all kinds.

Like ONUB in neighboring Burundi, expertise in the rule of law field has not been prioritized within MONUC. There was no ROL unit in the original plan for MONUC, and when one was finally created in 2003, it was staffed by only three international positions on legal and judicial issues.[105] All three positions were based in the capital, Kinshasa, thousands of miles from the volatile east, where, arguably, there is the most urgent need for capacity building in ROL. This is despite the recommendations of an interagency mission to the DRC in early 2003, which advocated the "establishment of rule of law and penal systems to counter the widespread culture of impunity."[106] Given the importance of legal questions over land ownership in many parts of the DRC – such as in Ituri and North Kivu – support for the reform of a generally collapsed and/or corrupted judiciary is an essential part of the peacekeeping process.

The UN Office of the High Commissioner for Human Rights (OHCHR) has been operating in the DRC since 1996.[107] Resolution 1995/69 specifically mentioned forced population displacement as one of the key concerns in the country.[108] However, the OHCHR originally

[104] K. Vlassenroot and T. Raeymaekers (eds.), 2004, *Conflict and Social Transformation in Eastern DR Congo*, Academia Press, University of Gent, 26.

[105] Supra, note 40, 8.

[106] UN-OCHA, "'Inter-agency Mission on Internal Displacement in the Democratic Republic of Congo," 26 January–8 February 2003, 13.

[107] M. Cisse-Gouro, 2004, "'Human Rights Challenges During the Transition: An OHCHR Perspective," in *Challenges of Peace Implementation: The UN Mission in the Democratic Republic of Congo*, M. Malan and J. G. Porto (eds.), ISS, Pretoria (accessed online at www.iss.co.za, 6 May 2006).

[108] United Nations Commission on Human Rights, Resolution 1995/69 on the Situation of Human Rights in Zaire, E/CN.4/RES/1995/69, 8 March 1995.

had only two international staff, both based in Kinshasa. MONUC had only fifty human rights officers in the country in 2003.[109] There are currently seventeen field offices for the Human Rights section.[110] The Human Rights Division (HRD) consists of four units: special investigations, justice support, desk and protection of victims, witnesses and human rights defenders.

The presence of MONUC's and OHCHR's human rights officers was particularly "limited or even nonexistent" in such areas such as Ituri/Bunia and South Kivu/Uvira.[111] The protection activities of humanitarian actors have been focused on child rights and sexual violence.[112] There is a need to pay greater attention to the re-integration of IDPs and returning refugees, and especially their long-term access to HLP rights. Despite the seemingly large budget for the operation, most of the money is spent on logistics, leaving very little available for other operational costs or activities, such as the protection and promotion of HLP rights.[113]

Land and Local Peace Processes

Given the extent of the challenges facing MONUC, it is perhaps unsurprising that the mission did not add a comprehensive approach to HLP issues to its long "to do" list. A MONUC political affairs officer based in Goma spelled out his feelings on HLP issues:

> In terms of housing, land and property rights, it is too early to look at these things here – this should be part of the 2nd or 3rd phase of MONUC's operations. It should be part of local peacemaking strategies – it should be pragmatic, and locally-rooted, instead of being based on a theoretical, overarching plan.[114]

[109] R. Ricci 2005, "'Human Rights Challenges in the DRC: A View from MONUC's Human Rights Section."

[110] Inter-Agency Internal Displacement Division (IDD) Mission to the Democratic Republic of Congo (12–20 May 2005), 3.

[111] UN-OCHA, "Inter-agency Mission on Internal Displacement in the Democratic Republic of Congo" (26 January–8 February 2003), 4.

[112] Supra, note 110, 6.

[113] L. Sundh, 2004, "Making Peacekeeping Missions More 'Prevention Aware,'" Presentation at Conference on Preventing Genocide.

[114] Interview with MONUC political affairs officer in Goma, 10 December 2006.

The political affairs officer did acknowledge that HLP rights were significant in the region:

> We see this conflict in North Kivu as having many root causes. Land issues are a structural aspect of local conflict, and have been around before the two "rebellions"... It's part of the social fabric of the conflict in these areas, due to the dynamic between the traditional structures of land access, and the immigration which also took place. MONUC is therefore well aware that land issues exist – but primarily at the local level. For us, it is not the highest priority issue. We tend to focus instead on the hardcore political issues of the conflict.[115]

Some commentary may be offered on this analysis. First, the "do no harm" principle dictates that the first step in a conflict or post-conflict zone must be to fully study the context, in order to avoid making things worse. The presence of a dedicated land rights specialist with a specific monitoring brief would have enabled MONUC to identify possible unexpected outcomes of military or political actions. Secondly, it is important to realize that local and pragmatic solutions can be "planned" – at least, funds and personnel can be assigned to support such initiatives, as they spontaneously appear. Thirdly, interviews with NGO personnel working with IDPs and refugees indicate that many feel that HLP rights are significant political issues not just at the local level, but at the intercommunity level, and are hence vital aspects of any sustainable peace.[116] Researchers have shown how years of war and state failure have fundamentally transformed local social, political, military, and economic structures, including control over the land and resource base of these structures. A return to the status quo is therefore not possible. A livelihoods-based approach suggests that focusing on local-level access to HLP issues could be an important step toward local-level good governance. By concentrating on macro-level issues, MONUC has unfortunately lost opportunities for local-level peacebuilding. In the words of two well-known experts on Eastern DRC,

[115] In interviews, Congolese national humanitarian affairs and political affairs personnel demonstrated a similar general awareness of the existence of land conflicts, but lack of knowledge of local-level details.

[116] Interview with Norwegian Refugee Council staff, Nairobi, 1 June 2006; and with Human Rights Watch personnel, Kigali, 28 May 2006.

> While the international community seems to be focused on creating a number of "islands of stability" in Congo – which would include the capital along with a number of strategic provincial towns – the entire interior of the country risks being left behind in a general state of chaos, where historical land conflicts, border disputes, and communal resentment will continue to be exploited by political entrepreneurs who are in search for a local power base.[117]

Given the difficulties facing MONUC and the lack of effective ROL capability, one of the main potential avenues for addressing HLP issues is support for local conflict resolution processes (involving customary leaders amongst other key stakeholders), which (a) prevent further population displacement and ethnic cleansing, and (b) can address the land conflicts that often lie at the root of interethnic rivalries. In hindsight, the activities of the ROL unit could have focused on providing a platform for dialogue between rural custodians of customary law and urban-based members of the formal judiciary. A sustained dialogue and lesson-learning could provide a platform for reform. Without such a dialogue, there is a risk that support for the formal judiciary could just prop up an institution which, in many parts of eastern DRC, is fatally flawed due to corruption and discrimination.

The importance of local peace processes was acknowledged in UN Resolution 1493 of 2003. The MONUC commander for the Kivu Provinces was requested to establish mechanisms to achieve local conflict resolution.[118] MONUC had already developed a policy on preventing local conflicts, finalized in December 2002 and championed by the then DSRSG Lena Sundh.[119] According to Sundh:

> Its primary objective was to ensure that MONUC regional offices, particularly in the eastern part of the country, obtain an analytical understanding of the situation in their area of operation, build up a capacity to detect underlying tension and potential conflict and be prepared and able to take action should an open, possibly armed, conflict erupt.[120]

[117] K. Vlassenroot and T. Raeymaekers, (eds), 2004, *Conflict and Social Transformation in Eastern DR Congo*, Academia Press, University of Gent, 27.
[118] L. Smith, 2004, "MONUC's Military Involvement in the Eastern Congo," supra, note 107.
[119] Many thanks to Severine Autesserre for drawing my attention to this.
[120] Supra, note 113.

Human rights monitoring was to be a key tool. The strategy led to an action plan for working on local conflicts in the Kivu (the "Kivu strategy") in early 2004, which did mention land issues. However, this action plan was never implemented. International observers suggest that the policy paper was not founded on sufficient grassroots-level research, or consultation either within or outside the UN system, and hence was not viewed favorably within the wider MONUC system.[121] The DSRSG identified a number of constraints to efforts to implement the strategy, including the lack of relevant expertise within MONUC. She recommended that civilians with specific expertise in conflict resolution and area knowledge be recruited. One might add that staff with expertise in various aspects of HLP rights would also be an asset.

The approach taken during 2003 was for MONUC military personnel, under the leadership of political affairs officers, to become directly involved in negotiations between different armed groups. In Kindu, the local pacification committee was actually chaired by a MONUC military officer.[122]

While direct involvement in negotiations between political factions may have yielded gains, the role of MONUC in negotiations over the root causes of local violence is another question. The efforts of the international community to support the *baraza intercommunautaire* (interethnic peace meetings) in the Kivu Provinces have not been altogether successful. The institution fell apart amidst claims of political interference from the provincial administration.

In North Kivu, a *Baraza la Wazee* has been recently established in order to fulfill similar objectives to the *baraza intercommunitaire*, and MONUC has provided to support it in terms of transport.[123] MONUC also participated in a meeting with traditional leaders at which it was agreed that customs would be codified, especially rules on inheritance. In parts of South Kivu, *chambres de la paix et du reconciliation* have been established, based on a model imported from further north.[124] They receive support from NGOs in Bukavu. However, due to the lack of a more

[121] Personal communication, Hans Romkema, 16 May 2006.
[122] Supra, note 118.
[123] Interview with President of the *Baraza la Wazee* in Goma, 23 May 23 2006.
[124] Interview with Koen Vlassenroot, Coordinator of Conflict Research Group, University of Ghent, Kigali, 9 December 2005.

comprehensive strategy to look at HLP issues and local peacebuilding together, it seems that the potential synergies provided from these experiences have been lost.

Recently, joint operations against "negative forces" such as FDLR and mai-mai groups, conducted by FARDC troops with MONUC support, have had mixed results. FARDC troops have been involved in massive human rights abuses and are accused of collaborating with FDLR in some areas, and MONUC's image has suffered as a result.[125] However, certain operations have been more successful, and MONUC's image has generally improved in the east over the last year and a half.

In addition to local peace and reconciliation meetings, the UN has been involved at the regional level. Since late 2002, an international conference on the Great Lakes has been underway, involving governments, civil society actors, and donors. Many preparatory meetings have been held on particular themes including natural resources, with land as an issue for discussion. Unfortunately, despite their willingness to participate in the process, some countries may not be willing to abide by the outcomes. Some days after a high-level meeting in late 2004, for example, the Government of Rwanda again threatened to invade the DRC, citing border security concerns.

Despite recognition by influential analysts of the importance of land issues as a source of violence, realistic strategies have yet to be identified.[126] However, history suggests that, unless resolved, land conflicts will recur, especially as population density increases and land becomes scarce. In the words of the former DSRSG of MONUC:

> While the primary focus of MONUC will continue to be the transitional process at the national level, paying more attention to the local, community, level would contribute to stabilizing the peace and at the same time provide opportunities to assist in addressing the underlying causes of conflict; causes that could, if not managed, make violent conflict start again.[127]

[125] Interview with INGO personnel in Nairobi, 1 June 2006.

[126] See, for instance, International Crisis Group, 2003, *The Kivus: The Forgotten Crucible of the Congo Conflict*, Nairobi/Brussels, Africa Report No. 56, 33.

[127] Supra, note 113.

Conclusions

Looking at the three case studies, one is struck by the lack of attention to HLP rights in the UN missions. In the absence of a strong mandate for HLP issues, some work in this sector could hypothetically be conducted through the ROL interventions; however, ROL capacity has also been limited. The mandates of the ONUB and MONUC go against the recommendations of the Brahimi report.

More than this, attitudes toward land issues in the missions suggest that the importance of HLP rights to local level livelihoods, and hence to peace (or continued conflict), have been underestimated. Where the UN has supported HLP-related work (for example, funding for the CNRS and a civil society conference in Burundi, or coverage of land disputes by Radio Okapi in the DRC), it has not made the necessary connections with programming, such as ongoing capacity-building work. Interventions remain relatively ad hoc and disconnected.

Resources available to the UN missions in Central Africa have not been equal to the task. In Burundi, the political and technical constraints affecting the CNRS, in the absence of systematic and sufficient support for the justice sector, meant that the ONUB was unable to build on the promising efforts of local and international NGOs. Awareness of issues is high, and significant local capacity exists to analyze the issues. With the "drawing down" of the ONUB, the international community must work to urgently ensure that the potential for BINUB to support HLP rights is achieved.

In Rwanda, potentials existed, but the particular context in post-genocide Rwanda, as well as HRFOR's own weaknesses, led to overall failure. Twelve years after the genocide and almost ten years after the mass return of the bulk of refugees, the land issue lies dormant in Rwanda, and the extent of societal control by the authorities means that it may remain so for some years. But that does not mean that it does not exist as a potential threat to peace and stability. In the DRC, the central role of land issues in certain areas demands that MONUC pay much more attention to analyzing the dynamics and supporting local efforts.

Based on some of the evidence discussed in this chapter, especially regarding the limitations of peacekeeping missions in complex political environments, it is possible to identify some elements of a successful approach to addressing HLP rights in peacekeeping operations. During

the early post-conflict period, key issues for peacekeeping missions include providing protection and ensuring a safe environment for the return of IDPs and refugees. Communities that are vulnerable to ethnic cleansing and violence because of land disputes or ethno-political conflicts should be identified. Attacks can be prevented through ensuring a strong presence. A more sustainable strategy for prevention involves support for local peace and reconciliation processes. Material support for returning populations may also be needed.

The early post-conflict period is also the best time to conduct an assessment of the HLP-related issues facing the country and identify key stakeholders. Early analysis of the challenges is vital if so-called secondary conflicts over HLP rights are to be prevented. Short-term measures should be integrated into long-term objectives in order to demonstrate immediate impact, and it is necessary to identify the likely dimensions of future activities and the appropriate resources.[128] Relief and development approaches should be linked in order to have synchronous effects. While HLP specialists should be present in peacekeeping missions, human rights observers and political affairs officers can also play a role in monitoring HLP-related disputes and abuses. Directives, developed on existing instruments such as the Pinheiro Principles, the Guiding Principles on Internal Displacement, and various decisions of the UN Sub-Commission on the Promotion and Protection of Human Rights, should be promulgated.[129] Other activities may be spelled out in peace agreements, such as support for specific institutions or identification of vacant lands for resettlement.

In the later stages of post-conflict recovery, attention can be paid to the development of land policies and laws, and/or support to implementation systems. Due to the damage often done to the justice sector, and the financial problems experienced by post-conflict regimes, there is often great need for training, funding, monitoring, and other forms of support. Unjust land laws, social inequalities, and corruption should also be tackled as far as possible. Support to informal and/or customary dispute resolution mechanisms is also important, especially in rural African

[128] D. Lewis, "Land Administration in Post-Conflict Environments," in African Centre for Technology Studies, "Report of the Conference on Land Tenure and Conflict in Africa: Prevention, Mitigation and Reconstruction," Nairobi, 6.

[129] See, for instance, S. Leckie, 2007, *Housing, Land and Property Restitution for Refugees and Displaced Persons: Laws, Cases and Materials*, Cambridge University Press, New York.

contexts where access to the formal justice system is limited. Indeed, interventions should aim for an integrated approach to both formal and informal legal systems.

If the laws and policies on HLP rights are inappropriate or unjust, financial and technical support can be provided for the development of new laws. This is often a time-consuming process. However, even when laws are still in the development stage, guidelines can be drawn up on key pressing issues, and given some legal basis if need be (e.g., through presidential or ministerial directives).

A successful approach would:

1. Gain an overall understanding of the dynamics of land rights, in particular, and other HLP issues in the country, with sufficient historical depth.
2. Identify specific "danger areas" and support UN and NGO interventions in these areas through investigation and detailed analysis.
3. Focus on enabling and informing "preventative" activities, such as a protective presence in danger areas or strengthening local peace processes.
4. Work indirectly, through provision of support for other UN and civil society entities.
5. Ensure that impartiality is observed in addressing HLP issues.
6. Rely on complementary activities in the formal and informal justice sectors from ROL.
7. Have a strong capacity-building component.
8. Connect and cooperate not only with local-level actors, but exert influence at higher levels of the mission, including military aspects.
9. Embed short-term activities and goals within a longer term work plan, in cooperation with the UNDP and other agencies.
10. Raise awareness of key national, regional, and international legal instruments and guidelines among members of the government, civil society, and peacekeepers.

7

The Trouble with Iraq

Lessons from the Field on the Development of a Property Restitution System in "Post"-Conflict Circumstances

Nigel Thomson[1]

Background

In recent Iraqi history, human rights abuses connected to housing, land, and property (HLP) issues are as complex as they are continuous. The background given here provides only an impression of that complexity. While this commentary primarily looks at responses to HLP issues from March 2003, the time of the occupation of Iraq by a coalition of foreign forces, it necessarily draws upon the deeper history of Iraq's human rights abuses.

In particular, the last four decades in Iraq have been witness to a series of events involving the death and displacement of many Iraqis and the destruction of their properties. In many cases, these abuses have been caused by Iraqi government actions against its' own people. These abuses flew in the face of Iraq's obligations under international law, in particular the Universal Declaration of Human Rights.[2] But there were a number of other specific international instruments that Iraq became party to and then subsequently violated. The instruments that either directly or indirectly enshrine HLP rights include:

- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination Against Women

[1] In the preparation of this chapter, the author is indebted to the comments and recollections of Denis Dragovic (former Country Director, IRC Iraq), John Kilkenny (former Deputy Country Director, IRC Iraq), and Vandana Patel (formerly of the International Organization for Migration [IOM] and now of UNHCR).

[2] In the context of HLP rights, for example, Article 25(1) and, more generally, Article 17.

- Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Civil and Political Rights
- Convention on the Rights of the Child[3]

Others have suffered too during this period, in particular, Iranians and Kuwaitis. Yet, we can see the seeds of displacement and dispossession leading back even further to the colonial "carve-up" of the Middle East decades earlier in the wake of World War I and various colonial political agendas. But it is also true to say that problems relating to border issues in the region can be traced back centuries.

In 1979, Saddam Hussein formally became president of Iraq, with the support of the Ba'athist Party (which itself dominated Iraq from the time of a second *coup d'etat* in 1968). From that time until Hussein's removal by a coalition of U.S.-led foreign forces in 2003, he led a ruthless dictatorship that made war against Iraq's neighbors, Iran (from September 1980 until August 1988) and later Kuwait (during 1990). As a result of his war against Iran there may have been as many as 1 million casualties.[4] There were also many Iraqis displaced along Iraq's border with Iran, and many of those displaced remain so today; occupying areas around Karbala and other parts of the country.[5] In addition to these external conflicts, Saddam presided over attacks against his own citizens, predominantly Shi'ites in the southern half of Iraq and Kurds[6] in the north during the "Anfal" campaign from 1987 to 1989. As a result of the Anfal campaign, the number of killed and displaced is hard to measure. Figures vary considerably, but perhaps as many as 100,000 noncombatants[7] were killed (including death as a result of the use of chemical weapons, most notably in the mainly Kurdish town of Halabja[8]) and the displacement or forced

[3] Although Iraq has not acceded to the optional protocols for the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

[4] The actual number of casualties has not been definitively determined and is unlikely to be.

[5] Although their status as IDPs is now probably questionable, many apparently prefer to stay around larger cities like Karbala in the upper south than return, for example, to the marshes of southern Iraq.

[6] Not only Kurds were singled out in this campaign. Other minorities such as Yezidis, Assyrians, and Chaldean Christians were also targeted. See *Genocide in Iraq*, 1993, Human Rights Watch, http://hrw.org/reports/1993/iraqanfal/ANFALINT.htm (sourced 11 May 2006).

[7] Id., HRW suggests between 50,000 and possibly 100,000.

[8] Id. Not strictly part of the Anfal campaign.

relocation of many more. In addition, many (perhaps almost 2,000 villages[9]) were razed. In 2001, a UN Habitat Report[10] indicated that there were approximately 805,505 internally displaced persons (IDPs) (141,234 families) in the Kurdish Autonomous Region in northern Iraq. As part of the Anfal campaign, southern Arabs were often paid to move into areas cleared of Kurds and other minorities in a process known as "Arabization."

As a result of the Iraq invasion of Kuwait, in 1990, international forces under a United Nations mandate[11] forcibly removed Iraqi forces, and, in the wake of Iraqi military attacks on Shi'ites in southern Iraq and Kurds and other minorities in the north, "no fly" zones were imposed.[12] In the north, the Kurdish regional government was beset with political infighting between 1994 and 1997, which led to armed conflicts and further dispossessions within that region. Many of those displaced in 2001 remain displaced today.

As a result of international concerns about Iraq's noncompliance with UN Security Council Resolutions relating to the possible development of chemical and other weapons, and the inspection of nominated sites, a U.S.-dominated international coalition of countries (without specific UN Security Council authorization) invaded Iraq on 20 March 2003. Saddam Hussein fled and the "coalition" established a transitional government.[13] Although the initial invasion by coalition forces was relatively

[9] Id. As many as 4,000 Kurdish villages may have been destroyed since 1975.

[10] UN Habitat, 2001, *IDP Site and Family Survey Final Report* (UN Habitat Report) at Table 2.2. The report indicates that at the time of the survey, 14,033 families were displaced as a result of the Kurdish in-fighting and 2,763 families remained displaced as a result of conflict with the PKK (refer to Table 2.2 of the UN Habitat Report).

[11] Iraq's failure to comply with UNSCR 678 (29 November 1990) triggered the response.

[12] These "no fly" zones were supposed to prevent the Iraqi Air Force from attacking Shi'ites in the south and Kurdish and other minorities in the north. The zones were not sanctioned by a specific UN Security Council Resolution, and their legal legitimacy was disputed by Iraq and other countries. The United States and the United Kingdom, however, relied on UNSCR 688 (5 April 1991), which "2. Demands that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected."

[13] This was recognized by the United Nations Security Council Resolution 1483 (2003), 22 May 2003, which stipulated: "*Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority')."

swift, there were considerable numbers of IDPs that resulted. Some of these were as a direct result of the coalition invasion and others, indirectly, when, for example, some communities in northern Iraq, returned to their former homes (from which they were displaced in the 1980s) and forced the "new" secondary occupants out (often those brought in as part of the "Arabization" process). Thus, the result was a wave of secondary displaced persons.

Displacements continue within Iraq with Iraqi refugees and IDPs now numbering almost 5 million. An "insurgency" probably composed of disparate groups with differing motivations (including some foreign fighters and purely criminal elements) has led to the development of local, sometimes sectarian, militias that have embarked on a spate of attacks and killings apparently motivated by religious persuasion. These killings (or the threat of violence) have caused the further displacement of many Iraqis along sectarian lines. As a result, there is evidence of Sunni Moslems moving from largely Shi'ite Moslem areas, and vice versa.[14] Existing refugee communities are also under pressure. Palestinian refugees, particularly in Baghdad, have become the target of evictions, intimidation, and violence[15] that is forcing many to leave their homes and try to cross borders into Jordan and Syria, often without success.

As far as trying to address the abuse of HLP rights is concerned, a number of international organizations have worked to try to assess the situation and arrive at ways of dealing with the problems. Without exception, their work has been limited by the insecure environment within Iraq. Organizations such as the International Organisation of Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) have worked together with Iraqi counterparts to develop legislation establishing a property restitution and compensation institution[16] designed to enable persons to reclaim property unfairly lost since 1958.

[14] Meeting with Chief of Mission, IOM, and the author in Amman on 2 May 2006.

[15] See UNHCR press release of 4 April 2006 at http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4432474b4&;page=news (sourced 11 May 2006). According to the UNHCR, there are about 34,000 Palestinian refugees in Iraq with about 24,000 registered with the agency (refer to 2 May press release at http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4457314d1c&;page=news; sourced 11 May 2006).

[16] This institution went through a number of incarnations. The first operational form was the Iraq Property Claims Commission (IPCC) established by CPA Regulation 12. The second is the Commission for the Restitution of Real Property Disputes (CRRPD), a newly named institution that was established in March 2006. The evolution of the property restitution and compensation process is discussed in more detail below.

The United Nations Centre for Human Settlements (UN Habitat) has also had a role in Iraq, primarily in the area of the development of housing policy. Nevertheless, it appears that a formalized housing strategy is yet to be completed.

The United Nations Office for Project Services (UNOPS) also contributed to the assessment process with its report entitled *Addressing Housing, Land and Property Rights in Post-Conflict Settings: A Preliminary Framework for Post-Conflict Iraq*.[17] This was followed by a more comprehensive Country Assessment Report that was undertaken jointly by the United Nations Development Group (USDG) and the World Bank in 2003, in particular, the Working Paper *Iraq Needs Assessment: Housing and Urban Management*.[18]

The United Nations Security Council also established the United Nations Assistance Mission for Iraq (UNAMI),[19] whose mandate is to advise and support the Government of Iraq and promote the protection of human rights.[20] Yet the role of all these international organizations has been extremely limited, first, by the Canal Hotel bombing in August 2003, when the United Nations Special Representative Sergion Viera D'Mello and more than twenty other UN staff were killed, triggering a pullout of international organizations from Iraq; and, secondly, the general decline in the security situation across much of the country.[21]

In this context, it is clear that even before the 2003 conflict there was a long history of HLP rights abuses in Iraq. Shortly after the cessation of major hostilities in Iraq in 2003, the UNDG and the World Bank indicated

[17] Prepared by Scott Leckie, 30 July 2003.

[18] World Bank Report No. 31544, 1 October 2003.

[19] UNSCR 1546 (8 June 2004).

[20] Id. at para 7. Specifically, the mandate is to (a) play a leading role to: (i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council; (ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections; (iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq; (b) and also to: (i) advise the Government of Iraq in the development of effective civil and social services; (ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance; (iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and (iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census.

[21] An exception may be the Kurdish regional government areas, where Kurdish militia, the Peshmerga, appear to have limited the number of attacks.

an estimated shortage of approximately 1.4 million housing units.[22] From that time, the situation has hardly improved, with independent sources indicating that the situation is declining.[23] As noted above, displacements continue to take place, the property rights restitution institution created under the coalition provisional authority (see below), while making many decisions, has not been able to enforce them, and its jurisdiction and procedural processes have been severely limited. Furthermore, it appears that since the time of the occupation no comprehensive housing policy has been articulated that addresses IDPs (or any other potential target for housing policy, for that matter).

A Brief History of the Property Restitution and Compensation Process in Iraq

One obvious way that the Coalition Provisional Authority (CPA) sought to lay the foundations for the return to the rule of law was by supporting the Iraqi Interim Government's election process and the later development of the new Iraq Constitution and subsequent elections. Again, there will be debate as to whether this was the right thing to do, in the right place, at the right time, and in the right way. But there have been other ways that the CPA, the Iraqi Interim Government (IIG), and, more recently, the Iraq Government have been trying to address the fundamental issues of governance and the rule of law. These approaches have, to a greater or lesser degree, been followed up after the CPA's role ended on 28 June 2004.[24]

The CPA and the IIG also sought to deal with rule of law issues through the development of a HLP restitution and compensation process. The loss of HLP rights is an issue that continually besets post-conflict[25] societies (and even in the post–natural disaster context, as we have seen and will

[22] World Bank, USDG Working Paper, Iraq Needs Assessment: Housing and Urban Management, 5.

[23] This was the consensus of representatives of the UNHCR and IOM, in Amman, Jordan, in discussions with the author on 30 April and 2 May 2006, respectively.

[24] The CPA formally handed over government activities to the Iraqi Interim Government on 28 June 2004. The handover was expected on 30 June but, in anticipation of potential violence targeting the handover, the CPA brought forward the handover by two days in a hastily called ceremony.

[25] Clearly there can be much debate on the issue of whether we are in a "post"-conflict situation. In the Iraq context, it may be better to speak of the post-Saddam environment.

continue to see as a result of the Asian tsunami that hit the northern Indian Ocean region late in December 2004). In East Timor, for example, complex restitution issues in the post-conflict environment manifested themselves in disputes that, in some cases, led back decades. People were left homeless and a number of opportunists (both national and international) sought to capitalize on the disastrous aftermath of violence.[26]

In Iraq, we now see the same sorts of issues arising. And the same basic questions are being asked: Should this be something that the international community becomes involved in? And, if so, what to do about it?

The arguments are often put forward (as they were in Iraq by at least some members of the international and Iraqi communities) that HLP rights policies are a matter for a national government to deal with. HLP rights are such a fundamental part of a society that foreigners should not interfere with them. They are also so incredibly complex, often subtle and politically fraught, that they are best left alone by the international community.

While these arguments may seem meritorious, they fail to acknowledge a critical reality in the aftermath of conflict: The abuse of HLP rights is often used as a tool for the further denial of other human rights. While these abuses can be human rights violations in themselves, they often evidence broader human rights abuses, and there is little administrative order in the post-conflict chaos to deal with them.

Abuses of human rights in this area occur through various means, including forced evictions, violence (or the threat of violence), dispossession of HLP rights based on discrimination related to ethnicity ("ethnic cleansing"), religion, or other factors, as well as unlawful or discriminatory government confiscations. It is suggested that, in the face of these threats, the international community need not question why it *should* intervene, only why it should *not*. In these circumstances it is difficult to envisage reasons for nonintervention except, perhaps, where a poor security situation prevents it. Having said this, it must be acknowledged that these circumstances are not an excuse for excluding the national population from the process. Indeed, the opposite is a necessary prerequisite to the success of any proposed intervention. And it is perhaps

[26] Ultimately, UNTAET – United Nations Transitional Administration in East Timor – decided (for political reasons and with the agreement of some influential East Timorese political figures) to do, essentially, nothing on property restitution. Since that time, there has been no detailed legislation to deal with it in that country.

because of a failure to adequately seek such a dialogue with Iraqis that the property restitution process has undergone a number of substantial revisions since it was first conceived in 2003. While the legislation finally promulgated by the CPA in 2004 represented the high watermark in terms of addressing human rights concerns, the most relevant revision (gazetted 6 March 2006[27]) pulls back from this position in a number of respects.

To its credit, the CPA acknowledged the importance of dealing with the issue of restitution and compensation reasonably early in its administration. The process that was finally arrived at combined principles of property restitution with compensation principles when restitution was not appropriate. But the fact that there were false starts in the process and the current property restitution mechanism, the Commission for the Restitution of Real Property Disputes (CRRPD), is the third property restitution institution incarnation underscored problems with the process' development. Before the CRRPD, the Iraq Property Claims Commission (IPCC) established by the CPA was not adequately articulated, nor resourced to carry out its functions properly. There was a history of problems in the development of institutional, governance, and legal frameworks. These failures stem from the CPA's unwillingness, or lack of experience, to deal with, or ignorance of, appropriate processes, available expertise within the international and Iraqi communities, resource needs, institutional capacity, and the legal framework required to do the job. In short, there appeared to be a lack of adequate understanding and planning on the issue. Perhaps in acknowledgment of its weakness in this field, the CPA contracted with IOM to help develop a legislative framework despite the fact that IOM had limited experience in dealing with post-conflict real property rights issues. The ramifications of this inexperience are still apparent at the time of writing given the substantial revision of the property restitution institution into what is now the CRRPD.[28]

At this point, a brief overview of the evolution of the development of the property restitution and compensation process may be useful. In June 2003, the CPA promulgated the *Establishment of the Iraqi Property*

[27] According to a personal email from Kathleen Milton, IOM, Geneva, 3 July 2006.
[28] Statute of the Commission for the Resolution of Real Property Disputes, Order No. 2, 1996.

Reconciliation Facility (IPRF).[29] There was, however, no visible infrastructure established under this legislation that would enable it to function. It appeared as a "law" on the statute books without real promise for implementation.

Later, as noted above, the CPA engaged IOM on the development of appropriate legislation.[30] This was an unusual relationship in itself because it effectively meant that IOM became the private legal adviser to CPA.[31] The result, in January 2004, was the repeal of the IPRF and the promulgation of CPA Regulation 8, *Delegation of Authority Regarding an Iraq Property Claims Commission*.[32] This legislation, too, was overhauled a few months later and signed into law literally four days before the CPA exited Iraq. CPA Regulation 12 was a restatement of Regulation 8 incorporating a number of changes that had been the result of discussions between the CPA, IOM, and the UNHCR (which had, by then, been incorporated in the informal legislative consultation process). Needless to say, coordination between the CPA and the international organizations was sometimes problematical. Even the harmonization of approaches as between the international organizations themselves was sometimes difficult, with UNHCR and IOM not always agreeing on an approach. Consultation with wider Iraqi society and other international players (for example, international and local NGOs) did not officially occur.[33]

The problems with the new IPCC were political, institutional, and legislative.[34] First, it seemed that the CPA was focused on quickly establishing IPCC offices that accorded with a governance checklist of "things to do before leaving" rather than sustainable governance. This approach suggested a political motivation. IPCC offices were "opened," but the

[29] CPA Regulation 4, 26 June 2003.

[30] Generally speaking, IOM provided its advice from Geneva. No experts were assigned to either Baghdad or Amman, Jordan, where IOM was later based.

[31] Whether it occurred to IOM that there may have been a conflict of interest in respect of its other activities throughout Iraq is unknown. This relationship reportedly so upset the UN mission to Iraq that its head at the time, the late Sergio Vieira de Mello, barred other UN agencies from contracting with the CPA.

[32] January 14, 2004.

[33] The International Rescue Committee, a U.S.-based NGO for whom the author was working at the time, was informally provided with background to these discussions but was not formally invited to participate.

[34] The jurisdictions of the IPCC and the CRRPD are analyzed in more detail under Section III, subheading *Legal Principles*.

institutional framework for implementation of the legislation existed primarily on paper only. And, as these offices were opening, the security situation throughout the country was becoming steadily worse. The national IPCC staff that existed (certainly those in the KRG areas) was left with limited training, assistance, and pay. As soon as the CPA left its compound in Erbil, for example, the operations of the IPCC office declined significantly and the KRG asked the IPCC for the return of the property so that it could be used for other purposes.[35]

Secondly, there was little meaningful communication between the central government and the regional offices, such as they were, giving little chance for a unified approach to the processing of property restitution claims (although certainly some of the reasons for this relate to political and regional security problems). For political reasons there seemed to be only limited cooperation between Baghdad and IPCC offices in the KRG areas. As a result, the regional offices started vetting applications "at the counter." The IPCC procedures in some northern offices became quasi-judicial, with staff refusing to accept claims that they considered were unlikely to succeed rather than let the process take its course. For example, anecdotal evidence suggests that community expectations – particularly in KRG areas – were that the IPCC would pay for damages caused to property under the former government, something outside the IPCC's jurisdiction. The fact that these false expectations were not adequately dealt with and claimants were being turned away could not have had a positive impact on public perceptions of justice.

The reasons for a lack of full cooperation from the KRG are uncertain but may relate to a number of issues, including the KRG's dissatisfaction with the IPCC management,[36] the view that the jurisdiction of the IPCC should have been wider so as to include damage to property as a result of the actions and policies of the former government, and even questions as to whether the process was likely to re-open locally "resolved" property restitution cases.[37] On the other hand, it was suggested by some IPCC staff

[35] Personal conversation between the author and the head of the IPCC, Erbil Office, in 2004.

[36] It was alleged that the head of the IPCC was, in the past, a senior Ba'athist.

[37] There is the question as to whether the IPCC process would conflict with decisions already made under the KRG's 1992 property restitution legislation, *Law on the Restitution of Expropriated Properties Due to Kurdish Liberation Movements to its Original Owners* Law No. 16, 1992, which was designed to return land to the Peshmerga (Kurdish guerrillas who fought against the former Iraqi regime).

that noncooperation may have related to the alleged covering up of land rights abuses by the KRG themselves.[38] On top of this, it appeared that the IPCC staff (including senior management in Baghdad) had virtually no understanding of human rights principles upon which the whole property restitution process was based. At times it seemed, from an outsider's view, that the IPCC staff considered the system to be merely "a process" with no clear basis in human rights policy and law.[39]

Finally, if these political and institutional issues were problematical, the legislation was equally so. The results of the legislative collaboration between the CPA, IOM, and UNHCR, as suggested above, were not spectacular, perhaps a reflection of differing motivations, perspectives, and ideologies. The law was a framework without details. More details were anticipated in subordinate legislation, but there were few of these.

The IPCC legislation was also marked with vague and inconsistent language. Phrases like "ethnic cleansing" were used without defining them and, in this case, seemingly without consideration for the fact that it was a euphemism for *genocide*. The legislation tried (in an ad hoc way) to deal with the "reverse Arabization" issue by saying that the Ministry of Displacement and Migration (MoDM) would be responsible for administering the policy on housing for the secondary displaced.[40] At that time, the MoDM existed largely on paper. Little seems to have changed in terms of secondary displacement policy. In fairness to the IOM and UNHCR, however, a mechanism for dealing with the secondary displacement of, essentially, Arabs may not have appeared at all without their input. As it turns out, the process became academic in March 2006 with the passage through the Iraqi Parliament of the *Statute for the Commission for the Resolution of Real Property Disputes*, which revoked the former institution's jurisdiction to hear such claims.[41]

[38] For example, in 2004, IPCC staff in Erbil indicated that the Erbil airport was subject to a number of property claims from former occupiers who said that they were provided alternative property from the KRG. Shortly after the defeat of the former regime, however, these persons were forced again from their "new" properties by the former occupiers who had returned. They could not return to their original properties because they now comprised the Erbil airport. They, therefore, were left with no property.

[39] To some degree, it could be argued that the later amendments to the IPCC, under the 2006 *Statute for the Commission for the Resolution of Real Property Disputes*, support the view that there is a limited perspective of human rights issues in the HLP context within the Iraqi Government.

[40] Regulation 12, Annex A, Article 10.

[41] There was no equivalent to the IPCC legislation's Article 9B in the CRRPD statute.

Now, secondary displacement claims do not fall within the jurisdiction of the CRRPD.

Admirably, the drafters of the IPCC legislation tried to provide guidance on deciding the various potential property disputes by setting out a number of important principles to be applied in the restitution process.[42] But it also provided uncertainty and a lack of detail. Readers were left with trying to determine what expressions like "value of improvements"[43] and "value of property"[44] (among similar expressions) meant. Did they mean "market value" or something else? And when and how were these values to be calculated? The legislation was unclear. There was no subordinate legislation to provide insight, either. More clarity on this point had to await the passage of the CRRPD statute.

Having said this, the IPCC, by November 2004, had begun making decisions at a regional level. This was a good result in itself, although there was some dismay expressed by at least one international organization at the substance of the decisions themselves; that is, the decisions were considered to be wrong.[45]

Despite the fact that claims were being heard, the nature of the work being undertaken by the IPCC appeared to be little known within much of the community, certainly within the KRG region in northern Iraq. According to a study undertaken by the International Rescue Committee,[46] however, the reality was that by the end of 2004, 89 percent of persons interviewed in the KRG areas had never heard of the IPCC.[47] And 58 percent of those who *had* heard of it admitted to knowing nothing else about it. On top of this, 77 percent of people interviewed said that they had lost land unfairly since 1968; that is, they were potential property claimants. Nevertheless, by April 2006, 132,607 claims had been lodged and 21,730

[42] Interestingly, a number of these principles are similar to those set out in earlier KRG legislation (*Law on the Restitution of Expropriated Properties Due to Kurdish Liberation Movements to its Original Owners* Law No. 16, 1992, Article 2, in particular).

[43] CPA Regulation 12, Annex A, Article 8(F).

[44] CPA Regulation 12, Annex A, Article 8(I).

[45] Concerns were raised with the author in conversations with UNHCR representatives in October 2004.

[46] *Report on the Operations of the Iraq Property Claims Commission (IPCC) in Northern Iraq* (December 2004). This report was the output of a project designed by the author with the support and funding of the project partner, UNHCR, and the agreement of the IPCC itself.

[47] Security concerns meant that a wider survey could not be completed. Most of those interviewed were outside the main cities.

of them had been decided.[48] It is impossible to independently verify whether these figures are accurate, although anecdotal evidence suggests that, of those claims decided, few (if any) decisions have been formally enforced.[49]

As noted above, in March 2006, the *Statute of the Commission for the Resolution of Real Property Disputes* came into force. It repealed the earlier IPCC legislation,[50] although the implications of this are not yet fully understood. This is a landmark piece of legislation for a number of reasons, but not all of them are entirely positive in terms of human rights in the context of property restitution and compensation. First, it is significant since the legislation was a product of the Iraqi Government and supported by the Iraqi Parliament. From this perspective, the legislation had significant "buy-in" from local experts. Indeed, international organizations such as the IOM and UNHCR provided comments to initial drafts, although some of these comments were apparently ignored, as is the right of a sovereign government.[51] Importantly, the role of the CRRPD is to encourage reconciliation and the amicable resolution of property disputes.[52]

Of concern, however, is that, at the time of writing, there are no supporting regulations under the CRRPD statute. Furthermore, the framework statute seems to limit the rights to claim that existed under the IPCC legislation both in substantive and procedural terms, while expanding the dates for potential claims back to 1958. The particulars of these changes are discussed in the brief analysis provided in the next section.

Analysis of the Property Restitution and Compensation Process

Until March 2006, the operational legislation[53] governing property restitution and compensation was set out in CPA Regulation 12, establishing the IPCC. Notwithstanding its repeal, a brief overview is provided here

[48] CPPRD at http://www.ipcciraq.org/09_stats.htm (7 July 2006). It appears to be the case that the remainder are still to be decided.

[49] Personal conversation with Vandana Patel, UNHCR, Amman, 30 April 2006.

[50] Article 39, CRRPD statute.

[51] Supra, note 49.

[52] CRRPD statute, Article 8 which states: "a) The Commission shall encourage reconciliation and amicable resolution of the property disputes between parties of the claim in accordance with a form prepared for this purpose to the extent that they do not contravene with the law, the public order and the public morals; b) The Judicial Committee shall certify the agreement of amicable resolution between the parties in the claim and its decision shall be subject to cassation."

[53] As noted above, an earlier legislative process, although promulgated, was never implemented.

for the purposes of outlining the development of the process and for the purpose of contrasting it with subsequent changes.

The scope of the legislation under CPA Regulation 12 recognized not only claims under the Ba'athist regime but also some claims resulting from post-occupation dispossessions.[54] Under Section 1 of Annexure A to Regulation 12, the role of the IPCC more simply became to "resolve real property claims in a fair and judicious manner." Furthermore, the "IPCC shall encourage the voluntary resolution of claims."

Aside from the primary regulation itself (Regulation 12) and the "re"-statement of Regulation 8 (Annexure A to Regulation 12), instructions have also been promulgated (Annexure B to Regulation 12) that set out more of the administrative and procedural issues associated with the establishment and operations of the IPCC.

In broad terms, CPA Regulation 12, Annexure A re-stated the establishment of the IPCC and the creation of the various institutional structures necessary for it to carry out its duties. In addition to this, Annexure A provided a framework of procedures to be followed in dealing with land and property claims. It also states the basic principles to be applied when the IPCC considers claims and the scope or jurisdiction of the IPCC (who was entitled to make a claim and when). The IPCC legislation stated that it over-rode inconsistent legislation.[55] This meant that its terms over-rode earlier legislation that may have applied different rules in relation to, say, compensation or rights to compulsory acquisition, formal procedures, or the laws for admitting evidence.

Institutional Structures

It is uncertain how the new CRRPD statute[56] will affect the previous IPCC institutional structure. As noted above, there is no regulatory detail yet

[54] Refer to Regulation 12, Annexure A, Section 5, Article 9.

[55] Regulation 12, Annex A, Article 12. "The terms of this Statute take precedence over any provisions in resolutions or orders or laws that are inconsistent."

[56] The author worked initially from an unofficial English translation of the original Arabic undertaken by IOM, as provided by the UNHCR (email correspondence from V. Patel, UNHCR, dated 28 March 2006). Additional input in relation to this translation was provided by Maher Elhashami of the ARD. The IPCC legislation mentioned here, however, worked from an original English text. It is not entirely clear, therefore, whether changes to some of the working principles (Article 8 of the IPCC Regulation and Article 6 of the CRRPD statute) were always intended to provide different meanings. All that can be said is that comparisons of English versions do imply differences in meanings.

articulated. Unlike the IPCC regulation, which set out a reasonably detailed institutional structure, the CRRPD statute prescribes virtually none. The CRRPD statute simply notes that "(t)he administrative and judicial structure of the Commission shall be formulated by regulation."[57] It appears, however, that the pre-existing institutional structures are still being used,[58] although this is not easy to verify. For the purposes of discussion, therefore, a brief discussion of the IPCC institutional framework is provided here along with specific variations noted under the CRRPD statute.

A number of government ministries had direct or indirect responsibilities in respect of the IPCC. Institutionally, the IPCC formerly lay within the responsibility of the Office of the Prime Minister.[59] The Ministry of Justice had indirect institutional responsibility for judicial and commissioner appointments. In recognition of the close ties between the need for housing and property restitution, Regulation 12 (Annexure A) envisaged responsibility for the development of appropriate housing policies with the Ministry of Displacement and Migration.

The IPCC comprised a number of specialized organs including an appellate division, regional commissions in each governorate,[60] and a national secretariat.[61] The Appellate Commission, as it is now called, is comprised of seven judges.[62] Under the IPCC regulation, judges were required to have had experience in adjudicating property disputes (one of whom must have been nominated by the Kurdistan Regional Government) and would hear appeals from decisions of the regional commissions.[63] There is no longer a

[57] Article 1, III of the CRRPD statute.

[58] Conversation between the author and V. Patel, UNHCR, 30 April 2006.

[59] This is not very clear from the legislation, although Annex B of CPA Regulation 12 notes that the appointment of the head of the National Secretariat may be renewed once by the prime minister (Annex B, Article 4a).

[60] Article 2B, Section 2 of Annexure A to CPA Regulation 12 states: "Regional Commissions established in each governorate in Iraq, and a maximum of three regional commissions in the Kurdistan Regional Government area. The Appellate Division may then establish more than one Regional Commission in a governorate . . . ." For an unknown reason, Article 3 of the Instructions for Operation (Annex B, CPA Regulation 12) does not use the same language in relation to the Kurdistan Regional Government area. That article states that the IPCC shall consist of "... *one or more* Regional Commissions in each governorate or Kurdistan Regional Government area." This implies that more than three regional commissions could be created whereas Annex A (CPA Regulation 12) says a maximum of three.

[61] Article 2, Section 2, Annexure A to CPA Regulation 12.

[62] Article 17, CRRPD statute. This is increased from five under the earlier CPA Regulation 12.

[63] Ibid. Article 3A.

property dispute adjudication expertise required within the Appellate Commission, and two judges must now be nominated by the KRG.[64]

The judges are appointed by the Supreme Council of Judges.[65] The Appellate Commission is an independent review body that is separate from the jurisdiction of the Iraqi Court of Cassation.[66] The Appellate Commission also has the following powers:

1. The appeals relating to decisions and judgments issued by the Judicial Committees.[67]
2. The transfer of a claim from one committee to the other.[68]
3. Disqualification of the chairman of the Judicial Committee.[69]
4. Rejection of judges.[70]
5. Providing advisory opinions.[71]

The regional commissions comprise judicial committees and a secretariat.[72] The judicial committees are responsible for hearing the property claims at first instance.[73] Unlike the Appellate Commission, however, the regional judicial committees are not composed solely of judges.[74] Presumably because of the need to ensure coordination on property issues across government and the need to employ all possible expertise on the critical issue of property rights in Iraq, the legislation permits other experts to serve on judicial committees. These other experts are the director of the Office of the Real Estate Registry (or a representative[75]) and a lawyer nominated by the chairman of the commission, who has at least ten years' experience.[76] These three persons sitting together comprise the judicial committee.

[64] Article 17, CRRPD statute (replacing Article 3A of CPA Regulation 12, Annex A).
[65] Annex B, Article 7a. There is no longer a requirement for each judge to have a deputy – only the chairman of the Appellate Commission (Art 17, CRRPD statute).
[66] CRRPD Statute, Article 17 (also refer to CPA Regulation 12, Annex B, Article 6).
[67] CRRDP Statute, Article 19(a).
[68] CRRDP Statute, Article 19(b).
[69] CRRDP Statute, Article 19(c).
[70] CRRDP Statute, Article 19(d).
[71] CRRDP Statute, Article 19(e).
[72] Although the secretariat is only mentioned in passing in CRRPD Statute Article 33.
[73] CRRDP Statute, Article 10.
[74] CRRDP Statute, Article 9. This is consistent with CPA Regulation 12.
[75] CPA Regulation 12, Annex A, Article 3B. Presumably, this person is the person holding that position in each governorate (similar to IPCC Statute Article 3B).
[76] CRRPD Statute, Article 9.

The IPCC legislation established a "national secretariat" as the administrative organ within the IPCC.[77] Such a secretariat is barely considered in the CRRPD statute.[78] As part of its functions under the IPCC legislation, the national secretariat also included an appellate secretariat whose function was to provide "operational and legal" support for the Appellate Division of the IPCC.[79] The Appellate Division secretariat reported to and took instructions and guidance from the national secretariat.[80] The national secretariat, like the regional commissions, also comprised regional offices to provide support of an operational and legal nature to each of the regional commissions. The regional secretariat reported to and took instructions and guidance from the national secretariat.[81] Aside from providing the staffing and other support for the regional commissions, the Appellate Division, and the regional and appellate secretariats, the national secretariat was responsible for issuing guidelines that set out the procedures to be followed by the IPCC as a whole. It was also responsible for issuing "interpretive memoranda" that were to explain how it would interpret the legislative instructions for operation.[82]

The regional secretariats created within the national secretariat were also to play an important role in the preparation of claims for hearing by the regional commissions established by the IPCC legislation. Through the Regional Commission Clerk's Office,[83] legal advisers prepared for the regional commission a case report in respect of each case. This report summarized the facts of the case, the legal issues involved, and the parties' arguments, and contained a recommendation as to how the case should be decided.[84] The appellate division secretariats, through the Office of the Appellate Division Clerk's Office, were to play an equivalent role in preparing cases for the Appellate Division.[85] However, the status of the national and regional secretariats formed within the IPCC is uncertain

[77] CPA Regulation 12, Annex A, Article 2A and Article 3C.
[78] CRRPD Statute, Article 33, which states: "The Head of the Secretariat may issue regulations to facilitate the implementation of this Statute."
[79] CPA Regulation 12, Annex A, Article 3C.
[80] CPA Regulation 12, Annex B, Article 8.
[81] CPA Regulation 12, Annex B, Article 16.
[82] That is, Annexure B to CPA Regulation 12, and any subsequent instructions for operation. At the time of writing, no official guidelines had been issued by the national secretariat.
[83] Established under Annex A, Article 3C and supported by Annex B, Article 17.
[84] CPA Regulation 12, Annex B, Article 17.
[85] CPA Regulation 12, Annex B, Article 9.

because of the repeal of CPA Regulation 12 and the absence of detail within the CRRPD statute.

Legal Principles

Critical to the operations of the CRRPD (and the IPCC before it) is its jurisdiction to hear and deal with property claims. Rather than being created as a single institution to deal with all claims of a legal nature relating to property, the CRRPD was created with a narrow scope of operations. This is the same as all incarnations of the property restitution and compensation mechanisms "created" since 2003. But there are a number of important distinctions between the IPCC legislation and the mechanism proposed under the CRRPD statute.

Claims Period

Of particular significance to the evolution of a property restitution and compensation model in Iraq is the jurisdictional change, particularly as between the IPCC and the CRRPD. The CRRPD's jurisdiction changed from that of the IPCC. In some respects, the jurisdiction of the CRRPD to hear claims is narrower and in others, broader. The "core" jurisdiction in terms of the period for claims remains unchanged from the IPCC, that is, the period from 17 July 1968 to 9 April 2003.[86] Yet this jurisdiction is narrower than CPA Regulation 12, which also included the period from 18 March 2003 through 30 June 2005, inclusive,[87] during which forced or threatened removals from housing, land, and property also occurred such as the so-called reverse Arabization (secondary displacement) mentioned above. This is a significant limitation to the scope of the CRRPD and is likely mainly to affect potential claims in northern Iraq, which seem, at least anecdotally, to have been the areas that were subject to reverse Arabization. The reasons for the change from the IPCC legislation are uncertain, although it may be the case that Kurdish political motivations were behind this. When queried by the UNHCR about the reasons for the changes, that organization was informed by Iraqi Government representatives that those claims (e.g., in

[86] CRRPD Statute, Article 4.
[87] IPCC Legislation, Article 9B.

relation to property loss during reverse Arabization) were really claims against the CPA.[88] The logic of the argument is not clear, which seems to point to political motivations behind the change.

Despite the removal of the ability for claims to be made after 18 March 2003, the new CRRPD statute appears to broaden the date range by permitting claims before 17 July 1968. The CRRPD may now be able to hear claims back to 14 July 1958, the date of the revolution that overthrew the Hashemite monarchy. Article 37 of the CRRPD statute contemplates an annex that will regulate the operation of "committees" established to hear claims arising from 14 July 1958 to 16 July 1968.[89] However, no annex has been proposed and no committees are known to have been established. Whether such committees will apply the same rules is not yet known.

Types of Claims

The scope of potential claims under the CRRPD Statute is similar to the scope under the IPCC Legislation and includes:

I – Properties that were confiscated and seized for political, ethnic reasons or on the basis of religion or religious doctrine, or any other events resulting from the policies of the previous regime of ethnic, sectarian, and nationalist displacement.

II – Properties that were seized without consideration or appropriated with manifest injustice or in violation of the legal practices adopted for property acquisition. An exception is made in the case of properties that were seized pursuant to the Law of Agricultural Reform, cases of in-kind compensation and appropriation for public purposes and which were actually utilized for public use.

[88] Meeting with V. Patel, UNHCR, Amman Jordan, 30 April, 2006. And such claims against the CPA were not permitted, in accordance with Section 2(1), CPA Order 17 (as revised), which states: "Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process."

[89] Article 37 of the CRRPD Statutes states: "Commissions shall be established in the Commission for the Resolution of Real Property Disputes to consider claims for properties that fall within the jurisdiction of this Statute during the period from 14 July 1958 to 16 July 1968. The work of such committees shall be regulated by an annex to this Statute."

III – State real properties that were allocated to factions of the previous regime without consideration or for a symbolic amount.[90]

The wording appears to have been changed from the former IPCC legislation,[91] although the basic thrust appears to be the same; the jurisdiction of the CRRPD is triggered where there has been a confiscation or seizure of property by the former regime because of ethnic, religious, or nationalist reasons. The exception is when property was taken in accordance with proper agricultural reform under the *Law on Agricultural Reform*. Whether this covers the situation where consideration was paid but it was not "fair" compensation is uncertain. In these circumstances, it may still be possible for a potential claimant to make a claim on the basis that the confiscation was made "with manifest injustice or in violation of the legal practices adopted for property acquisition . . . ."

The nature of property rights claimable is not entirely clear, although it is arguable that, under the CRRPD statute, claimable rights are fewer. Some exclusions remain unchanged between the IPCC and the CRRPD. For example, claims for movable property and interests in movable property (e.g., cars, livestock, and other chattels) were outside the jurisdiction of the IPCC and are also outside the jurisdiction of the CRRPD (although they *may* have been recoverable under separate civil proceedings). But the definition of "real property" has changed under the CRRPD statute. The IPCC legislation dealt broadly with real property claims (including immovable property and assets fixed to immovable property[92]) while the CRRPD statute includes "tangible rights" (primary rights *in rem*)[93] set forth in Article 68(1) of the Iraqi Civil Code.[94] There is a question mark here as to whether this covers all the potential claims to property or only those specifically articulated in Article 68(1) of the Civil Code. If it does not, then there may still be an entitlement to make a claim for the

[90] CRRPD Statute, Article 4.

[91] CPA Regulation 12, Article 9A(3) talks about property "that was confiscated, seized, expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner's or possessor's opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for purposes of ethnic cleansing, shall meet this standard . . ."

[92] CPA Regulation 12, Annex A, Article 9.

[93] CRRPD Statute, Article 2V.

[94] No. 40 of 1959.

restitution of, or compensation for, other forms of property (e.g., movable property or real property rights not covered under Article 68(1) of the Civil Code), but those remedies may lay with another institution, namely, the ordinary courts.

The scope of the jurisdiction under the CRRPD statute has also been broadened to allow the state to "claw back" state property (under Part III of Article 4). This was an area that was not covered by the IPCC legislation. The "sunset clause" on the lodgement of claims has been removed in the CRRDP statute,[95] although a reference to the official CRRPD website indicates that there is a closure on the lodgement of claims on 30 June 2007.[96]

But the ramifications for the jurisdictional change (in terms of the dates of actions triggering a potential claim) in the CRRPD statute do have negative implications, especially in the context of housing for the displaced. Article 10 of the former IPCC legislation stated:

> A. Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by former governments of Iraq prior to April 9, 2003 may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence in the governorate or area from which they came, or (iv) may receive compensation for the cost of moving to such area.

Notwithstanding a number of ambiguities with the former law,[97] it took an important step forward because it potentially did two things. First, it allowed for the creation of circumstances that permit Iraq to comply with its international obligations concerning property rights, adequate housing, and forced evictions.[98] Second, it provided a potential solution to secondary displacement by providing for alternative land, resettlement, or compensation. Under the current CRRPD statute, there is no longer a connection between the property restitution and compensation

[95] This was formerly 30 June 2005, after which the claims would be referred to the "Iraqi courts" (CPA Regulation 12, Article 11A and 11B).

[96] http://www.ipcciraq.org/00_announcement.htm (28 July 2006).

[97] Terms and concepts like "newly introduced inhabitants," "residential property," and "areas that were subject to ethnic cleansing . . ." were vague and confusing. They were not elucidated by regulation by the time that the CPA Regulation 12 was repealed in March 2006.

[98] International Covenant on Economic Social and Cultural Rights (in particular, General Comments No. 4 and No. 7).

mechanism and the development of an IDP policy. The implications for this change remain unclear, although, because there was no clear IDP policy developed that integrated with the IPCC Legislation (Article 10), it seems that the de facto position will remain unchanged.

Procedural Issues

In the context of post-conflict HLP processes, the international community, in developing appropriate procedures, has in other jurisdictions worked to ease otherwise complex and prescriptive procedural and evidential requirements that might technically preclude certain claims. This was the process developed under the IPCC legislation. That legislation was deemed to be paramount where there was a conflict with earlier legislation.[99] By taking this approach, the procedures developed could avoid possible conflict with existing legislation of a procedural nature such as the Civil Procedure Code[100] and the Evidence Code.[101] For whatever reason, however, the CRRPD statute reversed the flexibility provided in the earlier legislation and required compliance with existing, pre-conflict procedures.[102] Also, property rights for the purposes of claims appear to be limited to those set out in the Civil Code.[103] The risk with this reversal is that procedural and evidential requirements could be too burdensome for many claimants to comply with. In a post-conflict environment where documents and other property can be destroyed, along with the death of witnesses, compliance with ordinary procedural and evidential standards can be unfair. Again, it remains to be seen whether the changes from the IPCC legislation negatively impact on property claims.

In an important procedural shift under the new CRRPD statute, the period in which a party to a property claim can appeal has been reduced from sixty days to thirty days.[104] This change can certainly disadvantage

[99] CPA Regulation 12, Article 12.
[100] No. 83 of 1969.
[101] No. 107 of 1979.
[102] Article 25, CRRPD Statute.
[103] Article 68(1), Civil Code, No. 40 of 1959.
[104] CRRPD Statute, Article 14, which states "The decisions issued by the Judicial Commission are final and binding, unless they are appealed before the Appellate Division within a period of 30 days starting from the day following the day the decision is notified or the day it is considered notified."

parties to a property claim, especially in the current situation of insecurity. In addition, it is not yet clear how the appeals process will operate in regard to claims made outside Iraq in accordance with Article 30 of the CRRPD statute, which permits claims to be lodged with Iraqi diplomatic missions in other countries.[105] The reason for the reduction of the appeals period is uncertain at the time of writing but may relate to bringing the appeals process in to line with the Iraq Civil Procedure Code.[106]

Shari'a Law

The CRRPD statute could also have some potentially negative implications with the application of Shari'a law (Islamic law) permitted at the election of a party to a claim.[107] The overarching issue is the potential for women to be disadvantaged in the application of Shari'a law. This could happen in circumstances, for example, where there is a disputed claim to property between heirs. Under Shari'a law, female heirs could receive a lesser entitlement than male heirs.[108] In addition, the application of Shari'a law in the context of the CRRPD statute refers only to the Appellate Commission. It is not mentioned in the context of the work of the judicial committees at first instance. But if the Appellate Commission does apply Shari'a law on request, presumably first instance decisions could be changed by the application of Shari'a law. If there is this potential, then it is not unreasonable to conclude that judicial committees (at first instance) will be influenced by the decisions of the Appellate Committee (indeed, they may be obliged to follow them). This may translate into Shari'a law becoming the default legal position in some circumstances. If this were not the case, then there would be the potential for cases with similar facts to be decided differently.

One of the difficulties with the approach to the application of Shari'a law under the CRRPD statute is that *either* party can request its

[105] Article 30 of the CRRPD Statute states: "The individuals who reside outside the country may submit their claims pursuant to the provisions of this Statute to the branches of the Commission which shall be opened for this purpose or through the Iraqi diplomatic missions."

[106] No. 83 of 1969.

[107] Article 38 states: "The Appellate Commission shall refer to the experts of the Islamic law (Al Sharia'a) and follow their opinions upon the request of either parties of the claim."

[108] Although this is also the case under the Iraqi *Law on Inheritance*.

application. As noted above, where there is a dispute between male and female claimants, it may have negative implications for women. It is arguable that a better balance of justice may have been achieved if Shari'a law was applied only with the agreement of *both* parties.

In terms of developing a uniform and just system for property restitution and compensation, there are also likely to be some difficulties in the application of Shari'a law. In particular, it may be the case that Shari'a law is not entirely uniform, that is, regional variations may apply. A view of the legal position in one area may vary from another. There is no "Shari'a code" as such, and interpreting a definitive legal position may prove difficult. As with much of the new CRRPD statute, it is difficult to assess how its terms will be interpreted and applied. Subsequent analysis of judicial committee and Appellate Commission decisions will be necessary before useful conclusions can be made.

Transitional Provisions

There are a number of differences between CPA Regulation 12 and the CRRPD statute, and the latter contains a number of transitional provisions that attempt to deal with earlier decisions of the IPCC.[109] Importantly, the transitional provisions apply only to decisions relating to the payment of compensation – presumably by the regional commissions of the IPCC. In general terms, therefore, the CRRPD statute does not contemplate a major review of earlier IPCC decisions. This is probably a good thing that also recognizes the limitations on the CRRPD as an institution. Article 34 states that the provisions of the CRRPD statute will apply to certain earlier decisions. These include:

(a) Decisions that do not specify the party who is responsible for the payment of compensation or that do not specify the amount of compensation or that gave the right to one of the parties to refer to the civil courts to request compensation.
(b) Decisions involving valuation of the compensation amounts at the time of confiscation and appropriation or seizure and not at the time the claim is lodged.

[109] CRRPD Statute, Article 34.

(c) Decisions issued rejecting the claims for compensation pursuant to the repealed Regulation 12 of the year 2004.

But the mechanism for how these can be applied is not set out in the new statute and will have to wait for regulatory elucidation. Presumably, the claimants who had decisions falling under the above categories will need to re-apply to the CRRPD to have those decisions reviewed.

In addition to the earlier decisions of the IPCC, further provisions apply to the decisions of the now-dissolved Revolutionary Command Council (RCC) that conflict with the CRRPD statute. Decisions of the RCC that contradict the CRRPD statute are canceled.[110] It is uncertain what the practical implications of this change to the property restitution and compensation process will be. It may be the case that cancellation of earlier decisions provides an avenue for claimants essentially to appeal earlier decisions of the RCC when, previously, there were none.

Applicable Practical Principles

As noted above, the CRRPD statute, like the IPCC legislation before it, contains a number of procedures to be applied when the CRRPD hears cases.[111] It is unclear, however, if the principles are exhaustive, whereas under the IPCC legislation it was clear that the principles were not.[112] Nevertheless, the principles under the CRRPD statute bear some close similarities with the IPCC legislation principles.

As noted earlier, there are differences between the IPCC legislation (originally drafted in English) and the CRRPD statute (which was drafted in Arabic). It may be the case that at least some of the differences are not intended to be substantive (when compared to the earlier version) despite the differences with the words. Despite this, and the fact that many decisions of the IPCC have already been made, there is still uncertainty about the universal interpretation of the principles under the IPCC

[110] Article 36 states: "All the decisions of the dissolved revolution command council and the consequences resulting from them that contradict the provisions of this law shall be void."

[111] CRRPD Statute, Article 6. They are referred to as "examples" under the IPCC legislation, Article 8.

[112] CPA Regulation 12, Article 8 states in part: "The IPCC shall comply with, *but not be limited to*, the application of the following examples when resolving real property claims . . ." (italics are the author's).

legislation and, hence, there is likely to be continuing uncertainty about the application of the "new" principles (known as "procedures" under the CRRPD statute).

In general terms, the remedies available vary according to the circumstances of the original dispossession. These remedies include the following:

- Annulment of the confiscation that violated the law and the original owner is still the register owner.[113]
- Return of property confiscated by the state to the original owner where the state has become the registered owner.[114]
- Return of mosques, places of worship, religious schools, charities, etc., where the properties were confiscated with manifest injustice.[115]
- Return of property to the original owner where that property was acquired illegally by senior members of the former regime.[116]
- Either return of unimproved property to the original owner or payment of compensation to the original owner from the "person" who sold confiscated property to a third party, at the election of the original owner.[117]

[113] Article 6 I: "Annul the decisions of confiscation, seizure and allocation which took place in violation of the adopted legal norms on any property which title deed is still registered in the name of its original owner in the records of the real estate registration."

[114] Article 6 II: "Restitute the ownership of the properties that were confiscated or seized and that are still registered in the name of the State, to its original owner."

[115] Article 6 III: "Restitute the ownership of the mosques, places of worship, religious schools, places of worship (husseiniyat), hospices and charities associations that were confiscated or seized with manifest injustice, to its original owners."

[116] Article 6 IV: "If it is established that some senior members of the former regime or its factions and those who took advantage of their powers, acquired a property in an illegal manner, such property shall be returned to its original owner pursuant to the provisions of this Statute."

[117] Article 6 V: "If the confiscated or seized property was sold to an individual (natural or juristic) and no adjuncts or improvements were made, the original owner has one of the following two options:

(a) Return the title to the property back to his name, and in this case, the current owner shall be compensated the equivalent value of the property at the time the claim is lodged. The party that sold the property after confiscation or seizure shall be liable to pay the compensation.

(b) Compensation for the value of the property, and the party that (first) sold the property after confiscation or seizure shall be liable to pay compensation for the value of the property at the time the claim is lodged."

- In the case of confiscated property sold to a third party that had improvements added, the original owner can elect either to have the property returned or accept compensation, in certain circumstances.[118]
- In the case of confiscated property sold to a third party that was combined with an adjoining property, the original owner can elect to have the property restored (with or without the adjoining property) or accept compensation, in certain circumstances.[119]
- Where the confiscated property was charged with a loan or mortgage, the original owner is entitled to the return of the property without the charge after the payment of the charge by the chargor.[120]
- Claim a sum equivalent to the purchase price, at the time of claim lodgement, from the seller where the confiscated property

[118] Article 6 VI: "If a property was confiscated or seized and subsequently adjuncts or improvements were made to it, the original owner has one of the following two options:

(a) Return the title of the property back to his name and pay to the current owner the value of the existing adjuncts or improvements valued at the time the claim is lodged. In this case, the party that (first) sold the property after confiscation or seizure shall be liable to compensate the current owner for the equivalent value of the property at the time the claim is lodged less the value of such adjuncts or improvements.

(b) Accept compensation equivalent to the value of the property at the time the claim was lodged less the value of the adjuncts or improvements made. In this case, the party who (first) sold the property after confiscation or seizure is liable to pay compensation."

[119] Article 6 VII: "If a property was sold after it was confiscated or seized and subsequently an adjoining property was added to it and both properties were combined, then the original owner has the following options:

(a) Have the original and adjoining property registered back in his name, if it is impossible to separate both properties, provided that such original owner compensates the current owner the equivalent value of such adjoining property valued at the time the claim is lodged. The party that (first) sold the property after confiscation or seizure shall be liable to compensate the current owner for the value of the original property at the time the claim is lodged.

(b) Have the ownership of the confiscated or seized property, without the adjoining property, if this is possible, restituted to his name; have the ownership of the confiscated or seized property registered back in his name and the title to the adjoining property shall remain in the name of the current owner. The party that (first) sold the property after confiscation or seizure shall be liable to compensate for the value of the original property at the time the claim is lodged.

(c) Request compensation if the value of the adjoining property is higher than that of the confiscated or seized property and it is not possible to separate them without damage or high costs."

[120] Article 6 VIII: "If the confiscated or seized property was charged with a loan or a mortgage registered in the real property records, the property shall be returned to the original owner free from any such charge or loan after payment of the mortgage value by the party who seized the property or sold it. Such party can claim the value of the settled mortgage from the mortgagor provided the mortgage was certified before 09/04/2003."

was sold at public auction and re-purchased by the original owner (or an heir).[121]

- Pay compensation to the original owner where the confiscated property is currently used for charitable purposes.[122]
- Return of the property to the original owner where the confiscated property was given to a third party for no, or nominal, consideration.[123]
- Either return property or claim compensation, at the election of the original owner, in certain circumstances, where improvements were demolished (and new improvements constructed) on the property.[124]
- Restoration of the property or compensation in the case of confiscated property where improvements were subsequently added, depending on the relationship between the value of the property and the value of the improvements at the time that the claim is lodged.[125]

[121] Article 6 IX: "If the confiscated property was sold in a public auction and was thereafter purchased by its original owner or his heirs or one of his heirs, such owner or heirs are entitled to claim from the party who sold the property, an amount equivalent to the purchase price at the time the claim is lodged provided that the title to such property be re-registered in the name of all the heirs if it was purchased by one of them."

[122] Article 6 X: "If the confiscated or seized property was utilized for public use or charitable purposes, the government or the party who (first) sold the property shall be liable to compensate the original owner for the value of the property, at the time the claim is lodged provided the property continues to be used for the purposes mentioned."

[123] Article 6 XI: "If the confiscated or seized property was given to another party without consideration or for a symbolic amount, such property shall be registered back in the name of its original owner and the provision of item VI of this article shall apply in case of adjuncts or improvements."

[124] Article 6 XII: "If the property was built prior to confiscation or seizure and then it was sold and subsequently demolished and a new building was built on it, the original owner has one of the following two options:

(a) The transfer of the ownership of the property to his name after he pays for the value of the constructions that were built less the value of the construction that was demolished. The party that sold the property shall be liable to compensate the current owner for the value of the property before its demolition valued at the time the claim is lodged.
(b) Compensation for the value of the property in its condition at the time of confiscation and with its equivalent value at the time the claim is lodged and the party that sold the property shall be liable to pay such compensation."

[125] Article 6 XIII: "a) If the confiscated or seized property was an empty plot not built upon and subsequently constructions were made on such plot and the value of these constructions is higher than that of the plot, the title to the property shall remain in the name of the current owner and the party that (first) sold the plot shall compensate the original owner for its value at the time the claim is lodged. b) However, if the value of the plot is higher than that of the constructions, the property, land and building, shall be returned to the original owner who shall be liable to compensate the current owner for the value of the constructions as they exist at the time the claim is lodged. The party that (first) sold the plot shall compensate the current owner for value of such plot, to be valued at the time the claim is lodged."

- Restoration of property or compensation in certain circumstances, at the election of the original owner, in the case of property confiscated illegally or with manifest injustice[126]

As noted above, there still remain many issues unresolved in the operation of these principles. For example, while purporting to deal with the issue of "value" (which was highly ambiguous under CPA Regulation 12), claimants are still potentially disadvantaged by a process that requires valuation at the time of lodgement of the claim rather than at the time of the decision of the CRRPD.[127] This may not pose such a challenge, however, if the process is reasonably quick. But if there is a lengthy period from the time of lodgement until the time of claim determination, then the issue of when value is assessed could become critical.

There is also a question over properties that are now subject to charges (e.g., mortgages). Strangely, Article 6 (VIII) states that charged property "shall be returned to the original owner free from any such charge or loan *after payment of the mortgage value by the party who seized the property or sold it*" (emphasis added). Why the legitimate owner should have to wait until the essentially improper charging of the property is discharged is uncertain. It can be strongly argued that the issue of the charge should be settled between the chargor and the chargee without the original owner being subject to the settling of an arrangement that he or she had nothing to do with.

[126] Article 6 XIV: "1 – If the property was confiscated in violation of the legal practices or with manifest injustice or was not utilized for public use, then the original owner has the following two options which are:

(a) Return the ownership of the property to his name and in this case, he shall be liable to pay the consideration of the appropriation that he received valued in gold and with the equivalent of gold in Iraqi dinar at the time the claim is lodged.

(b) Get compensated for the difference between the consideration of the appropriation that he received from the appropriation claim and the actual value of the property at the time of appropriation, valued in gold and with the equivalent of gold in Iraqi dinar at the time the claim is lodged before the Commission.

2- If the property was appropriated in violation of the legal practices or with manifest injustice and was utilized for public use, then the original owner is compensated pursuant to the provisions of paragraph (b) 1 of item 14 of this article."

[127] This is the case of claims made under Article 6V, VI, VII, X, XII, and XIII of the CRRPD Statute.

Application of the Process[128]

The powers of the judicial committees and the Appellate Commission are not entirely clear. Of course, the CRRPD, like the IPCC, has the power to determine property claims and the Appellate Commission may issue advisory opinions, too. But how are fair determinations ensured?

Under the IPCC regulation, commissioners were required to disqualify themselves from considering a claim if a commissioner's "impartiality might reasonably be questioned."[129] The same rules also applied to judges of the Appellate Division.[130] While the disqualification of a chairman of a judicial committee or an Appellate Commission judge is still contemplated under the CRRPD statute,[131] the reasons for disqualification are not articulated. The CRRPD is also required to adhere to the principles set out above when considering its decisions. The Appellate Commission (and probably the judicial committees by implication) can apply Shari'a law at the request of a party.[132]

In making its determination, and unlike the IPCC, the decision of the regional judicial committee of the CRRPD appears to be the decision of the chairman (a judge), with the other two members of the committee being able to lodge dissenting opinions.[133] This differs from the approach of the all-judge Appellate Commission, which decides by majority.[134]

The status of earlier decisions of the CRRPD is uncertain, although it is probably the case that those decisions will be instructive while the

[128] As noted above, the new CRRPD statute varies in a number of ways from the IPCC regulation. Some of the processes articulated in the earlier regulation (and subordinate legislation) have not been re-articulated. For this reason, the discussion below includes elements of the IPCC process that may still be applied. Specific changes included in the CRRPD statute are included.

[129] CPA Regulation 12, Annex B, Article 20a. Article 20b goes on to provide a nonexclusive list of circumstances in which impartiality might reasonably be questioned.

[130] CPA Regulation 12, Annex B, Article 13.

[131] CRRPD Statute, Articles 19 and 20.

[132] CRRPD Statute, Article 38.

[133] CRRPD Statute, Article 13, which states: "The Judicial Committee shall hold its session to consider the claim and the chairman of the Committee shall issue his decision resolving the claim pursuant to the Statute. The two other commissioners or one of the two is entitled to record his dissenting opinion on a separate sheet in the event he has an opposing opinion."

[134] CRRPD Statute, Article 18.

decisions of the Appellate Commission will be binding on judicial committees.[135]

In terms of the legal procedures to be applied by the CRRPD (and unlike the IPCC), the commission 88 will follow, at least in part, the procedures under the Civil Procedure Code and the Evidence Law.[136]

In hearing claims, judicial committees hold at least one pleading session. It may also conduct site visits and listen to statements it considers necessary to resolve the claim.[137] The judicial committee may also consider claims in the absence of parties and on the basis of documents presented in that event. The processing of the claim is not affected by the absence of one of the parties.[138] If a decision is made in the absence of a respondent to a claim, the respondent is entitled to object to the decision of the judicial committee within ten days of being notified of the decision. The judicial committee itself, and not the Appellate Commission, will consider the objection and review its initial decision accordingly.[139]

The powers of both the judicial committee and the Appellate Commission are not entirely clear from the CRRPD statute. Where a party is absent, the judicial committee is entitled "to issue the appropriate decision to resolve the claim . . . ."[140] The legislation is very general in this regard, and it is assumed that the judicial committees and Appellate Commission will have powers akin to the courts and therefore be able to make the usual orders and compel witnesses.

[135] Under the IPCC regulation, the IPCC could look to the earlier decisions of a regional commission in deciding cases, but it was required to accept any decision of the Appellate Division as binding on any resolved issue of law or fact (CPA Regulation 12, Annex B, Article 50). Any decision of the IPCC was also required to be, by implication, in writing that set, among other things, the legal basis for the decision (CPA Regulation 12, Annex B, Article 51). Similar rules applied to the Appellate Division (CPA Regulation 12, Annex B, Articles 57 and 58).

[136] CRRPD Article 25, which states: "The real property claims shall be adjudicated pursuant to the provisions of this Statute, and the provisions of Procedural Civil Law number 83 of the year 1969, as amended and Evidence Law number 107 for the year 1979, as amended shall govern matters not provided for in the Statute."

[137] CRRPD Article 10.

[138] CRRPD Article 11, which states: "The Judicial Committee shall consider the claim in the event the parties are not present, after verification of the accuracy of the notifications and it is entitled to issue the appropriate decision to resolve the claim in light of the documents and attachments that are presented. The claim shall not be deferred and cancelled in case one of the parties was present."

[139] CRRPD Article 12.

[140] CRRPD Article 11.

Details of the claim process have not been clearly articulated under the CRRPD statute at the time of writing. There are procedures outlined, but they do not have the same level of detail as in the former IPCC regulation. There are also some notable changes.

The claims process, such as it is, is set out in Section IV of the CRRPD statute. These can be contrasted with the process under the IPCC regulation set out in Figure 1. The new process permits natural or juridical persons to make a claim[141] to the commission on the prescribed form.[142] At this time, the commission will request the Department for Real Property Registration to report on the property concerning transactions made on it.[143] On the assumption that all conditions are met in respect of the claim, the commission will then record the claim, open a file, allocate a unique number to the file, and issue a filing receipt.[144] It must be noted that this is an unusual process, and it varies from that prescribed under the former IPCC regulation. Under the new process, a claim seems to be "provisionally" filed until it is reviewed. After it has passed the requisite tests it is given a file number. This raises a couple of problems. First, from a practical perspective, it raises the issue of how all the claims will be organized before they are finally given a unique file number. Without a process that provides a record at lodgement, there is a risk that potential claims will be lost or even interfered with. It also raises the issue of how the commission will find the persons who lodged the claim in the first place either to reject the claim or to issue a receipt. More importantly, from a procedural perspective, however, is the power that this preliminary administrative process gives government functionaries in the process before a claim can be considered by the judicial committee. Arguably, under the current process there is too much power with administrators to reject claims before they have a chance to be properly heard. It is suggested that this may lead to unfairness in the system and injustice.

When a claim is accepted, it is recorded electronically and the data centralized at the commission's headquarters.[145] The branch of the commission where the claim is lodged is obliged to notify the respondents to

[141] CRRPD Statute, Article 7II.
[142] CRRPD Statute, Article 7III.
[143] CRRPD Statute, Article 7IV.
[144] CRRPD Statute, Article 7V.
[145] CRRPD Statute, Article 7VI.

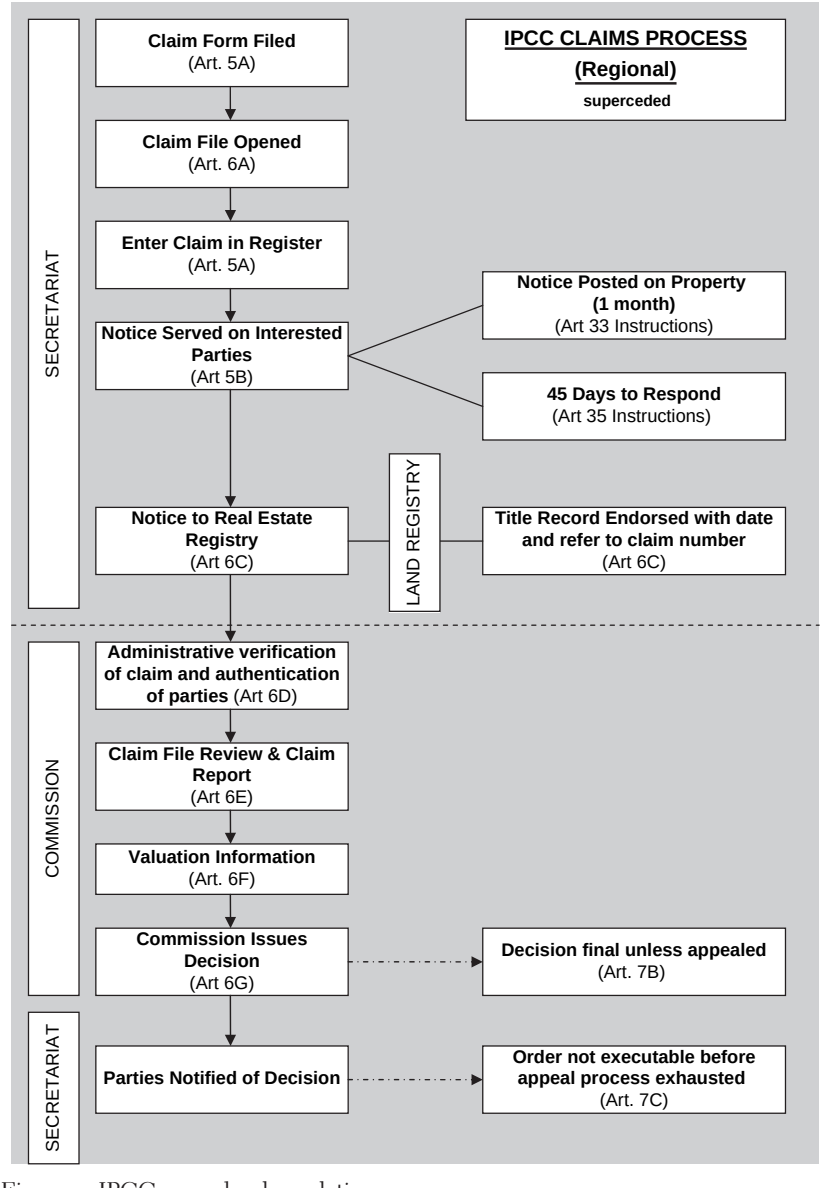

Figure 1. IPCC procedural regulations.

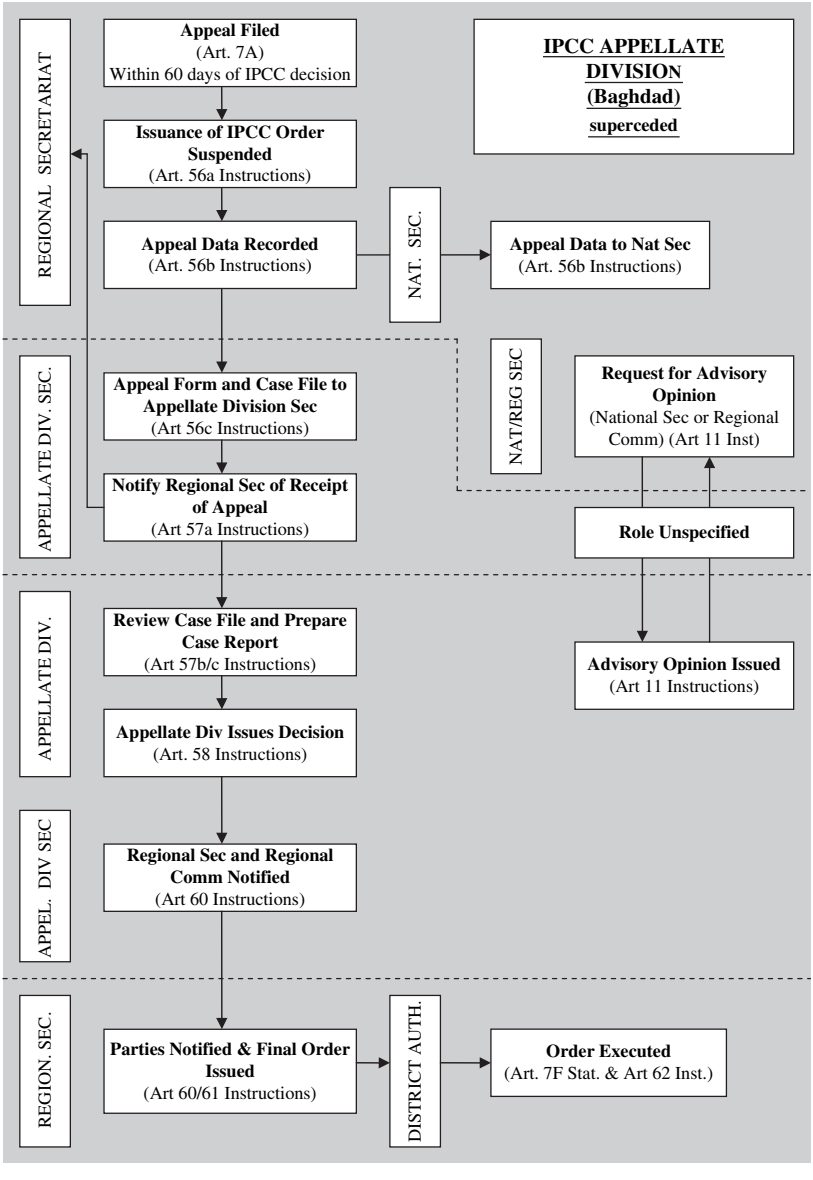

Figure 1. (*Contd.*)

the claim, and those respondents must respond within fifteen days from the date of notification.[146] This is a particularly short time for a respondent to respond to a claim in a proper manner, or at all, given the security situation at the time of writing. It is substantially shorter than the period specified under the IPCC regulation, namely, forty-five days.[147] It may be particularly difficult for expatriate Iraqis to respond properly in the prescribed time.

The responses to claims are entered into a computer[148] and claims are transferred to the relevant judicial committee for consideration.[149] All decisions for the judicial committee are then entered onto the computer.[150]

The process for appeals, unlike that for initial claims, is not articulated under the CRRPD statute. This is distinct from the reasonably detailed process set out under the IPCC regulation and associated instructions. Because of the lack of detail provided for appeals, it is unclear how they will operate procedurally. Nevertheless, for the sake of discussion, the process that applied under the IPCC regulation is set out below. It may be the case that this process will provide a basis for subordinate regulations on appeals procedure under the CRRPD statute.

An appeal from the decision of the IPCC regional commission, as noted above, could be made within sixty days (now thirty days under the CRRPD statute[151]) from notification of that decision. Any order arising from that decision is then suspended pending the appeal. The regional secretariat then forwards the appeal papers to the Appellate Division secretariat (the Appellate Commission under the CRRPD statute).[152] The Appellate Division secretariat processes the appeal and forwards it to the Appellate Division of the IPCC for review. The Appellate Division decides the appeal and the secretariat advises the parties of the outcome.[153] Under

[146] CRRPD Statute, Article 7VII. It states: "The branch of the Commission shall notify the respondent of the subject of the claim to allow him to respond within a period of 15 days starting from the day that follows the day he is notified or considered as notified according to the response form prepared by the Commission."
[147] Article 35 of the Instructions under the IPCC Regulation.
[148] CRRPD Statute, Article 7VIII.
[149] CRRPD Statute, Article 7IX.
[150] CRRPD Statute, Article 7XI.
[151] CRRPD Statute, Article 14.
[152] CRRPD Statute, Section VI.
[153] Although this process is not articulated in the CRRPD statute.

the IPCC regulation, this decision is final.[154] Although the position is probably the same under the CRRPD statute, it is not clear.[155]

Summary and Lessons Learned

HLP restitution in Iraq is a strongly economic, cultural, political, and emotional issue. It is a potentially divisive issue. Yet, if allowed to be implemented in an appropriate way that respects human rights and promotes justice, it can act as a tool for reconciliation.

The process is not a simple one. Nor is it one that can be resolved quickly. The IPCC and now the CRRPD have started the process of dealing with property claims. While a substantial number of claims have been decided, the effectiveness of the restitution and compensation institution for providing justice, however, lays just as much with the political will of stakeholders as it does with the legal and administrative frameworks that underpin it. Nevertheless, the legal and administrative frameworks provide an important starting point for justice, security, and the rule of law in Iraq.

From the above discussions and the context of attempting to provide practical guidance on the development of post-conflict HLP strategies, it is useful to consider a summary of positive and negative factors associated with the strategies applied in Iraq to date. Positive aspects in attempts to develop human rights–based HLP strategies include the following:

- CPA enacted legislation acknowledging the urgent need to deal with HLP issues reasonably early in the post-conflict environment.
- The CRRPD statute has significant buy-in from the Iraqi Government.
- Decisions are being made by the IPCC/CRRPD.
- The "sunset clause" for the lodgement of claims with the IPCC (now the CRRPD) has been removed, allowing more freedom with the lodgement of claims in terms of timing.

[154] CPA Regulation 12, Annex A, Article 7D.

[155] CRRPD Statute, Article 21. "The appellate commission may approve decisions and judgments either without modification or they may amend or replace them entirely. When the commission amends or replaces decisions or judgments, these shall be binding on all parties."

On the other hand, a number of negative elements were (and continue to be, in some cases) associated with the development of appropriate human rights–based HLP strategies. These include the following:

- In the evolution of the process, there was not initially appropriate input from and dialogue with Iraqi specialists and international experts.
- The necessary capacity building of staff and development of institutional infrastructure was not in place, in a sustainable way, before the CPA completed its mission, leading initially to a breakdown in the operations of the IPCC.
- The IPCC institution itself has been the subject of intimidation both politically and literally, particularly in the Kirkuk area.
- The claims process has at times been interfered with by IPCC administrators rejecting potential claims at the point of lodgment.
- The marketing of the IPCC and the claims process was, at least initially, poor and did not gain the support of regional governments.
- Post–April 2003 dispossesseds have been excluded from the claims process.
- There is now no obligation on the MoDM to develop a policy to deal with those who lost property rights as a result of displacements occurring after 18 March 2003 (secondary displacement).
- The claims process is now arguably harder, because the flexibility associated with not tying the evidential and procedural processes to existing laws has been repealed under the CRRPD statute.
- The time for appeals has been reduced from sixty days to thirty days, potentially working unfairly against claimants, especially those not resident in Iraq or in the area in which the claim was made.
- The time for responding to claims has been reduced to fifteen days, potentially limiting parties' abilities to respond properly or at all.
- The application of Islamic law (Sharia'a) at the request of *either* party (as distinct from *both)* may work unfairly against women, in particular, as well as potentially establishing regional differences in interpretation.
- Enforcement of IPCC/CRRPD decisions is likely to remain problematic because of institutional capacity and security issues.
- Initial and continuing lack of security throughout the country has negatively affected the efficient operations of the IPCC.

In more general terms of HLP issues in Iraq, there is still no coordinated policy to deal with the development of an effective housing strategy addressing IDP needs as well as Iraq's international obligations under the international covenants. The MoDM is still in the process of developing an effective strategy to deal with IDPs, and the general insecurity within the country is impacting on the daily lives of millions of Iraqis. Minorities in central Iraq, in particular (e.g., Palestinians and Roma), are still the subject of threats and evictions. Sectarian violence continues to drive further movement of peoples from their homes. While there are some positive elements, the overall situation in terms of HLP rights, security of land tenure, and compliance with Iraq's international obligations to those ends remains highly uncertain. Likewise, the effectiveness of institutions like the IPCC and CRRPD are yet to be fully assessed (and are unlikely to be for some time).

Nevertheless, there is still an opportunity to reflect on the process so far. Given the difficult experiences in Iraq, what further lessons can be learned for property restitution/compensation in the post-conflict environment? The main ones are mentioned here:

- Time must be taken to develop the institutional and legislative frameworks in a careful manner with the view to legal consistency and sustainable governance. The political and financial commitments to the process must be long-term.
- There is a critical need for international organizations to coordinate their approaches to the provision of assistance in the development of the appropriate legal and institutional frameworks for a property restitution/compensation mechanism. In this regard, it is important for an organization like the United Nations to nominate a "lead agency" that will be responsible for the provision and coordination of advice on these issues (while seeking support from other organizations where appropriate).
- There are inherent difficulties in developing government institutions in a period of declining security. Therefore, the pace at which the institutional framework is expanded across the country must be carefully considered. To do otherwise means to create a process that cannot be adequately implemented, leading only to dissatisfaction, disappointment, and mistrust within the community. Consideration

could be given to "piloting" the process before expanding it throughout the country.

- There must be a strong commitment to the application of international legal principles such as the right to return, without exception. Nevertheless, forced evictions of occupants for the purposes of permitting return, without alternative housing policies in place to deal with secondary displacement, should be avoided.
- The development of an appropriate restitution/compensation mechanism should involve the active engagement of experts, ordinary persons, and national and international organizations.
- The effectiveness and sustainability of an HLP restitution system would likely be enhanced if it exists within the context of a broader reconciliation strategy and not merely as an isolated "mechanism."
- There should be strong coordination between HLP institutions in both legislative and policy development.
- There should be undertaken a survey of the potential claims (a difficult process probably requiring many "educated guesses") to establish likely institutional resource requirements as well as an overview of the types of claims likely to be received.
- Appropriate resources (training, capacity building, public advertising, etc.) should be made available for the operations of a functioning and sustainable restitution/compensation mechanism. These resources will need to be available for the long-term and not just for "start-up" purposes.
- While the expectations of the community must be taken into account when designing a property restitution/compensation mechanism, these expectations need to be balanced against realistic and sustainable outcomes. Therefore, the scope of the process needs to be clearly articulated to potential claimants to prevent false expectations arising.
- Systems for monitoring and evaluating institutional performance should be legislated so that performance monitoring is a public (transparent), legal requirement. There may not always be the capacity (or willingness) within government for this to happen. In these circumstances, contracting the process to external experts may make this obligation easier to accomplish while also giving the process some independence in the view of the wider community.

- The role of the property restitution/compensation institution should be widely disseminated to the public to encourage participation in the process (*all* claims should be *encouraged*, not discouraged).
- The ability for the government to reject claims should be prescribed and limited. Public desires for justice will only be realized when there is evidence that the government is willing and able to apply a prescribed and transparent process to *all* claims.
- Any process must capture marginalized and/or vulnerable groups (women[156] – and children – are almost invariably especially disadvantaged groups in conflicts and in their aftermath) and ensure that their rights are protected.

These are hardly new insights. But they need to be restated because the recurring issue of property restitution/compensation in the post-conflict environment has been treated in dramatically different and inconsistent ways by the international community in the recent past (compare the differing UN positions taken in Kosovo and East Timor). Now is the time for the consideration of a more unified policy approach to this critical human rights issue. In this context, therefore, it is heartening to see that United Nations agencies (led by the UNHCR and UN Habitat), with the support of international NGOs, are now considering this very issue.[157]

An HLP restitution/compensation process can be an important tool in maintaining peace and stability in the post-conflict environment as well as contributing to the restoration of basic human rights and perceptions of justice. Let us hope that a post-conflict Iraq can build on the lessons learned from its own experiences (and those of others) as part of the return to the rule of law, in particular, respect for HLP rights, among other human rights, which, for many Iraqis, have been too long absent.

[156] In this context it is acknowledged that "women" is a collective term that comprises a number of subcategories, such as women heads of household, women as mothers, and others.

[157] In November 2004, in Geneva, the author was privileged to be invited to an Experts Meeting hosted by UNHCR for the purposes of developing a unified policy approach to HLP issues in post-conflict environments based on a paper prepared by Scott Leckie.

8

Sudan's Comprehensive Peace Agreement

An Opportunity for Coherently Addressing Housing, Land, and Property Issues?

Paul De Wit and Jeffrey Hatcher

Introduction

Sudan has captured the world's attention for hosting the African continent's longest standing violent conflict. The war between Sudan's northern and southern regions has resulted in some 2 million deaths, the internal displacement of approximately 4 million citizens, and an estimated 400,000–600,000 refugees.[1] The Comprehensive Peace Agreement (CPA) between the Government of Sudan and the Southern opposition was signed in 2005, but the return of displaced people is still incomplete and has not yet taken on its expected massive proportion. Secured access to land, property, and natural resources is a pre-condition for the return of millions of people displaced by war. Failure to provide for this may jeopardize the ongoing conflict transformation and peace consolidation efforts.

Southern Sudan is one of the least developed areas in the world. Basic infrastructure and services are not found in most regions of the country, and even the national and state capitals require considerable infrastructure improvement.[2] There is an urgent need to attract investment in rural and urban areas of Southern Sudan to boost the recovery and development process. There are some signs that this process will go along with

[1] Most refugees from Southern Sudan fled to Uganda, Kenya, and Ethiopia.

[2] On several occasions the GoSS has moved the national or state capitals. A state official from Eastern Equatoria remarked that moving the capitals (e.g., Rumbek to Juba; Torit to Kapoeta; Gongrial to Kuajok) is a deliberate GoSS strategy to benefit from the improved infrastructure brought along by the international community.

efforts to privatize land and natural resources to promote investment. This may jeopardize the return of internally displaced people (IDP) and refugees, especially when they find out that their former assets are no longer available. In early post-conflict situations there is always a danger that investment efforts have a speculative, extractive character with the ordinary citizen in the losing end. The chaotic post-conflict environment is indeed very conducive for land- and property-grabbing, especially in the absence of the original owners and/or users who may still be displaced. Such a situation of opportunistic asset stripping and grabbing may lead to renewed violence, especially in the case where access to land, property, and natural resources was a major cause for the conflict itself.

This chapter focuses on housing, land, and property rights as part of the peace transformation process between North and South Sudan.[3] The attention paid to Southern Sudan in no way negates the seriousness of frequent human rights violations regarding housing, land, and property (HLP) rights in the rest of Sudan.[4] While HLP issues are highly relevant to any analysis of the current Darfur conflict, the United Nations response to HLP issues in that region and the struggling peace agreement (with serious implications for HLP rights) are not yet mature enough for an assessment.[5] On the other hand, the longer international response to the North–South conflict and the subsequent activities in Southern Sudan on HLP issues allows for a more detailed analysis of their structure and effectiveness.

The chapter will begin by presenting an overview of the Sudanese context in terms of access to land, conflicts over land, ecological imperatives, and the social dynamics of land use. This will be followed by a presentation of the

[3] Contemporary Sudan presents a complex environment regarding housing, land, and property rights. Sudan's size and socio-political diversity present considerable challenges related to housing, land, and property issues. The country presents three distinct (though interrelated) environments: (i) post-conflict in Southern Sudan (with brief episodes of open, violent conflict); (ii) conflict in many parts of Darfur despite the ongoing efforts to reach a peace agreement legitimated by all major forces and the population; and (iii) emerging conflict in Eastern and Northern Sudan with some outbreaks of violence.

[4] See, for example, the protest letter from COHRE (2006) to Sudanese President Bashir concerning the forced evictions in Khartoum (often IDPs from Southern Sudan) and near the Meroe Dam.

[5] Insecurity, political sensitivity, and institutional confusion in Darfur have hampered several UN initiatives to address HLP issues. Despite this situation, the FAO and UNDP held a series of seminars in the three Darfur states on land rights, the FAO held a series of trainings for UN and INGO staff on land tenure in Darfur, and UNMIS has begun preparing to support the Darfur Land Commission established by the DPA.

North–South civil war, paying special attention to the role HLP issues played in fueling and expanding the conflict. An analysis of the Comprehensive Peace Agreement (CPA) and the protocols that led up to the final agreement is then presented. The return process that hesitantly followed the CPA and its implementation will then be reviewed, including a look at the national and the southern land commissions. The chapter will then delve into the UN's involvement in the peace process and the subsequent operations related to assessing HLP issues, and actions on their findings to secure or restitute HLP rights and promote peace consolidation from the HLP perspective. A thorough assessment on the impact of the actions will set the scene for reflection on how to improve the coherence and efficacy of the UN response.

The Southern Sudan case presents a number of specific perspectives from which HLP rights need to be addressed. Firstly, the conflict has probably had a greater direct impact on rural areas than on urban areas in terms of displacement. Southern Sudan has few cities (e.g., Juba, Wau, Malakal, and three major garrison towns),[6] and other towns have a rural character, particularly those in former Sudan People's Liberation Movement (SPLM) areas.

Secondly, land access and other issues related to land and natural resources seem to constitute greater challenges at this moment than housing or property issues. It is characteristic that rural populations in Southern Sudan seem to value their planted fruit trees more than their residential infrastructure, which is often erected from local materials and more easily replaced than full grown and productive trees. Abandoned property in southern towns was not always of a high standard and was often of a temporary nature or under construction when abandoned. Undeveloped urban plots may constitute a significant part of lost property. In some cases, rights to residential plots and property expire when displaced people return.[7]

[6] Garrison towns were towns located in Southern Sudan but occupied and administered by the Khartoum-based Government of Sudan.

[7] Since the enactment of the Unregistered Land Act in 1970, residential plots are in principle only allocated on a leasehold basis. The duration of the leaseholds is variable according to the class of the residential plot. Class 3 plot leaseholds in Wau town, for instance, have a leasehold period of twenty years, which implies that returnees who left around the beginning of the war in 1983 will have expired leaseholds upon return after the signing of the CPA. Section 572 of the Civil Transaction Act provides, however, that "impossibility of user by reason of force majeure or act of nature does not amount to an extinction of the usufruct right" unless it is so provided in the instrument creating the usufruct. If displacement due to war can be considered as a reason of *force majeure*, the leasehold right may not have expired.

Thirdly, Sudan is the home to societies that continue to rely heavily on customary norms, regulations, and institutions to deal with a wide number of issues – especially land and natural resources. The populations of Southern Sudan are often characterized as some of the most traditional on the African continent.[8] Moreover, the Government of Southern Sudan (GoSS) plans to rely heavily on existing customary structures such as customary law, traditional leadership, local institutions, and traditional conflict resolution mechanisms.

Sudan – An Environment Conducive to Displacement and Confrontation

Structural conflicts between different land users in Southern Sudan have persisted for centuries. Often latent for years until they flare up, conflicts over land present a constant concern. Undermined livelihood strategies are often a major cause for dispute and conflict in rural areas. Reduced access to a variety of natural resources on which rural people depend, degraded resource bases, and curtailed mobility in certain production systems such as pastoralism – in short, reductions in the number of options available for achieving a sustainable livelihood – are often at the root of conflict.

A Food and Agriculture Organisation–International Fund for Agricultural Development (FAO–IGAD) study[9] identified a multitude of land and natural resource disputes between different groups in Southern Sudan at the time of the field work in 2001. These included confrontations between agro-pastoralists over the use of pastures and water along the Bar El Arab (Kir) River, conflicts related to the competition for grazing land and water (Bahr El Jebel, Lau swamps, and Bahr El Arab) between the major southern ethnic groups, that is, Dinka and Nuer (eleven cases were reported). During the 1990s, conflicts between Nuer and Dinka groups destabilized large parts of Bahr El Ghazal, the Sobat river area, and the Bor region, with its violence inducing massive displacement. Similar conflicts over grazing and water resources between different Nuer

[8] Prof. Kwesi Kwaa Prah, Director of the Centre for Advanced Studies of African Society, Cape Town, South Africa (De Wit personal communication).

[9] P. de Wit, 2001, *Legality and Legitimacy: A Study on Access to Land, Pasture and Water in Sudan*. Report prepared for IGAD by FAO, Rome.

groups have been documented in detail, such as the Lou-Jikany conflict.[10] The major reasons for Sudan being a country susceptible to structural land and natural resources related disputes will be discussed below.

A Need for Access to Land and Natural Resources for Livelihoods and Economic Development

In Sudan, agriculture remains the main source of livelihoods and the major sector of the economy, constituting 45 percent of the gross domestic product (GDP), with more than 87 percent of the population dependent on it.[11] Notwithstanding the increasing urbanization in Southern Sudan, the rural economy continues to play a central role in the recovery and medium-term development process. This strong reliance on the use of land and natural resources requires access to land and natural resources. These different land uses by different rural groups tend to overlap.

At the same time, the state depends heavily on the exploitation of land and natural resources for promoting the economic development of the country and its different regions. Oil exports account for about 80 percent of the total exports. Large tracts of land were evacuated from their original population to open the concessions.[12] The development of mechanized farming schemes in the transitional areas between North and South Sudan has similar consequences. Rural land users are cut off from their resource base, major pastoral routes were blocked,[13] and sometimes

[10] UNICEF, 2000, *The Lou-Jikany conflict: A Situation Analysis and Procedures to Resolve the Conflict*, UNICEF, Khartoum.

[11] FAO Work Plan 2006.

[12] Human Rights Watch (2003) reports on the basis of information from the UN, WFP, and others that an estimated 174,200 civilians remain displaced as a result of the conflict in the oil fields in Western Upper Nile and Unity State.

[13] In an unpublished FAO report, Abdelbasit (2006) reports that "in Southern Kordofan, more than 44 seasonal migration routes spanned by pastoral communities have been blocked by mechanized schemes and have permanently been lost to agricultural capitalist leaseholds due to increased expansion of demarcated and undemarcated mechanized farming from 300,000 fedans (in 1969) to 4.5 million fedans in 2006. The situation is even worse in the Blue Nile State (in 2006) where three out of the eight major trekking routes have been closed down by large-scale agricultural leasehold owners. For the remaining four nomadic routes, along the east bank of the Blue Nile River, continuous threats of confiscation of livestock apprehended in the game reserve not only pose serious hazards to pastoral peoples, but also have made herders and shepherds realize that they could save their wealth from random confiscation only if they resort to the 'barrel of the gun'. This is a potential threat to peace in the Blue Nile State."

people were evicted from their ancestral lands. Efforts to transfer grazing land in mechanized farms continue,[14] and they take on enormous proportions in some areas (Blue Nile, Southern Kordofan).

Macro-economic state objectives for using land and natural resources do not always coincide with rural household–level land-use strategies, leading to stiff competition for access to land and natural resources between different classes of land users, and resulting invariably in disputes and conflicts.

Hostile Ecological Environment, Adapted Livelihoods, and an Imperative for Mobility

The ecological environment can be described as being in a nonequilibrium state where systems are event-driven. Rainfall is erratic and unpredictable in some areas, whereas flooding in other areas requires adapted dynamic strategies of land use (such as flood recession cultivation). The quality of the natural resource base for agricultural production is variable in space and time, with vast tracts of infertile sand or permanent swamps alternating with high-value key resources such as fertile alluvial lowlands and highlands, dry season grazing places, and pockets of more fertile soils.

Rural household strategies have adapted in time to this nonequilibrium environment and developed a system with a high degree of mobility. Nomadism, pastoralism, and shifting cultivation constitute the core of the rural economy and are well adapted to the environment.

Some systems are spread over hundreds of kilometers (the Yirol and Bor Dinka trek routes), while others have a more localized character (the normal transhumance systems of, e.g., Twic Dinka). Pastoral- and agropastoral–based livelihood systems always lead to contact and eventually confrontation between different land users, frequently breaking along ethnic lines, because livelihood systems are organized along social organizational structures.

A better management of mobility is one of the key issues that need to be addressed to consolidate the peace and to reduce the multitude of disputes and conflicts between different land users.

[14] M. Bellini, A. Saeed, and Y. El Tayeb, (forthcoming), *Land Tenure and Land Use in Eastern Sudan*. FAO, Khartoum.

Social Organization and Cultural Diversity

Social organization in all communities is strongly tribally embedded, with social structures being characterized by significant segmentation. A rich pallet of tribal groups makes Sudan a truly "multicultural" society. In Southern Sudan social groups are structured in a strongly horizontal fashion; generally there is no overseeing paramount authority (one of the exceptions is the Shilluk kingdom). In this structure, building alliances between segments is required and constitutes a continuous and dynamic process. Different segments manage different territories over which customary management institutions have decision-making powers on land allocation and land use. Community members have also established strong rights over these resources or their use. The dynamic and sometimes volatile character of the alliances might easily turn into confrontations and disputes over land, including border conflicts over management territories, land use by outsiders (visiting pastoralists), and lack of clarity on land management rules.

Conflict Catalysts

Over the past decades, the intrinsic tensions and incidents occurring when managing the livelihood mobility are influenced by a range of events that may exacerbate conflict, including:

- Drought resulting in a degraded and shrinking natural resource base.
- Arbitrary interference of the government in customary land use and management due to policies and legislation that favor state interests only.
- Access to arms to settle local disputes.
- Undermined customary leadership, making land management less efficient and unaccountable.
- Lack of infrastructure and access to technology, making local development increasingly difficult.
- Administrative weaknesses and legal vacuums to deal with land management.
- Some customs and cultures have a direct negative impact on land and property rights.

The North–South Conflict

Since Sudan's independence in 1956, its political landscape has been illustrated by military *coup d'états*, short-lived ceasefire agreements, and unsuccessful peace negotiations yielding little progress.

The prolonged conflict between Northern Sudan and Southern Sudan can be portrayed as two periods of one civil war with an interval of peace between 1972 and 1983. The first period began before Sudan gained independence from the British. During most of the colonial rule Northern and Southern Sudan were administered as separate entities, giving the culturally different Southerners some comfort. Shortly before independence, however, the British merged the two administrative areas as part of a larger plan for the Middle East, causing Southerners to begin to mistrust the Northerners' commitment to a federal state after independence.

In August 1955, members of the armed forces mutinied in Torit, Eastern Equatoria, as a reaction to the perceived future marginalization, resource-grabbing, and Islamization by the North (Arabic had become the language of the administration and Northerners held many of the administrative positions in the South). This group of guerrillas, known as the Anya-Nya movement, expanded out of Equatoria into the Upper Nile and Bahr al Ghazal. The movement was, however, hindered by its own internal divisions. At the same time, the first post-independence government in Khartoum was suffering from its own internal weaknesses. A military coup overthrew the first president of Sudan and the new president, Ibrahim Abboud, governed until social unrest led by Islamist movements forced him to institute a series of interim administrations. Abboud was finally toppled by another military coup led by Gaafar Nimieri in 1969. Nimieiri entered into negotiations with the then-unified umbrella Southern Sudan Liberation Movement (SSLM), and in 1972 the Addis Ababa Agreement was signed, giving Southern Sudan limited autonomy. It is estimated that more than 500,000 people died in the first seventeen years of the conflict.

Foreshadowed by the government's deployment of troops to oil-rich Bentiu in Southern Sudan, the peace agreement was broken in 1983 when Nimieri declared a state of emergency in order to apply Shari'a law throughout the country. Southern troops again mutinied, this time led by John Garang, and the war between the North and South raged on. In

1985, the Khartoum government was overturned by the Umma Party's Sadiq Al-Mahdi following a popular uprising. Al-Mahdi's efforts at a peace agreement with the rebels, now known as the Sudanese People's Liberation Army, were brought to an abrupt close when yet another coup took place in June 1989. This coup was led by the National Islamic Front headed by General Omer Al-Bashir and was motivated by the Umma Party's motion to freeze the imposition of Shari'a law. Bashir's government banned political parties and purged thousands from the police, army, and civil administrations. In 1991, the government introduced a harsh penal code with elements of Shari'a law and transferred all non-Muslim judges from the South to the North. Again in 1991, the SPLA took a hit when the supportive Mengistu regime in Ethiopia fell. The war continued throughout the 1990s, with the SPLA controlling Equatoria, the Upper Nile, and Bahr al Ghazal and the Government of Sudan (GoS) controlling major garrison towns such as Juba, Malakal, and Wau. Factions within the SPLA formed their own groups and some signed peace agreements with the GoS.

International efforts for peace were channeled through the Inter-Governmental Authority on Development (IGAD). The peace talks between the SPLA and the GoS began in 2001 while the conflict persisted, even if less intensely. After a series of interim agreements, the Comprehensive Peace Agreement was signed on 9 January 2005.[15] Total estimates on deaths and injuries produced by the war are over several million, as are the number of displaced.

The causes of the war between North and South Sudan have been documented as being economic, religious, social, tribal, and political.[16] At the beginning of the second civil war in 1983 three attacks by the southern movements well illustrate that control over land and natural resources is "the" major cause of the war between North and South Sudan. The analysis below is inspired by the coverage of the three events in Suleiman (2005).[17]

[15] The death of John Garang in a helicopter accident in July 2005 brought about fears over the stability of the CPA, but the new President of Southern Sudan, Salva Kiir, has been able to continue the efforts for peace that Garang began, even if in a more low-key manner.

[16] International Crisis Group, 2005, *Garang's Death: Implications for Peace in Sudan*, Africa Briefing No. 30, 9 August 2005; International Crisis Group, 2005, *The Khartoum-SPLM Agreement: Sudan's Uncertain Peace*, Africa Report No. 96, 25 July 2005.

[17] M. Suleiman, 2005, "Ecology, Politics and Violent Conflict," in *Respect, Sudanese Journal for Human Rights Culture and Issues of Cultural Diversity*, Issue No.1, November 2005.

Chevron Oil Installations

Oil was discovered in the South in 1978, and control over it became a contentious issue between the Southern Autonomous Region and the GoS. A plan to locate a pipeline through the North and to build a refinery in Red Sea State, and consequently the risk that all profits and jobs would shift from the South to the North, ignited major animosity between the two sides.

In 1974 Chevron was the first foreign company to be granted an oil concession in Sudan and was developing the first oil field in Unity State in 1983. In early 1984 a Southern separatist group attacked the Chevron facility and killed some workers, causing the operations to be suspended. The expansion of oil development since the beginning of the 1990s has been accompanied by violent forced displacement of the agro-pastoral Dinka and Nuer people from their traditional lands atop the oilfields.

Earth Digger at the Jonglei Canal

In 1978, the construction of an immense canal along the Nile to drain the swampy homelands of some 1.7 million Southerners including Dinka, Shilluk, and Nuer was started as a joint Sudano-Egyptian project along with the French CCI company. The local population was very much aware of what these changes would bring: no access to dry-season grazing lands, alien people settled on their land, grazing routes cut off, and severely reduced access to natural resources. The project's immense earth-excavating machine was one of the earliest targets of the SPLA.

Tractors of Absentee Landlords in Blue Nile State

Blue Nile State is part of the transitional belt where, during the 1960s, large tracts of land were allocated at almost no cost to an urban-based Northern elite to implement an ambitious program of "mechanized farming" mainly for the production of sorghum and sesame. These farms cut across cattle migratory routes, and local populations had to be evicted, at times through the use of force, from locations demarcated for mechanized schemes. To overcome these exigencies, the government issued, in 1970, the Unregistered Land Act, proclaiming all land as government-owned

land if not registered before, giving the GoS full legal powers to alienate customary lands. Thus the germs of disputes were sewn. In the early 1980s a number of farms were attacked and tractors destroyed by Southerners who claimed their land back.

As Suleiman shows, these three events clearly highlight the trend of the South defending its resources from the business class and the GoS. The SPLA soldiers and members of the SPLM believed that the war was in large part about the exploitation of resources. While during the conflict the perception of the war has been shifting to other differences between the North and South (religion, culture, ethnic, policies, legislation), the inherent cause is beyond any doubt access to land and natural resources, their management, and the distribution of the benefits derived from their exploitation.

The conflict itself was not restricted to a purely North–South confrontation. At different stages Southern fractions and segments of ethnic organizations allied[18] with Northerners, probably as part of the search for different alliances to survive in a hostile environment.

The Peace Process

Toward the Comprehensive Peace Agreement

There have been many attempts to bring peace to Sudan by neighboring states, concerned donors, other states, and the parties themselves. It is, however, the regional peace initiative under the auspices of the IGAD, initiated in 1997 with the support of the United Nations, that ultimately led to the Comprehensive Peace Agreement in 2005.

During the process of negotiation, a Working Group for Peace was formed (late 1999) by the IGAD Partner Forum (IPF) under the chair of the United Nations Development Programme (UNDP), comprised of member governments of the IGAD, partner governments from Europe and the European Commission (EC), and specialized agencies of the UN. This working group initiated the design of a framework to assist the international community in planning for a future peace in Sudan. The

[18] Different Nuer militias from Southern Sudan allied with the GoS on several occasions.

framework was considered an important reference for the following peace talks held in Naivasha under the auspices of the IGAD.

The framework document drafted in 2002 and presented in Rome in April 2002 was drawn from two main sources. Firstly, a series of technical research projects was commissioned on selected themes believed to be critical in the post-conflict period, including landmines, demobilization, internally displaced people, land tenure and access to land and natural resources, food security, and information/data stocktaking. The studies on land, internally displaced people, and food security were commissioned to the FAO, and technical reports were prepared.[19] Second, a comprehensive grassroots consultation on future peace was undertaken with representative groups from war-affected areas controlled by the GoS, the SPLM/A, and the Sudan People's Democratic Front (SPDF). The amalgamation of these resources with additional inputs from the GoS, SPLM, and the IPF working group members in the region shaped the outline of the planning framework. The document presents a range of themes and issues that were to be addressed. Access to land and land ownership was a core theme. It recommended the establishment of working groups and contains recommendations for immediate and post-conflict follow-up action on land access organized around a series of action clusters.

Without any doubt, these early assessments by the UN put land more firmly on the agenda of the peace negotiations. It confirms the importance of these assessments, even when there is no strong national will to proceed with such an exercise. From 2002 onward the Sudan peace process made significant progress; milestones of the process with a special emphasis on land issues can be summarized as follows:[20]

The Machakos Protocol (20 July 2002) lists eleven agreed-upon principles including the acknowledgment of the right to self-determination by the people of South Sudan. The structure for a semi-autonomous government in the South for a six-year period was provided (Interim Period). This is preceded by a six-month Pre-Interim Period within which a National Constitution for the six-year period was agreed. Before the end of the six

[19] Supra, note 9.

[20] This section draws on the analysis of N. Marongwe and P. Palmer, 2004, "Struggling with Land Reform Issues in Eastern Africa Today," *Independent Land Newsletter*, www.oxfam.org. uk/what_we_do/issues/livelihoods/landrights/africa_horn.htm.

years, Southerners will vote in a referendum to determine whether to establish a fully independent country or remain part of the greater Sudan.

The Agreement on Wealth Sharing (7 January 2004) is largely focused on the distribution of revenue from oil and gas exploitation. It set aside for later agreement the question of subsoil, surface land, and natural resources ownership. It provides for two independent land commissions at the national and Southern Sudan levels,[21] to report to their respective presidents. The commissions have the same powers, including the right to receive and resolve land claims.

The Wealth Sharing Agreement (WSA) is the most important reference for addressing HLP issues in the CPA. Specific provisions on land commissions were later included in the Interim Constitutions. Additional efforts to expand on HLP issues in the Interim Constitution such as USAID's strong lobbying efforts in 2004–2005 have not succeeded.

The Protocol on Power Sharing (26 May 2004) provides for a decentralized government with regard to the national, Southern Sudan, regional state, and local levels. The protocol includes provisions for the Government of National Unity, a Southern Sudan government, and state-level governments. The protocol also lays out sixteen human rights, including equal rights between men and women. Land is not mentioned except in the annexes on powers – the control over all (unspecified) national lands and national resources is vested at the national level.

The Protocol on The Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Niles States (26 May 2004) refers to two of the three key contested areas, which lie between the North and South. These two areas contain important oil and gas enterprises run by foreign companies, with GoS often as partner. They also include many thousands of hectares of large-scale mechanized, rainfed, and irrigated farm schemes (variously initiated since the 1950s and largely under lease to Northerners or agencies sponsored by the GoS). These two areas will also establish their own State Land Commissions, each of which will have the same powers laid out for the National and Southern Sudan Land Commissions. The protocol specifically allows the two commissions to review existing land leases and

[21] While draft legislation has been developed for both the National Land Commission (NLC) and the Southern Sudan Land Commission (SSLC), neither has yet been established. The five commissioners of the SSLC were, however, appointed by presidential decree on 27 June 2006.

contracts, examine the present criteria for land allocations, and introduce changes.

The Protocol on the Resolution of Abyei Conflict (26 May 2004) refers to the third main contested area, now defined as Abyei County, comprising the nine Ngok Dinka chiefdoms. Residents of this area will be citizens of both the North and South during the Interim Period and will cast a separate ballot simultaneously with the referendum for Southern Sudan to decide if their county becomes part of Bahr el Ghazal, which is in the South, or retains special administrative status in the North.

The Comprehensive Peace Agreement (9 January 2005) includes the above-mentioned protocols and additional agreements on outstanding issues that remained after the Machakos protocol and has provisions such as an agreement on a permanent ceasefire and security arrangements implementation modalities during the pre-Interim and the Interim periods (31 December 2004). The parties decided to set up a six-and-a-half–year interim period during which interim institutions would govern the country and international monitoring mechanisms would be established and operationalized.

It must be emphasized that an embryonic framework for addressing HLP issues is an integral part of the CPA. Whereas no major decisions on land and property ownership are made in the agreement itself, it sets the scene for discussion and decision-making during the Interim Period.

The Return Process and the Sudanese Perception of Housing, Land, and Property Issues

A number of diverging views seem to exist on the return process of IDP and refugees itself and on the possible consequences this may have on HLP issues in Southern Sudan.[22]

Pre-CPA Perceptions on Return

Before the signing of the CPA, most of the SPLM cadres anticipated, as members of a rural movement, that all displaced people would voluntarily

[22] P. De Wit, 2004, *Land and Property Study in Sudan: Scoping of Issues and Questions to Be Addressed*, Project OSRO/SUD/409/HCR, FAO, Rome.

return to their rural areas of origin. Local communities would welcome their returned "brothers and sisters" and provide these with the necessary assistance to restart their life. It was asserted that chiefs and leaders using customary law would deal with eventual disputes. These leaders have always been able to resolve disputes without turning to litigation.

Return or resettlement in urban areas was considered as an unlikely scenario, notwithstanding the fact that significant numbers of IDPs come from towns and cities.[23] During the war, rural IDPs also occupied non-owned plots in towns in the absence of their legal owners, sometimes fellow IDPs or refugees. These new occupants have expressed that they are not going to leave land now in their possession when the owners return.[24]

The phased return of IDPs and refugees, for instance in border areas of Equatoria, was also considered as a fait accompli for policy-makers and government officials. Under the present conditions it is not realistic to imagine that IDPs will first vacate the land they occupy so that refugees can recover their property. On several occasions these IDPs are occupying a plot under administratively legitimate conditions through the temporary property transfer process. There are also cases of leaseholds having expired when people return; these returnees thereby lose their right to reclaim the property. These phenomenon all result in problems for returning refugees to re-occupy their abandoned property.

Post-CPA Situation

Following the signing of the CPA, the perception of the authorities on the occurrence of contentious HLP issues gradually changed. An overall feeling at the central level remained that "in rural areas, chiefs and leaders use customary law to successfully settle all disputes." In most cases, they are indeed able to resolve disputes without turning to litigation. The main strengths are that the customary settlements are widely accepted and functioning.

[23] It is estimated that some 21,000 Juba citizens took refuge in rural areas after military actions.
[24] Interviews in Yei town, De Wit (2004).

Local authorities, however, perceive that HLP disputes do occur in rural areas.[25] There is also an acknowledgment and some evidence[26] that HLP disputes in urban areas occur more than was anticipated some years ago.

There is factual evidence now that "it is the assumption of the GoSS that a large proportion of returning IDPs ultimately will settle in urban areas in pursuit of urban services and employment opportunities." This places a significant pressure on the GoSS and the ten state capital administrations to create basic physical and administrative conditions for the integration of these while also recovering from many years of physical deterioration and underdevelopment. This statement differs substantially from previous ones and seems to acknowledge that not all displaced people will return to their rural areas of origin.

It is clear that there are more disputes occurring than was anticipated some years ago. It is also true that the number of disputes has not yet taken on enormous proportions. A number of reasons for this exist. The return process of IDPs and refugees has not yet taken on a massive scale. High numbers of IDPs presently settled in northern Sudan, and especially Khartoum, are not yet ready to return to the South. High numbers of refugees stay in the camps where they have access to basic services, which are still missing in their areas of origin. The need for addressing HLP issues seems, at least to date, to be localized in a number of hotspots, like border towns in the Equatoria states. This may, however, quickly change when the return process takes on a different dimension, and when private/public investment starts to take place in urban and rural areas.

[25] "There are many cases of land disputes in rural areas that seem to contradict earlier perceptions that there should not be many problems for allocating land to returnees," unpublished report on the Land and Property Workshop, Rumbek, May 2006. FAO, Khartoum.

[26] Quantitative evidence is not readily available, but it is known that local courts now entertain significantly more cases on HLP issues than some years ago. Qualitative evidence on the occurrence of disputes is included in monitoring reports of the UN Protection Working Groups. The following statements made by local administrators when participating in a Land and Property workshop organized by FAO/UNHCR/NRC are also self-explanatory. "In urban areas, statutory courts deal with land disputes, however, they are being overwhelmed and not able to deal with land issues consistently and systematically. The judiciary does not have the capacity to deal with the caseload brought in by the peace process. A wider portfolio of conflict resolution mechanisms has to be put in place, prioritizing traditional mechanisms and procedures (elder's councils, neighbours, witnesses, informal evidence"....."With the return of many IDPs and refugees, problems are expected if their land is occupied or if they wish to be allocated a plot in an area from which they do not originate. In particular, women who would opt to return to a rural/urban area from which they do not originate will face major problems."

Grassroots perceptions on such challenges do not always seem to reach policy-makers, or if they do, the latter do not respond to these. The military background of some SPLM and GoSS officials makes it more difficult for them to respond to grassroots worries. It must also be acknowledged that since the signing of the CPA, enormous pressure has been put on these officials by the UN to meet tight deadlines and respond to a multitude of other obligations set by different agendas. This all happens in an era where former military leaders are sensitizing their respective constituencies to acquire some degree of political power. It also seems to be characteristic in post-conflict situations in Africa[27] that a chaotic status quo on HLP rights is more favorable for an emerging elite to transfer military into economic power by accessing and consolidating tenure over assets such as land, productive infrastructure, and real estate.

The CPA Implementation Process

All concerned parties have made historic progress with the implementation of the CPA. The Interim National Constitution (INC) has been signed, the Government of National Unity (GoNU) appointed, the Government of Southern Sudan (GoSS) installed, a Transitional Legislative Assembly for Southern Sudan appointed, the Southern Sudan Constitution approved, and a Joint National Transitional Team (JNTT) established to follow up on the donor's assistance flow after the Oslo conference. Of the six major commissions included in the CPA, the Petroleum Commission, the Judicial Service Commission, and the Fiscal and Financial Allocation and Monitoring Commission have been established. These achievements prove that the parties have embraced the CPA as a genuine mechanism for durable peace in Sudan.

The unimplemented sections of the CPA are more significant for gauging the progress made on addressing access to land, land ownership, and claims over land, property disputes, and violated HLP rights. There has been a serious delay in the implementation of the Abyei Protocol, and the Land Commissions have not yet been established.

[27] FAO, 2006, *Access to Rural Land and Land Administration after Violent Conflicts*. Land Tenure Study 8, FAO, Rome.

Abyei Protocol

Under the Abyei Protocol, a Boundary Commission was mandated to determine the exact border of the nine Ngok Dinka chiefdoms in central Sudan, which were transferred from Bahr El Ghazal Province in South Sudan to Kordofan Province in the North during colonial rule in 1905. This is a clear case of identifying and eventually restituting access rights to land between the involved parties, that is, the Dinka from the South and the Baggara from the North. The Abyei area is contained within one of the oil blocks, and there has been significant exploration and drilling of oil wells in the area. As established in the protocol, the residents of Abyei will vote on remaining in the North or joining the South. If they vote to join the South and the South subsequently gains complete independence, then the oil wealth of Abyei will be completely Southern. The issue of defining the boundary (and thereby the oil allocations) is, therefore, extremely sensitive.

The Boundary Commission was composed of five representatives each from the GoS and the SPLM, as well as five international experts. The two sides could not agree, and the final decision fell to the experts. In July 2005, the experts reached a unanimous decision and drew the boundary farther north than the GoS delegation had anticipated, and farther south than the SPLM had hoped for. Although the decision was supposed to be final and binding, the GoS rejected the findings, and no action has been taken to implement the ruling so far. In an interview with the *Sudan Tribune*,[28] Douglas Johnson, an independent expert on the commission, confirmed that Abyei is a potential flashpoint that might hamper the implementation of the CPA.

Land Commissions

Six months of discussions on the Sudan land question in Naivasha, Kenya, were not enough to reach an agreement on substantial issues related to land rights as part of the peace process. The different positions on land ownership seem to have constituted the major hurdle to an agreement.

[28] *Sudan Tribune*, 8 August 2006, http://www.sudantribune.com/spip.php?article15913&var_recherche=douglas%20johnson.

Whereas the former GoS has vested land ownership in the State through the Unregistered Land Act (ULA) of 1970, the SPLM policy statement declares, "Land belongs to the people/communities."[29]

The only point of compromise reached during the discussions was that land commissions would be established, reflecting the political setup of the country during the six-year Interim Period: a national land commission, a South Sudan land commission, and two state land commissions for Southern Kordofan and Blue Nile. Addressing land claims and disputes using arbitration, and making decisions on future land ownership (land tenure reform), presents some of the major tasks ahead.[30]

In the aftermath of the Pre-Interim Period and after the establishment of the first set of foundation-laying institutional pillars (the vice-presidency, the Interim National Constitution, and the South Sudan Interim Constitution), the creation of the six CPA commissions[31] was high on the agenda of the GoNU. To facilitate the startup of the reflections on the mandate, functions, and structure of the commissions, the British Government's Department for International Development (DFID) made substantial funds available to UNDP to facilitate, in agreement with the JNTT, the preparation of draft legislation for the establishment of the commissions.

For each of the six commissions a commission preparatory team (CPT) was appointed. The now defunct CPTs were composed of two members representing the interests of the National Congress Party (NCP) and two from the SPLM. Each CPT was to work for one month to draft the legislation for the establishment of each commission. The UN participated in this process through, among other things, the provision of technical assistance to the CPT of the NLC by the FAO.

The law drafting process lead by the CPT, which was supposed to last only one month before handing over the draft to the National

[29] There are, however, signals that the GoSS is backing away from this statement in favor of government ownership.

[30] The specific mandates of the land commissions are yet to be established by law. It is, however, clear that the parties are very reluctant to divert from the original proposals on mandate as they are reflected in the WSA. The latter gives the land commissions a strong mandate for arbitrating land claims and some responsibilities for land tenure reform, legal review, and policy development.

[31] The Civil Service, Land, Petroleum, Judicial, Human Rights, and Fiscal and Financial Allocation and Monitoring Commissions.

Constitutional Review Committee (NCRC), became lengthy and unpredictable, with increasing difficulties for external agents to provide any advice and technical assistance. Actually, from December 2005 onward, the drafting process has become increasingly slow and self-contained. By August 2006 only a draft was available, which still needs to be endorsed by the NCRC and ratified by Parliament.

Since March 2006, the GoSS has initiated the preparatory work to establish the SSLC, which has concurrent powers to the NLC. By August 2006, draft legislation to establish the SSLC was prepared but no SSLC was yet functional. Presidential Decree 56/2006 of June 2006 appoints the five SSLC members and instructs them to establish the commission.

There are no clear reasons known to the international community for such a delay. In a more generic way one could conclude that the delayed implementation of the Abyei Protocol and the absence of an established NLC may be indicators on the degree of political willingness and commitment of the national instances to timely deal with land and property claims. It may also be that these sensitive issues need more reflection by the governments that may have underestimated the challenges ahead. In this case a delay in the establishment of the land commissions may be fully justified.

UN Involvement in the Implementation of the Peace Process

Apart from its specialized agencies, which have always supported the different parties by providing relief to the conflict situation and initiating a number of activities that concretely contributed to facilitating the peace process,[32] the UN deployed two special missions to specifically deal with the North–South peace process.

United Nations Advanced Mission in Sudan – UNAMIS

To intensify the peace efforts and build on the momentum of the progress made with the signing of the WSA and the PSA, the Security Council established a special political mission to Sudan by Resolution 1547 (11 June

[32] In April 1989, Operation Lifeline Sudan was created to provide basic humanitarian provisions for the populations remaining in Sudan during the conflict.

2004). The United Nations Advanced Mission in Sudan (UNAMIS) facilitated contacts with the parties concerned and prepared for the introduction of an envisaged peace support operation. A multidisciplinary team was assigned to the final stages of the peace talks in Naivasha, to provide support and to ensure complementarities between the outcome of the negotiations and preparations for an expanded operation in Sudan.

In addition, the Special Representative of the Secretary-General (SRSG)– appointed head of UNAMIS worked along with the United Nations Country Team (composed of heads of agencies) to develop a unified structure to ensure that the UN was in the best position to support the implementation of the CPA. The UNAMIS focused on developing and refining operational plans on the ground, as well as preparing for the deployment of military and civilian personnel and providing effective forward support to the mission.

United Nations Mission in Sudan – UNMIS

Immediately after the signing of the CPA, the UN Security Council, by its Resolution 1590 of 24 March 2005, decided to establish the United Nations Mission in Sudan (UNMIS). The mandate of UNMIS has a monitoring, supporting, and facilitating character, with a major task of providing support to the implementation of the Comprehensive Peace Agreement. More concrete tasks include:[33]

- **(i)** to monitor and verify the implementation of the Ceasefire Agreement and to investigate violations;
- **(ii)** to liaise with bilateral donors on the formation of Joint Integrated Units;
- **(iii)** to observe and monitor movement of armed groups and redeployment of forces in the areas of UNMIS deployment in accordance with the Ceasefire Agreement;
- **(iv)** to assist in the establishment of the disarmament, demobilization, and reintegration program as called for in the Comprehensive Peace Agreement, with particular attention to the special needs

[33] UN Security Council Resolution 1590 (S/RES/1590 (2005)).

of women and child combatants, and its implementation through voluntary disarmament and weapons collection and destruction;

(v) to assist the parties to the Comprehensive Peace Agreement in promoting understanding of the peace process and the role of UNMIS by means of an effective public information campaign, targeted at all sectors of society, in coordination with the African Union;

(vi) to assist the parties to the Comprehensive Peace Agreement in addressing the need for a national inclusive approach, including the role of women, towards reconciliation and peacebuilding;

(vii) to assist the parties to the Comprehensive Peace Agreement, in coordination with bilateral and multilateral assistance programs, in restructuring the police service in Sudan, consistent with democratic policing, to develop a police training and evaluation program, and to otherwise assist in the training of police;

(viii) to assist the parties to the Comprehensive Peace Agreement in promoting the rule of law, including an independent judiciary, and the protection of human rights of all people of Sudan through a comprehensive and coordinated strategy with the aim of combating impunity and contributing to long-term peace and stability and to assist the parties to the Comprehensive Peace Agreement to develop and consolidate the national legal framework;

(ix) to ensure an adequate human rights presence, capacity, and expertise within UNMIS to carry out human rights promotion, protection, and monitoring activities; and

(x) to provide guidance and technical assistance to the parties to the Comprehensive Peace Agreement, in cooperation with other international actors, to support the preparations for and conduct of elections and referenda provided for by the Comprehensive Peace Agreement.

Other responsibilities include:

- facilitating the voluntary return of refugees and internally displaced persons by helping to establish the necessary security conditions;
- cooperation in the mine action sector;
- contribute to protect and promote human rights;
- coordination of civil protection efforts.

The mission is headed by the SRSG and two deputy special representatives (DSRSG). The SRSG is also mandated to coordinate all activities of the UN system in Sudan, to mobilize resources and support from the international community for both immediate assistance and the longer term economic development

The link between UNMIS and the "traditional" UN agencies, funds and programs in Sudan, is secured by a DSRSG who at the same time is a UN Resident (RC) and Humanitarian Coordinator (HC). He is responsible for implementing strategies, policies, and programs in support of humanitarian assistance; return, recovery, and reintegration; development coordination; and protection, among other issues. He heads the UN County Team and ensures that the respective arms of the UN presence in Sudan work in a complementary manner.

There is a UN Sudan Unified Mission Plan, which outlines the structure, strategy, and activities of the UN in post-conflict Sudan. The work of the UN in Sudan in the humanitarian, recovery, and development clusters is carried out by the UN agencies, funds, and programs through the UN Country Team (UNCT). The primary operational planning tool is the annual UN Workplan for Sudan, which outlines the strategic priorities, and a comprehensive program intended to pursue them.[34]

Whereas housing, land, property, and natural resources issues were at the heart of the conflict and continue to present a major challenge, no specific provisions are foreseen within UNMIS to deal with these issues.[35] Practice has shown that within UNMIS some attention on land was given under the governance area, more specifically the rule of law and civil affairs clusters. This engagement is, however, more due to the interest that the staff has given to these topics than to a structured intervention. The humanitarian and development assistance (including relief, rehabilitation, and reconstruction [RRR] and protection) have so far only marginally considered the importance of addressing land, property, and natural resources issues in their respective activities.

[34] The UN Workplan for Sudan is a planning tool that outlines all UN-planned activities for each year according to a set of clusters (e.g., food security and livelihoods, infrastructure, health, etc.). The activities are divided into two groups: humanitarian, and recovery and development.

[35] The best indicator is that the words "housing," "land," or "property rights" do not appear in the 2005 UN Sudan Unified Mission Plan, a 73-page document.

Within the UN system a number of specialized UN agencies, including the FAO, UNHCR, UNDP, and UN-Habitat, have been dealing with HLP issues so far, but without much support from the mission itself.

Assessment of Major Housing, Land, and Property Intervention Needs by the UN

Studies and assessments that more concretely identify needs to address HLP issues as part of a peace consolidation process are few. With an emphasis on the UN activities, the following require further attention.

Joint Assessment Mission – JAM

Shortly after the signature of the CPA, the World Bank and UNDP (on behalf of the international community) were asked to co-lead a Joint Assessment Mission (JAM) for Sudan to provide an assessment resulting in a common framework on the rehabilitation and transitional recovery needs through 2010, oriented toward the Millennium Development Goals. The assessment was organized around eight main clusters, including institutional development and capacity-building; governance/rule of law; economic policy and management; and productive sectors including agriculture, basic social services, infrastructure, livelihoods and social protection, and information systems.

The JAM was managed by a Core Coordinating Group comprising representatives from the GoS and the SPLM, as well as representatives of the UN system, the World Bank, the IPF, and IGAD. The JAM exercise has resulted in a concrete plan of specific activities including a budget, which was presented to an international financing conference held in Oslo shortly after the CPA signature (9–10 March 2005). A second conference was held in Paris (11–12 April 2006) mainly to evaluate the progress made on the implementation of the CPA and its financing through the JAM. The JAM stands out as the most complete and authoritative needs assessment for Sudan.

While HLP issues are a cross-cutting issue, touching at least five of these clusters, concrete support activities can only be found under the governance/rule of law cluster. The JAM considers land policy reform as the only explicit land-related activity in Sudan for the six-year interim periods.

It projects a budget of US$500,000 for the GoNU and US$300,00[36] for the GoSS over this period. If the presently identified budget is a proxy for the importance that the GoSS, the GoNU, and the international community including the UN give to address one of the root causes of the longest armed conflicts in Africa for the next six years, then it is highly unlikely that the efforts will produce tangible results.

The recovery and development projects of the JAM are being funded through national resources, two Multi-Donor Trust Funds, and through bilateral funding. The UN system and the GoSS/GoNU use the JAM as the main framework for pledging recovery and development funds, while at the same time it is considered by donor agencies and bilaterals as the sole basis for the development of an assistance strategy and the allocation of funds. It is thus not surprising to see that little financial resources for addressing HLP issues have been disbursed so far. This level of funding is disproportionate to the acknowledgement that land issues were at the heart of the conflict.

It must be emphasized, however, that the aggregated budgets for the three contested areas (Blue Nile, South Kordofan, and Abyei) total a sum of US$5.5 million for the same period. The reason for this apparent inconsistency is not clear, though heavy lobbying by the Southern Sudan USAID team may have contributed to this.

FAO – UNHCR Land and Property Studies

As a follow up to the FAO-IGAD study from 2001 that put land on the agenda of the peace talks, the FAO resumed its activities in 2004 in partnership with UNHCR and the Norwegian Refugee Council (NRC). A study on land and property[37] was conducted covering Southern Sudan in the context of the return of IDPs and refugees. Without being all-inclusive, it still stands out as a solid reference for the GoSS, the UN, the international community, and other stakeholders including NGOs to devise a consolidated action plan. The study identifies the existence and

[36] The JAM is budgeted at US$7.9 billion for the first two and a half years, until the end of 2007. For this same period the budget for the GoNU and the GoSS to deal with land policy is, respectively, US$0.4 million and US$0.2 million. The total budget for land policy over the six-year period is US$0.5 million and US$0.3 million, respectively.

[37] Supra, note 22.

nature of HLP disputes in urban areas,[38] and it highlights a number of issues that may require specific attention.[39]

More recent information not only confirms the occurrence of HLP disputes, but also indicates a trend that disputes are on the rise, and that it is increasingly difficult to immediately respond to the grievances. Whereas the nature of the disputes is well known, the dimension of these disputes, their impact on the return process and on the implementation of the peace agreement are, however, less clear to date.

The situation in rural areas is different with HLP problems when displaced people's returns are apparently minor in nature.[40] Restitution of land and property in rural areas is governed by a rich pallet of customary rules and regulations that are specific for different ethnic groups. The customary leaders seem to adequately deal with the return of IDPs and refugees to their places of origin.

Problems occur, however, with the use of the customary law itself, especially for ensuring the rights of women. The customary rules and regulations that deal with land access, holding, and transfer are almost invariably discriminatory toward women in Sudan. The Interim Constitution provides equal rights to women and men, but recent FAO-UNHCR organized workshops on HLP rights show that there is still a wide gap in certain areas (Aweil) between the guiding principles of the Interim Constitution and local customs. When it is expected that up to 50 percent of the returnees may be women-headed households, there are real problems to be expected.

[38] The following HLP disputes were identified: IDP occupation of abandoned refugee property; sale of nonowned plots by occupants; possession of property by military, public bodies, and newcomers; reallocation of nonexpropriated property by local authorities; and temporary allocation of abandoned land and property turning into "de facto" ownership.

[39] Issues of special interest that were identified include the role of state and local administrations as a party to HLP grievances voiced by returnees; difficulties in dealing with the military when they are part of an HLP dispute; grievances addressed by women who find that they do not encounter a fair and equitable solution to their HLP problems; the delivery capacity of land administrations that are in shambles and are subject to severe pressure to deliver conditional services to well-informed, connected, and privileged clients added to the multilayered character of the disputes; and the overall lack of available information (cadastral and land register data, maps, official documents) to support a land and property restitution process.

[40] This of course does not include the numerous cases in which people have been forcibly evicted from areas covered by oil concessions, mechanised farmlands, and other lands that have been allocated by the GoS. These require specific attention, probably one of the tasks of the different land commissions.

A second challenge is the protection of the community land rights acquired through historic possession according to customary norms and practices. These rights are fragile and put under pressure by outsiders such as returnees, emerging private sector actors and land speculators, elite groups that seek access to productive assets, and the military. This problem takes on an important dimension in the context of the opening up of rural areas for private investment, a process that may be accompanied by some form of future land privatization. On the basis of this problem assessment the FAO-UNHCR identified a selected number of priority HLP interventions, including:

Restitution of Land and Property Rights

Restitution of land and property rights, especially in urban areas, is essential for meeting the expectations of returnees, and consequently for consolidating the peace process. Perceptions of injustice are perpetuated if these needs are not translated to the local level. Security of tenure is an element of the basic rights lost during the conflict.

Provision of New Land for Settlement of Returnees and Displaced People

Apart from the fact that Southern Sudan needs to drastically increase its housing stock, which has always been neglected, the provision of new land for settlement is especially relevant in the following cases:

- Returnees who are not able to re-occupy their lost land and property;
- Returnees who require new land as an outcome of a restitution case or compensation in kind; and
- Returnees who want to settle in urban and peri-urban areas other than their residential place before the displacement.

Improved Land Dispute Resolution Through Different Mechanisms

The nature of land and property disputes generated by the return process of IDP and refugees requires a three-tier approach: specialized land tribunals, regular courts, and customary authorities.

Major claims, including claims against public institutions, will probably require submission to specialized land tribunals. The different land commissions, as indicated in the WSA, can take up this task. It must also be remembered that the Southern Sudan judiciary is severely understaffed.[41] The SSLC can alleviate the workload of the courts and, most importantly, provide fast and cost-effective solutions to people whom on average cannot afford the cost of a judicial proceeding and who cannot wait for months, let alone for years, to see certainty on their rights unveiled. A balance must be sought, by deciding which claims need to be filtered to the judiciary and have a full judicial process in ordinary courts, and which will have to be addressed by the land commissions. A third layer of the disputes will be dealt with by the local customary authorities, out of court, as has been the case for years, using local rules and regulations.

Participatory Land Use Management as Part of the Conflict Transformation Process in Rural Areas

It will be a challenge to find a way to transform the conflict in rural areas into a situation where returning IDPs and refugees are integrated into existing social structures, where different social groups share natural resource use, and where there is space for an emerging private sector to develop their businesses using these same resources. The land rights issue should be seen in a broader context of recovery and development.

Securing community land rights by identifying the boundaries over which communities have land and natural resources management rights is an essential step. Communities also need to be assisted with preparing simple land and natural resources management plans. Emerging but still weak community management institutions require support so that these are in a better position to take responsibilities and accountability for local land management.

[41] In an interview with Paul De Wit in August 2004, an SPLM judge indicated that for the whole of Southern Sudan there were only thirty-nine trained judges. In May 2004, another judge confirmed that the New Sudan Law Society had fifty-four registered members, with only ten having High Court experience. The Presidential Decree 43/2006 of 24 June 2006 nominated forty-nine County Court Judges of the First Grade for Southern Sudan.

UNDP

The UNDP assessment[42] on the needs for intervention in HLP issues is included in the *Southern Sudan Urban Appraisal Study (August 2005)* conducted along with the Development Planning Unit of the University College London. The study assessed the status of the current towns in Southern Sudan, looking at infrastructure and services, land and housing, and security and vulnerable groups. The study identifies a number of explicit HLP issues that require attention, including:

- The need to initiate a comprehensive land registration to provide a full transparent record of land tenure and a basis for land transactions;
- Transparent allocation procedures for residential and commercial land;
- A supply of development plots to hand out to legitimate claimants;
- A fundamental review of the technical procedures related to urban planning and management.

The study also develops a set of clear program priorities for the GoSS and the UN (UNDP, UNHCR, UNICEF) to identify immediate measures to improve the absorptive capacities of urban areas to accommodate returnees:

- The production of town maps and plans;
- Capacity-building for urban management and administration;
- Technical training of land administrators and planning officers; and
- The implementation of priority capital projects.

While there has been considerable effort put forward by several UN agencies, there is no single coherent and balanced assessment on the needs for addressing HLP issues. Each specialized UN agency made its assessment, which, while valuable on its own, does not foster the proper holistic approach needed. The GoNU and the GoSS assessments through the JAM fall short on HLP issues, most probably because of the cross-cutting

[42] The UNDP has worked closely together with UN-Habitat to develop an MDTF proposal for urban governance on the basis of this assessment.

nature of HLP issues in reconstruction and the setup of the JAM exercise itself (eight clusters with no specific attention to land).[43] The completed assessments did, however, pave the way for actions to address the multi-dimensional HLP issues facing Southern Sudan.

The Action Response of the United Nations and Other Relevant International Actors with Respect to Identified HLP Needs

The UN response to a series of identified HLP issues in Southern Sudan falls mainly on the shoulders of a number of agencies and programs that have, all but one (UN-Habitat), a rather long history and presence (UNDP, FAO, and UNHCR) of previous involvement in the country. UNMIS has so far not been involved in the conceptualization, design, or implementation of activities, projects, and programs.

UN agency support seems to be centered around two distinct blocks: on the one hand, the UNHCR-FAO partnership and, on the other, a UNDP-UN-Habitat co-habitation.[44] This division is de facto, and probably took shape on the basis of common and diverging interests, available expertise, and specific mandates. It has resulted in the fact that UNHCR-FAO is mainly, but not exclusively, operational in rural areas, whereas the UNDP-UN-Habitat plan is to deal with the more urban-related HLP issues. Although this division of focus is being pushed by a number of organizations, it is artificial and does not enhance the development of a coherent approach to deal with HLP rights, conflict management, and eventual restitution. Capacity-building of land administrations cannot only be restricted to dealing with urban matters.

The dimension of the response is still small. The FAO and UNHCR initiated concrete program activities in Southern Sudan by the end of 2004, that is, just before the signing of the CPA. The UNDP and UN-Habitat are still in a phase of planning and programming with real on-the-ground activities in a stage of being initiated.

[43] It appears that lessons were learned from this and that the Darfur JAM considers the land issue with more care.

[44] On several occasions there have been approaches between the UNDP and FAO to engage in joint activities or at least to provide complementary inputs in a common program/project in Southern Sudan, but this has not yet been put into practice.

Sudanese authorities respond with the same reluctant pace. This is fully comprehensible in light of the urgent need to put into place a functional government and institutions, relying in the first instance on a quantitatively weak capacity. It must be noted, however, that meanwhile the regional and local authorities, including the embryonic land administrations, are faced every day with new challenges that they are responding to their best possible knowledge and capacity. Local authorities of several towns (Wau, Juba) have taken steps to try and ensure that new plots are available to returnees and incoming displaced people. Dispute resolution committees (Wau) have been established to resolve HLP disputes. Inventories on HLP ownership, occupation, and possession are conducted and provisions made for the temporary allocation of property to new occupants (Yei). All these initiatives need to be applauded and supported. Important lessons can be learned for the conceptualization of policies, the design of procedures, among other things. Most of these activities are implemented to date on an ad hoc basis without any reference to a policy or legal framework. Bits and pieces of former GoS legislation and land administration procedures are being used to the best knowledge of the staff. There may exist a danger that this approach may add another layer of dispute when it appears that the taken action is not compatible with the future framework.

The FAO-UNHCR Response

Since early 2005 the FAO has tried to develop a coherent land program in both North and Southern Sudan. This program has included different projects and activities covering a wide range of issues. Most of the projects are still being financed and implemented in the UN emergency framework, which poses some additional operational and funding challenges.

The concrete activities that were or are being implemented in Southern Sudan[45] include:

- *Return and reintegration*: Two major pilot projects on community-based land management and planning, including securing land

[45] Support to the National Land Commission is documented elsewhere in this chapter; the technical assistance that the FAO provided to the conceptualization of the NLC is important to better understand the role of the UN to HLP issues in Sudan.

rights for communities and community members, community-based recovery planning, addressing land and property-related disputes, and restitution of land rights. These activities are implemented in a partnership with the UNHCR and a number of NGOs.

- *Awareness creation and protection*: Information dissemination workshops on land and property rights in ten state capitals in Southern Sudan in partnership with UNHCR and NRC.
- *Institutional capacity building*: Direct support to a number of land administrations to better prepare them for their daunting future task, including dealing with an ever-increasing number of requests for access to land and property from different actors, securing land for returnees, and HLP rights restitution.
- *Research:* Support to the Ministry of Justice for the study of customary land and property law in a number of different locations to support the judiciary and the Ministry of Justice with the application of customary law for addressing and resolving land and property disputes.
- *Upstream land policy development:* Using lessons learned from pilot projects and activities to feed into the land policy debate.

The first two clusters were conceptualized and are implemented in partnership with the UNHCR. The FAO-UNHCR response to previously identified action must be considered as a direct follow-up to the assessment study that was conducted by the same organizations (with an additional partner, the NRC). The two organizations have a number of common interests that fall within their respective mandate not only in Sudan, but also in conflict and post-conflict situations in general. This cooperation is established by a Letter of Agreement and strengthens the cooperation between the two organizations that was signed by the director general of the FAO and the high commissioner of the UNHCR in February 2005. This high-level agreement was followed by a more operational MoU at the country level, which paves the way to finance programs and implement concrete activities related to land issues in Sudan.

The UNDP-UN Habitat Response

The actual program for the UNDP-UN-Habitat intervention is encompassed in the multidonor trust fund proposal on "Strengthening Urban

Governance and Management in Southern Sudan" (2005). It aims for an overall strengthening of city authorities' urban governance and management capacities. The land management module reflects well the UNDP-UN-Habitat thinking on immediate and mid-term needs (three years) for addressing HLP issues in Southern Sudan, which are encapsulated in the following activities:

- Assisting local government in developing its contribution to the debate around the formulation of the Land Act and the definition of municipal statutory roles in land management and administration.
- Establishing an updated information base on land and occupancy/ownership systems and tenure arrangements through rapid land audits.
- Supporting city authorities, in consultation with communities, in carrying out a transparent process of land arbitration and adjudication.
- Ensuring that the gazetting of town boundaries provides adequate land for current and projected demands and that the resettlement of returnees and IDPs takes place within clear provisions for tenure security.
- Developing, within the framework of forthcoming legislation, a system of adequate property valuation and property taxation rates and establishing an efficient and transparent collection system.
- Assisting city authorities in deciding the most suitable and cost-effective land information system (LIS) and, subsequently, establishing LISs in selected cities to support all of the above functions and to serve as a development control mechanism.

This proposal did not find the necessary and timely financing through the Multi-Donor Trust Fund (MDTF). The UNDP, however, accessed seed money to initiate an urban management program within the Ministry of Housing, Lands & Public Utilities in 2006.

Apart from this partnership, the UNDP also operates a Rule of Law Programme in Southern Sudan. It appears that this program intends to include some HLP rights issues in the activities. A similar initiative was rather successful in Northern Sudan, where the UNDP and FAO co-organized a number of seminars on HLP rights in the Darfur region.

Other International Responses

A number of NGOs and private agencies are involved in addressing some aspects of HLP issues. Norwegian People's Aid (NPA), in close cooperation with the Ministry of Agriculture and Forestry of the GoSS, implements a series of pilot projects on community-based land and natural resource management in rural areas of Southern Sudan. At the same time customary land management practices are researched in the same areas. The lessons learned from these activities are fed into the land policy and law debate. Previous attempts by the SPLM/GoSS to co-ordinate similar activities with the USAID, FAO, and World Vision have failed.

Under the direction of the Secretariat for Physical Infrastructure and Town Planning and with UNDP funding, Creative Associates International (CAII), a U.S. company, initiated the production of base maps from high-resolution satellite imagery for all state capitals in Southern Sudan. The activities also include the compilation of essential data of physical infrastructure development. There is no doubt that the production of these maps provides essential urban management tools that can be used for planning purposes.

The Secretariat for Physical Infrastructure and Town Planning has also appointed a consortium led by the consultants GIBB Africa to prepare town plans for the ten state capitals. It is expected that these will use a more comprehensive approach based on a participatory planning process that focuses on the existing towns. It will probably also look into the need to create new plots on the basis of realistic projections of population growth and arrivals of IDPs and refugees. It is also likely that this approach will include policy development for land allocation, review, and fine-tuning of land allocation procedures. It is not certain whether addressing HLP disputes and eventual efforts for the restitution of HLP rights are part of the program.

Impact of Activities on the HLP Rights Situation

The involvement of the UN and other international actors in HLP issues in Sudan is in an initial phase, and an assessment on the impact of these activities on the HLP rights situation is, therefore, premature. It is also difficult to separate the impact of specific HLP activities, even when considered in their widest sense, from other actions, events, and occurrences. At

this stage of the peace process, it is important to focus on changing trends, rather than on objective impact indicators. It is more encouraging to highlight what has been achieved or is in the process of being achieved, than on what is missing. The following thus attempts to capture some trends and early highlights of positive and constructive impact.

Awareness Raising and Information Dissemination

Just some five years ago HLP rights issues in Southern Sudan were not on the agenda of the SPLM/A – under the assumption that there would be no problems or, when problems would arise, that these could be easily dealt with by customary chiefs. It is an issue now, mainly because problems do occur and former wishful thinking does not correspond with reality. The merit of UN intervention is to have taken stock of the issues and channeled this information to policy- and decision-makers through different mechanisms (assessments, pilot experiences, workshops, seminars). The UN, through its specialized agencies, has created an environment of more permanent exposure to the grassroots reality for decision-makers at different levels. Genuine participation of senior-level public staff in the activities and events is slowly inducing a change from inside that is not necessarily imposed by the external actors.

More concretely, these changes include:

HLP rights issues in general are recognized by local authorities as a challenge. Local judges have expressed the need to strengthen the judicial capacity to deal specifically with HLP issues. Some land administrations have established HLP dispute resolution committees.

HLP rights of women are more strongly on the agenda. It is acknowledged by central authorities that the provision on the rights of women in the Interim Constitution is a first important step. However, some local and regional decision-makers proclaim that "it is too early to talk about women's rights," or that "women's rights are a foreign concept." On the other hand, practical examples of a positive response of administrations to the rights of women already exist.[46] HLP awareness creation activities are

[46] In small-scale irrigation schemes in Malualkon, Tearfund and the FAO have developed a plot allocation system with local leaders that issues a type of land use certificate directly in the name of women. The Yei county administrations developed a by-law that requests that property transfers are signed by both husband and wife.

contributing to slowly and hesitantly reconcile traditional values with the gender-equality principles of the Interim Constitution.

Community involvement in decision-making is gaining strength. There are still ways to go to come to a genuine upstream policy and especially law development process, where local needs and solutions are included. Moreover, more openness to learn from pilot experiences and to include findings and recommendations in regulatory mechanisms seems to exist.

Some wishful assumptions on the *nature of the return process* seem to have taken another direction among the authorities, including:

- A more realistic perception on the challenges of a phased return.
- A more balanced view on returns to rural and urban areas.
- New perceptions on the right of freedom of movement and settlement, although strong feelings remain that women (including women-headed households) have much less right to settle in a place of their choice.
- The right to voluntary return: It is not clear whether there is a change in perception or not after serious awareness creation efforts by the UN on this issue. It seems that the permanent settlement of part of the returnees in new settlement centers draws less attention now;[47] there are still strong feelings among the authorities that IDPs who are settled in Northern Sudan, and especially in Khartoum, need to return to Southern Sudan at any cost. This would clearly be a violation of the right to a voluntary return of IDPs.

Development of Policy, Legal and Institutional Tools, Including Procedures

By virtue of the inclusion of land commissions in the CPA, the institutional scene for addressing HLP issues including restitution is set. The WSA and the Interim Constitutions also provide the basis to develop *a legal framework for HLP rights restitution*.

[47] In the Darfur conflict, the establishment of new permanent settlements and peace villages for displaced people is high on the agenda of the GoNU.

The most visible involvement of the UN to facilitate the establishment of institutional, policy, and legal frameworks for dealing with HLP rights is so far the support by the FAO and UNDP to the establishment of the NLC by, among other things, providing international references for legislation, commission structure, mandate, and functioning; addressing legal uncertainties in draft legislations; technical assistance for law development; and managerial support and financial resources for the work of the preparatory team drafting the legislation.

It is difficult to gauge the real impact of all this on the outcome of the process, mainly because the NLC is not established yet. The involvement of the UN in drafting the SSLC Act has been marginal. Support was mainly provided by USAID through the consultancy firm Bearing Point.

The field interventions by the UN have contributed to the opening up of the land policy debate, and the unraveling of the SPLM/GoSS land policy statement "land belongs to the people." Until recently it was assumed that all land in Southern Sudan would be managed by the "people," but now there is more openness to discuss the different dimensions of this statement. It is evident that the GoSS believes that municipal areas require a different approach with a strong role for a public urban HLP management within a statutory regulatory framework. There is also a belief that the creation of an enabling environment for promoting private/public investment in rural areas, while at the same time protecting the rights of rural communities, will require serious reflection. First lessons from pilot experiences are contributing to this policy development, while numerous brainstorms with former and present leaders (SAAR, legal affairs, the judiciary, local government) seem to pay off. The UN (through the FAO) is becoming an active partner of the GoSS in this policy debate.

The *direct support to land administrations* by the UN and other international partners (CAII, GIBB) has a positive impact. Some land administrations (Juba, Wau, and Malakal) received basic GIS equipment. Clear, standard procedures for a series of land administration duties are not yet available or agreed upon but seem to be coming together slowly. So far, "commonsense ad hoc handling" seems to do the job in a number of places. Of course there is a need for better, transparent, efficient, user-friendly, and cost-effective procedures; cadastral data collection, storage,

and analysis; and dissemination to the public. Again a note of caution must be given not to force these reforms. Similar experiences in other African countries have shown that transforming a simple "emergency post-conflict cadastre" to a multipurpose cadastre may take a long time, not necessarily because the technology is not available but mainly because "the culture" is not readily acquired.

The GoNU and the GoSS have also had an impact on the UN strategy dealing with HLP issues. The two governments have convinced the UN that the restitution of HLP rights will not necessarily require a massive and executive UN response as had happened in other countries (e.g., Kosovo). Further involvement from the UN should be well analyzed and agreed upon with the authorities, and it should play a supporting role. It may occur that some problems will require special measures for which there is a need for more substantial external assistance, as was the case with the Abyei Boundary Commission.[48]

Protection of Rights

The UN mandate in Sudan does not include the physical protection of people from forced eviction, nor does it assist enforcing court decisions on HLP restitution. The UN contribution to the return process has a monitoring character. The para-legal and legal advisors who received basic information packages and some training in HLP rights issues enhance the impact on the protection of HLP rights for the displaced. This information material was derived from the key outputs and recommendations of a series of land and property workshops, as well as from field assessments. A rather large displaced population in the IDP camps of Khartoum was exposed to the information. Concluding that adequate legal aid can be provided to all those who need it is, however, not realistic at present.

[48] In fact, the Protocol on Abyei itself is also from the hands of an external actor, namely, the U.S. Special Envoy Senator John Danforth, who presented a full text proposal to the leadership of the GoS and the SPLM entitled "Principles of Agreement on Abyei."

Is the UN Intervention Leading to a Coordinated Approach?

The Nature of the Interventions

The Southern Sudan authorities are coping with HLP problems as best as they can without reference to any consistent legal or policy framework. Until recently the institutional structure of the Southern Sudan authorities was unclear. The international partners were interacting with individuals more than with institutions. This changed with the appointment of the GoSS, but in the early stages of its functioning, ambiguities about responsibilities persist. What is now getting clearer is that the Ministry of Housing, Land and Public Utilities is probably the leading institution dealing with HLP issues. Under this setup there is, however, a serious concern that rural land issues may be ignored at the expense of urban challenges. Major conflicts over access to rural land and natural resources (grazing and water) between different social groups continue to result in major casualties.

Considerable doubt also remains about the legal framework to address HLP issues. So far there is no clarity on which laws can or will be used in Southern Sudan or what the status is of the GoS laws enacted before the CPA.

Support by the UN to the authorities has the same ad hoc character. A unified UN view on the needs and possible responses to HLP issues has never existed; a comprehensive multisector assessment was never put together. Possible responsibilities of the different UN actors were not discussed at the country level. Some bilateral agreements between agencies, including strategic partnerships, have been made. Leadership roles and comparative advantages of different agencies were briefly discussed in UN Country Team meetings[49] but left without the necessary follow-up.

A multifaceted institutional problem seems to exist for achieving a more structured, complementary (and not necessarily integrated) approach. On the one hand, framework agreements (mainly bilateral) are made between organizations at the headquarters level, but these are not always translated in the field. On the other hand, pragmatic and

[49] There is anecdotal evidence that the leadership role for land tenure within the UN system in Sudan was discussed at the Red Sea UN retreat in May 2005.

practical arrangements emerge at the field and country levels, but these are not necessarily supported by headquarters due to operational difficulties. Third, different UN organizations compete for the same donor resources, and operational and functional interagency agreements may erode their access to funds.

Political Support

The GoNU and the GoSS have so far not expressed strong political will to address HLP rights issues in a structural fashion, with or without the involvement of the UN system. The marginal importance of HLP issues in the JAM is a clear indicator for this. Moreover, a massive intervention by any external player is certainly not desired by the authorities. This does not rule out the involvement of external actors in the process, as is demonstrated by the preparatory work for the NLC. It depends, however, on the aim (technical assistance, funding) and the dimension of the involvement.

Approach

The segregated character of the approach to deal with HLP issues is directly linked to the specific mandate, strategies, and experiences of the different agencies.

- *UNHCR*: a human rights dimension, using a legalistic approach in the context of the protection of refugee and IDP HLP rights (not necessarily land);
- *UNDP*: a human rights dimension, using a legalistic approach under the Rule of Law program; a conflict transformation dimension with an emphasis on developmental issues under the natural resource management program;
- *FAO*: a rights-based developmental approach, focusing on livelihoods, rural communities, land management, and economic development;
- *UN-Habitat*: a technical approach, focusing mainly on housing and urban development.

There is no agency that specifically and exclusively deals with HLP issues. All are contributing in one way or another to come to something in common, though this "something in common" is not yet clearly defined. While there may not be a need for a fully integrated approach, it is important that there is coherence, compatibility, and mutually supportive action. Field activities demonstrate that there may be compatibility between immediate human rights protection initiatives for returnees and a longer term recovery and developmental approach that is rights-based.

Any approach to HLP issues in Sudan will most probably be identified by the national authorities, while international organizations can provide advice and eventually lobby for a desired approach.

UN Planning Process

When HLP rights constitute a problem acknowledged by a multitude of actors, when access to land and natural resources is recognized to have been a main issue in the previous conflict, when provisions of the CPA directly dealing with these issues are not timely implemented, and, when, on the other hand, there is no mention of HLP rights issues in the UN Sudan Unified Mission Plan, it may be suggested that there is a problem with the UN planning process.

Planning in Southern Sudan has long been a problem. Uncertainties on the location of the future capital, on future public institutions, and on the transfer of political power in garrison towns all have contributed to this. This has left the UN system with major questions on the deployment of a field capacity in Southern Sudan, and on strategies and priority activities.

A significant part of the UN planning still occurs in the emergency context, with a maximum time horizon of one year. The FAO and UNHCR plan land and property activities under the humanitarian sector of the annual workplans. This planning has, of course, direct implications for the funding of activities and programs. Under the Workplan 2006, the FAO included six proposals to support land activities, but by mid-2006 none had received financing. The allocation of financial resources for HLP issues under the Common Humanitarian Fund is also problematic given the nature of the intervention.

This is not to say that there are no funds available for HLP rights activities. The FAO has access to bilateral funds (The Netherlands and Italy) for substantial land activities in Southern Sudan and to support the NLC (Denmark). Lack of regular funding implies, however, that some organizations (UNHCR, FAO, UN-Habitat, and less so UNDP) may have problems deploying a stronger and qualified human capacity and technical expertise on a more permanent basis to develop a more coherent program approach.

The FAO is trying to tie up the bits and pieces of different projects into a more coherent "Sudan Land Programme" within its own organizational structure.[50] This task is far from achieved and has encountered a number of serious managerial and operational challenges.

Reflection on a More Consistent and Effective UN Approach to HLP Issues in Post-Conflict Environments

Several UN agencies have pushed hard for the inclusion of HLP issues on the agenda for humanitarian, recovery, and development efforts in Sudan. While these efforts have not always translated into the needed political will, the projects and activities have brought about some positive changes. Suggestions for an improved UN response to HLP issues in post-conflict situations are presented below. These recommendations are informed by work in several post-conflict environments and do not stem solely from the Sudan experience.

Issues of access, control, and transfer of land, property, and natural resources are multidimensional and need to be tackled during the different phases of the post-conflict situation: emergency, recovery, and development. Injustices tied to land are often a root cause of the conflict, and when past injustices are not addressed, it is difficult for a conflict transformation process to be sustainable. Figure 2 displays the different needs for intervention for the post-conflict period.

The challenge ahead can be summarized as follows:

"Dealing with past injustices to establish a sound basis for the future while providing temporary solutions for the present."

[50] P. De Wit, 2005, "Sudan Land Programme: Present Status and Outline for the Future," internal note, December 2005, FAO, Rome.

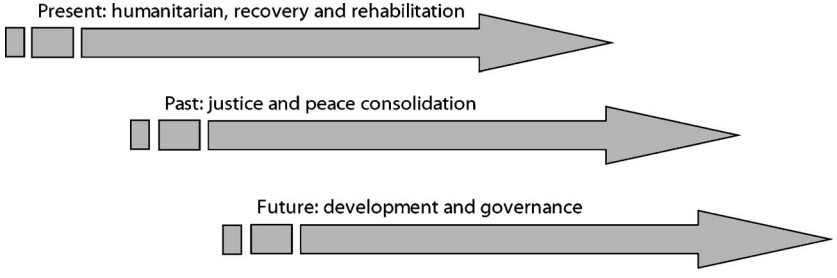

Figure 2: The phases of addressing HLP issues.

Dealing with the present and the future requires the same enabling policy, legal, and institutional frameworks. However, addressing the past merits special measures and may result in the need for specific policy, legal, and institutional frameworks, which are time-bound and of a temporary character.

It is important to get things right from the start and certainly not promote short-sighted solutions that may jeopardize longer term development. For instance, focusing only on urban or rural areas is a wrong start for Sudan. All immediate and mid-term corrective, preventive, and retentive land- and property-related measures that are envisaged to facilitate the return and recovery process need to be streamlined with an overall developmental vision and policy that is often missing in chaotic post-conflict situations. After years of war, everything is poor: institutions, civil society, legal and policy frameworks, absorption capacity of government, and so on. On the other hand, post-conflict situations provide an opportunity to address specific issues that were left aside before and eventually caused the emergence of the conflict. A major task for the UN is to take the necessary steps to convince the post-conflict governments that short-sighted, often explorative and speculative land management in a chaotic environment has a high opportunity cost for later economic development and may eventually result in the resumption of open conflict.

The three phases for intervention on HLP issues and concrete actions to be taken are explored below:

1. *Dealing with the present: humanitarian, recovery, and rehabilitation issues*

The urgency and efficiency with which a number of immediate post-conflict HLP issues are being dealt will contribute to the success of the return process. The Sudan case shows that early assessment is essential to including HLP issues in the peace negotiations and consequently in the peace agreement. This will always remain a solid reference for ensuring that HLP issues are effectively addressed by post-conflict governments, even when genuine political will to do so fades away during implementation of the agreement. Other specific actions to be taken should include:

- Awareness generation and information dissemination on HLP rights for IDPs and refugees;
- A model for legal aid and counseling for returnees;
- Research and ascertainment of customary law;
- Inventory, assessment, and research on statutory law, HLP issues, the nature and dimension of HLP disputes, and others;
- Transparent and coherent measures and procedures to provide secure temporary access to HLP for returnees;
- Different mechanisms of expedient dispute resolution for HLP disputes;
- Capacity-building of community structures and participatory emergency and recovery planning;
- Direct support to emerging livelihoods (seeds, tools, veterinary services, provision of water, other basic services);
- Support to emerging land administrations; and
- Direct support to women-headed households.

2. *Addressing the past: restitution of HLP rights*
Two different dimensions for the restitution of HLP rights appear to exist. In the first instance there are the individual and household rights of IDPs and refugees that were lost during the conflict itself. Secondly, there are the longer standing historic grievances and injustices, which are mainly group claims and often more complex to be addressed. The latter have often contributed to the emergence of the conflict.

At a minimum, the following mechanisms need to be developed to effectively deal with the restitution of HLP rights:

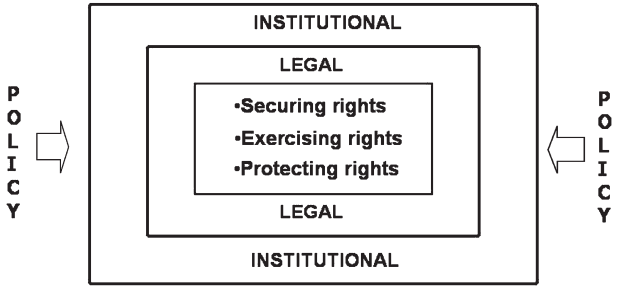

Figure 3: The framework for securing, exercising, and protecting HLP rights.

- Functional and effective land and property claims commission: legislation, procedures, operational support tools;
- Monitoring capacity on hot spots to target interventions;
- Awareness creation and information dissemination on the rights and procedures to lodge claims;
- Establishment and capacity-building of basic functional land administrations and other supporting institutions (HLP valuation capacity, judiciary);
- Compensation policy and mechanisms including the provision of a new stock of housing plots;
- Capacity-building to enforce decisions made on restitution, on compensation, or on any other matter decided upon by the claims bodies.

3. *Preparing the future: the land use development framework*

Over the past years the FAO has developed a framework for addressing land and natural resources management in a post-conflict transformation process.[51] It can be retained as a reference for identifying action clusters and packages that can be delivered to post-conflict governments. Schematically it can be presented as shown in Figure 3.

Specific packages of activities and mechanisms to implement such a strategy include the following.

[51] P. De Wit, M. Bellini, and J. Hatcher, 2005, "The FAO Land Programme in Sudan – From Emergency Interventions to Sustainable Development," *Land Reform Bulletin* 2005/2, FAO, Rome.

Securing Rights

Securing access to land and natural resources on the basis of existing livelihood strategies is essential. It is the major overarching reason why HLP rights need to be secured on a communal basis and not on an individual basis. This includes the following:

- Community land rights delimitation and registration.
- Devising mechanisms to negotiate access to communal land and eventually alienate communal land for private use.
- Mechanisms to transfer land rights.
- Mechanisms to strengthen tenure for women under customary law and communal tenure.

Exercising Rights

A major challenge is to ensure that communities use the acquired rights in such a way that they may recover from crises and transform a conflict situation into a local development process that may be sustainable in the medium- to long-term. The following measures might help ensure this:

- Mechanisms to strengthen community-level management institutions.
- Functional participatory land use development methods: community asset mapping, development of negotiation platforms; and establishment of local development portfolios.
- Innovative resource-sharing mechanisms including negotiated partnerships for land use and management between the communities, the private sector, and the state.

Protecting Rights

Acquired rights that are subsequently exercised need protection. Protection can be achieved in contexts governed by customary law, statutory law, or some combination of the two, provided, at a minimum, that the following attributes are in place:

- Clarity as to the physical location and boundaries of land.

- Clear and recognized "rules of the game." It should be clear what rights land owners have, and what powers government or traditional authorities have regarding the allocation of land and the regulation of its transfer and use.
- Freedom from fear that land rights will be arbitrarily taken away or diminished. In other words, there needs to be both an expectation that the "rules of the game" will be enforced, and freedom from fear that the rules will be unilaterally changed without resulting damages being fully compensated.
- Accessible, affordable, fair, and effective avenues for seeking protection of rights and for solving disputes.

It is clear that these attributes need to be addressed in broader "access to justice" and "rule of law" programs that are streamlined with programs on natural resource management.

Keeping this framework for intervention in mind, it is important to add several other considerations regarding the coherence of the overall UN support to securing and protecting HLP rights.

A *comprehensive, process-driven, action-oriented needs assessment* – The value of a comprehensive needs assessment for HLP issues cannot be overestimated. This is preferably organized and coordinated by the UN mission, with participation of its specialized agencies. It needs to be process-driven[52] and action-oriented so that the outcome can be easily transferred into an actionable response.

A*n available package of deliverable goods and tools* – The effectiveness of the response of the UN to a number of post-conflict HLP issues will largely depend on the development and availability of tested response packages that can be delivered by its specialized agencies during the different phases.

A *better buy-in of national authorities* – When specialized UN agencies work on HLP issues in post-conflict situations they often work in parallel to emerging government structures or with little impact on these, partly

[52] The needs assessment conducted by the FAO as part of the design of a support program to the establishment of the National Land Commission can be considered as a process-driven, action-oriented exercise. Four processes were identified for action: land restitution, land tenure reform, land use policy development, and ascertainment of customary law. For each of these processes a sequence of activities was agreed upon for implementation.

because of the ad hoc and fragmented approach of the UN intervention itself. There is a need to use the political leverage of UN missions to provide the necessary groundwork for specialized agencies to facilitate their service delivery. A continuous process of awareness creation, advocacy, and monitoring of HLP rights by the mission can achieve this. The task is facilitated when HLP issues are part of the peace agreement and the mission is monitoring its implementation. In the case of Sudan, UNMIS could have used its monitoring mandate to ensure along with the governments that the land commissions were established and functional in due course. It must, however, be avoided that the UN pushes ahead of the local political dimension.

Multisector program approach – HLP issues are complex and multisectoral, with specialized agencies often only responding to some aspects of the challenge through specific projects. A program approach with mutually supportive projects and activities seems to be an answer to curb a fragmented response with gaps and overlaps.

There is need for an agreed-upon overall UN vision, which may be derived from the comprehensive needs assessment. A lead technical agency seems to be required, but not a single UN agency appears to respond to the requirements to cover such a broad mandate. It may be possible that the Department of Peace Keeping Operations (DPKO), through the mission, takes the overall responsibility and delegates authority to specialized agencies on the basis of their comparative advantages.

Existing operational interagency cooperation mechanisms (MoU, LoA) need to be improved and eventually new tools need to be developed; this requires action at both the headquarters and field levels. A program approach also requires institutional (and not voluntary) coordination. UN missions could take this responsibility, at least until there is a national capacity established to take over.

Agreed-upon basic principles – When responding to HLP issues the UN must use a common language based on basic principles. It appears that even within the same UN agency this is not always accomplished. These streamlined common basic principles include policy issues (e.g., a policy on dealing with the settlement of returnees in urban areas), technical issues (e.g., the use of the same methodologies for community-driven recovery initiatives), and managerial issues (standardized overheads for projects, clear guidelines on operational costs, etc.).

Multidonor funding – A program approach that is sustained over a number of years requires financial resources that will not likely be disbursed by an individual donor. Examples exist in Africa (Mozambique), where donors join funds to finance service providers including international agencies to implement land programs. This also helps to reduce gaps and overlaps between different donors when responding to HLP issues.

Conclusions

After a half-century of violent conflict, Southern Sudan finally faces the opportunity to sustainably develop its territory and natural resource base. The conflict that displaced millions of people from their homes and land had its roots in the control over natural resources. Major efforts are needed to ensure that this root cause is addressed and does not propagate more conflict.

The overall international response during and following the peace talks in Naivasha often avoided the difficult issues of housing, land, and property rights though it recognized the important role they play in any attempt for a real and lasting peace. Despite the operational and funding obstacles, several UN agencies and international NGOs have implemented a series of activities in attempts to respond to the legal, institutional, and policy vacuum. These activities were aligned along two distinct trajectories – one focusing on rural land and livelihoods, and the other focusing on urban land and management. Some agencies developed programs based on projects in an attempt to create a coherent response to the needs. Several assessments were completed that gave a clearer picture of the issues at stake in a very complex environment. Unfortunately, these efforts took on an ad hoc character rather than the coherent, multisectoral, and well-planned one that was and is needed in Sudan.

Despite the ad hoc nature of the interventions, HLP issues are now better understood by decision-makers at all levels of customary and government authority. Moves toward creating the appropriate legal and institutional frameworks for redressing past injustices while preparing the ground for future development are slow but consistent. Officials are beginning to recognize that customary authorities and simplistic policy statements will not resolve the coming wave of HLP disputes that will arise as

soon as the millions of expected returnees make their way to the cities, towns, and rural areas of Southern Sudan.

The experience in Sudan, which hosts one of the world's largest UN peacekeeping operations, provides useful lessons for other post-conflict situations. Coherent, complementary, and far-sighted interventions are needed to ensure that the HLP rights of the local population are secured, exercised, and protected. But perhaps most importantly, the recognition of the importance of HLP issues in post-conflict situations needs to be practically translated into concrete and supported actions to assist IDPs and refugees that will soon return home.

9

The Impacts of UN Peace Operations on Local Housing Markets

Mayra Gómez

Introduction

This chapter addresses the impacts of UN peace operations on local housing markets. These impacts encompass the effects, both negative and positive, that the presence of highly paid international staff [1] – often associated with UN peacekeeping missions and other field operations – may have on local housing markets. Indeed, anecdotal evidence from peacekeeping mission personnel, as well as many UN staff living "in the field," suggests that the marked disparity that exists in income levels between "internationals" and "locals" leads to local economic inflation in a number of sectors. By many accounts, the housing sector has been no exception.

This phenomenon amounts to what may be called a kind of "UN inflation"[2] in local housing markets. This trend, while often spurring housing renovation and restoration, at the same time can increase housing costs to such an extent that the housing market becomes skewed, catering to the desires of more affluent renters and owners. Moreover, this initial inflation may be compounded further down the road by foreign investments and intensified real estate developments that are spurred on by higher levels of economic and political stability once hostilities in a

[1] The term "international staff" here refers to staff persons employed by international organizations or other foreign agencies. As such, under this definition, international staff persons themselves may in certain cases be nationals of the country in which they are working.

[2] As discussed below, this term is perhaps a bit misleading, as this phenomenon is spurred not only by UN missions and agencies, but also by other international organizations, including governmental and nongovernmental human rights, development, and humanitarian organizations and agencies.

country have ended. In these cases, the inflation effect may be so strong as to affect all categories of housing stock – from affordable housing and rental units, to moderate income homes, to luxury housing – raising the cost of housing to such an extent that it is increasingly out of economic reach for average locals.

It should be noted at the outset that, perhaps counter to its title, this chapter is not principally concerned with the potential market distortions caused by international forces, *at least not for their own sake*. Rather, the motivation of this work is firmly human-rights based. Namely, this chapter focuses on the impacts that these market distortions might have on the ability of local residents to realize the full range of their human rights, including, most notably, their human right to adequate housing.[3]

International peace operations should care about how they effect local housing markets not least because affordability of housing has been acknowledged as a key component of the human right to adequate housing, as recognized by the international community itself through the adoption and ratification of various human rights standards and treaties.[4] The Universal Declaration of Human Rights, for example, recognized in 1948 that every person has the right to an adequate standard of living for themselves and their family, including rights to adequate food, clothing, housing, water, and sanitation, and to the continuous improvement of living conditions.[5]

While this chapter discusses the impact of UN peace operations on local housing markets, it should also be noted that, most times, personnel involved in peacekeeping missions are not the sum total of the international presence within a locality, and that UN inflation can also take place in the absence of a formal peacekeeping mission. To be sure, the international presence may be comprised of a range of staff and consultants from

[3] The right to adequate housing is enshrined in several international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Indeed, housing rights are not a new development within the human rights field, but rather have been long-regarded as essential to ensuring the well-being and dignity of the human person. Housing rights are integral to the whole of human rights in general, and have been included in the most authoritative international statements regarding human rights.

[4] See United Nations Committee on Economic, Social and Cultural Rights, 13 December 1991, "General Comment 4: The Right to Adequate Housing (Art.11 (1))."

[5] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

human rights, humanitarian and relief agencies, UN agencies, and other international organizations that may be working within the context of post-disaster or post-conflict recovery. As such, the concept of UN inflation should well be adjusted to cover not only the impact of UN agencies and personnel on local economies, but also the impact of similarly situated "international" actors and staff who are also receiving high levels of income relative to the local population.

While the anecdotal evidence supporting the reality of housing price inflation due to the presence of the UN is considerable, data collected and analyzed by various institutions and academics on the question of UN housing inflation present a less clear picture of its real impacts. Relatively little definitive data exist documenting the impact of international staff on local housing markets, and the information that does exist is at least somewhat contradictory. As we shall see, perhaps what we know best is actually what we don't yet know. Nonetheless, it should first and foremost be noted that several important questions underlie our consideration of the impact of UN peacekeeping missions on local housing markets. The most obvious question is simply: Is there an impact, and if so, what is it? From there, is it possible to identify differential impacts, affecting different sectors of the population? Is it possible to sustain both positive and negative impacts at any one time? These and other questions will be addressed in further detail below.

Along a similar vein, it is also important to understand the potential differential impact on the right to adequate housing for local residents versus its impact on the right to housing, land, and property restitution for returnees. Little empirical evidence has illuminated this question, although international standards have been adopted that lay out important guidelines with respect to the conduct of international organizations in facilitating housing, land, and property restitution for refugees and displaced persons. The responsibilities of peace operations in upholding the restitution rights of returnees is a theme that is also addressed below in greater detail.

In order to elucidate the answers to these and other questions, we begin first by focusing our attention on that information which already exists regarding the phenomenon of UN inflation, and its relationship to local housing markets. Much anecdotal information exists, but what data have actually been gathered and analyzed to support or discredit these points of view?

What We Know: Weighing the Negative and Positive Consequences

The Negative Consequences

Perhaps one of the most incisive reports summarizing the negative effects of an "international" presence on local economies was an International Peace Academy study completed in 2002 on "Economic Priorities for Peace Implementation." Between late 1997 and early 2000, Stanford University's Center for International Security and Cooperation (CISAC) and the International Peace Academy (IPA) engaged over two dozen scholars to undertake a systematic study of the determinants of successful peace implementation. The project examined every peace agreement between 1980 and 1997 where international actors were prominently involved: In total, sixteen cases were studied.[6]

[6] Susan L. Woodward, *Economic Priorities for Peace Implementation*, International Peace Academy (IPA) and Center for International Security and Cooperation at Stanford University, IPA Policy Paper Series on Peace Implementation, October 2002, New York. The study noted the following five important lessons that have emerged from experience in the area of peace implementation over the last decade:

(1) *The need for broad-based impact assessments:* At present, assessments tend to measure whether an aid project was implemented as planned, not whether it contributed to a sustainable peace. As a consequence, important opportunities to make informed mid-course adjustments in long-term programs and to develop more effective programs are lost.

(2) *An early emphasis on employment is critical:* Active employment is critical to redirecting behavior and encouraging support for the peace process. Lending decisions such as those for the demobilization and reintegration of former combatants and the return of refugees and internally displaced persons are also linked to the availability of employment;

(3) *Invest in building institutional and social capital:* Conventional approaches to post-conflict economic recovery tend to emphasize macroeconomic stability at the expense of economic infrastructure. However, in post-conflict settings, the financial and legal institutions so necessary to implement economic policy and ensure good governance are either weak or nonexistent. More attention must be paid to financing the development of basic public-sector capacities and social capital.

(4) *Donor decisions about whom to assist and what to fund have lasting political impacts:* Donor monies influence government policy, whether directly through the imposition of explicit conditions or in more indirect ways. Lending decisions also influence the political landscape within the recipient county and the behavior of third-party implementers.

(5) *An international presence introduces economic distortions:* It is seldom acknowledged that the economic impact of international peace missions runs contrary to the aims of self-government and economic and political sustainability. As a consequence, decisions about implementation and exit are extremely important." The study also noted an "urgent need for a new economic strategy that addresses the challenges of post-civil war environments."

This IPA study contained information on what was called "The Bubble Economy: Distorting Effects of an International Presence"[7] and noted that "The very presence of an international peace mission, military force, and aid agencies has economic consequences that are directly contrary to the political goals of self-governance and economic and political sustainability. This problem is rarely discussed, but it emerges vividly in every case study for this project."[8] Indeed, the study confirmed that, in most cases, these consequences transpire in large part because of marked wage disparities, with average wages for local residents being far lower than the average wages of UN staff and other personnel employed by international organizations and other foreign agencies. As these higher paid actors move in and become residents of local communities, they often bring with them an uninvited guest: economic inflation.

The IPA's study noted several negative economic effects in this regard. For example, in stark contrast to the idea that economic benefits will "trickle down" to locals, the study noted that while internationals *do* spend money within the local economy, international staff *do not* consume enough locally to stimulate and sustain local businesses.[9] The presence of internationals alone, therefore, does not have enough of a widespread economic benefit to raise the living standards of most locals. To the contrary, in some cases, the concurrent inflation brought on by the international presence may even be severe enough to actually lower standards of living for some local residents.

Evidence gathered from various countries where the UN has had a peacekeeping presence seems to bear out many of these conclusions. In Cambodia, for example, the UN's mission after the fall of the Khmer Rouge pumped an estimated USD$2 billion into the local economy, although most of this money reportedly never reached the hands of Cambodia's poor.[10] According to one reporter's account in 1993, "The UN presence in Cambodia has created unprecedented economic disparities. The local currency, the riel, is barely worth the paper it is printed on, having lost up to 75 per cent of its value against the overwhelming US

[7] Id.
[8] Id.
[9] Id.
[10] Eric Ellis, "Cambodia has a Future Without the Carpetbaggers," *Financial Review*, 27 May 1993.

dollar in the past year, crippling the average Cambodian with little or no access to US dollars."[11] Wage inflation further exacerbated these problems: "With its developed Western ways, the UN has introduced a wage push inflation, remarkable in a country whose per capita earnings average less than $300 a year. The UN is paying anything from $US400 a month to $US2,000 a month for its local staff, creating huge resentment among the average Cambodians whom the UN claims to be helping."[12]

In addition to the wage inflation problem, with respect to the housing sector, the IPA's study bore out the popular wisdom that as international staff move into a particular locale for the duration of their assignment, local residents often see their housing costs, and in particular their rents, increase. In fact, the study went even further, noting that the high prices paid for housing crowd out locals and lead to increased housing poverty, as well as housing insecurity among the local populace, and that the inflation of housing prices and rents was felt across the board for all segments of society.[13] However, the IPA's study did not make clear whether these negative effects were or were not only isolated in major cities/capitals where the majority of international staff are concentrated. Nonetheless, the picture presented was a critical one, suggesting that peacekeeping missions too often wreak havoc with local economies.

The Positive and "Mixed" Consequences

Other studies suggest that the impact of "internationals" on a local economy is a somewhat more mixed proposition. Most notably, a recent study on "Economic Impact of Peacekeeping," prepared as part of the Economic Impact of Peacekeeping Project commissioned by the Peacekeeping Best Practices Section (PBPS) of the UN Department of Peacekeeping Operations (DPKO), presented a significantly more optimistic picture.[14] The methodology for this study was also quite comprehensive. To collect field data, research teams visited eight

[11] Id.
[12] Id.
[13] Id.
[14] Michael Carnahan, William Durch, and Scott Gilmore, *Economic Impact of Peacekeeping: Final Report*, prepared as part of the Economic Impact of Peacekeeping Project of the Peacekeeping Best Practices Section (PBPS) of the UN Department of Peacekeeping Operations (DPKO), March 2006.

then-active missions: UNMIK (Kosovo); UNMISET (Timor-Leste); UNAMSIL (Sierra Leone); MONUC (Democratic Republic of Congo); MINUSTAH (Haiti); ONUCI (Côte d'Ivoire); UNMIL (Liberia); and ONUB (Burundi). In addition, researchers also studied the financial reports of UNTAC (Cambodia) and drew upon research on UNAMA (Afghanistan).[15]

The DPKO-sponsored study made no obfuscation of the fact that peacekeeping missions are often roundly criticized for their negative impact on local economies:

> United Nations peacekeeping missions presently spend about $5 billion a year and are regularly criticized for a wide array of damage they are thought to do to the war-torn economies into which they deploy. They are criticized for inducing inflation, for dominating the real estate market, for co-opting the best local talent and for drawing the most capable people away from both government and the local private sector.[16]

Nonetheless, the overall conclusion of the study was that international peacekeeping missions do more good, and less harm, than previously thought to local economies. In fact, the study noted that: "Peacekeeping operations' spending has the potential to kick-start the local economy at the time when it is most needed. This economic activity provides employment and incomes supporting the restoration of peace and stability."[17]

As such, the higher prices that internationals are willing to pay for certain goods and services may amount to an economic boost for some, and the more negative effects commonly associated with peacekeeping missions may not be as widespread as some have argued. In terms of general findings, the study concluded that:

> **(1)** There is an immediate upsurge in economic activity associated with the restoration of basic security;

[15] Id. Although a research team also reportedly visited UNMIS (Sudan), a quantitative assessment of UNMIS could not be done because the mission was too recent to have filed an expenditure report at the time the study was conducted.

[16] Id.

[17] Id.

(2) Spending from international staff allowances, local procurement, and on national staff wages provides a stimulus to the local economy; and, perhaps most interestingly for this discussion on "UN inflation" and its impact on local housing markets,
(3) The perception of widespread inflation is not borne out – some price rises occur in parts of the economy servicing internationals, and wages for scarce skilled labor increase.[18]

While the study drew a justifiable distinction between "widespread" economic inflation and inflation in the housing sector, when researchers examined the housing issue more closely, some of the same trends emerged as were illustrated by the IPA study. In fact, on housing markets in particular, the DPKO-sponsored study showed that peacekeeping missions *do* tend to trigger price escalation in housing markets catering to international standards and tastes (i.e., higher end housing).[19] The study also bore out the idea that mission deployment tends to motivate the renewal and renovation of housing stock in order to meet the expectations and desires of internationals.[20]

Despite these factors, however, the DPKO-sponsored study found that there is little evidence that the price hikes affecting the cost of higher end housing will spread, or "trickle down," raising the cost of more moderately priced housing for the local population, especially outside of the capital cities.[21]

Making Sense of It All

Based on the most comprehensive studies available, there can be no doubt that a sustained and active international presence, including the presence of UN peacekeeping operations, impacts local economies and local housing markets. While the extent of the effects is arguable, it seems that there is general agreement at least on the following points: 1) The presence of internationals increases demand for higher end housing, leading to inflation at least within this segment of the housing

[18] Id.
[19] Id.
[20] Id.
[21] The study also found that Mission Subsistence Allowance (MSA) spending in the mission area accounts for about half of a mission's local "economic footprint." Surveys indicated that just under half of the MSA spent by staff went toward housing.

market; and 2) this demand, at least in part, also spurs renovation and restoration of housing in order to cater to the desires of new international clientele. On both of these points, the IPA study and the DPKO-sponsored study seem to agree.

Before leaving these two conclusions, however, it deserves mention that there is perhaps a curious relationship between these findings that merits further consideration. To reiterate, we know that internationals tend to desire more luxurious or affluent housing than the general population can on average afford (and this certainly seems to be the case almost always), and that this heightened demand for higher end housing leads to inflation within this segment of the housing market. We also know that this trend also inspires renovation of housing in order to make it more competitive within that segment of the market. It would seem, then, that at least in some cases, expensive housing will become more expensive, while some previously moderate housing will seek to break into the "expensive category," thereby also taking advantage of new housing demands. (This phenomenon will perhaps sound eerily familiar to urban gentrification experts, a theme that is considered briefly in the next section.)

The question that this discussion leaves us with is this: What is the true degree to which economic inflation in the housing market affects the general population? There seems to be directly contradictory evidence cited in responses to this question, with the IPA study citing widespread negative effects vis-à-vis local housing markets, and the DPKO-sponsored study presenting a much different account of the damage done, suggesting that the negative effects are far more circumscribed than otherwise imagined. Perhaps more significantly, there is little clear evidence about the degree to which economic inflation in the housing market specifically affects poor and marginalized people, who are often most disadvantaged and vulnerable in the aftermath of conflict.

In theory, various factors would influence and mitigate the effects of UN-inspired housing inflation on these populations. For example, it would seem plausible that the negative effects of housing inflation would be more exacerbated in cases where the housing stock has been decimated as a result of war, as was the case in Bosnia and Herzegovina, and where competition over existing or the available housing that remains is most acute. The effects may be less pronounced in cases where the existing

housing market can more readily absorb the new demands introduced by international staff.

While many questions have yet to be fully answered, in recent years the international community has become more sensitive to its role in contributing to economic inflation in the countries where there is a strong international presence, particularly in times of post-conflict and post-disaster. For example, at the 2002 Afghanistan Recovery and Reconstruction Conference (also know as the Tokyo Conference), international donors pledged more than US$1.8 billion in aid to rebuild Afghanistan in 2002, and US$4.5 billion over the following five years.[22] Various international agencies highlighted the hazards of rent and wage inflation, which could be spurred by the influx of money and international aid workers. The conference itself took note of a proposal submitted by the United Nations Development Programme (UNDP) for a Code of Conduct to avoid distortions in wages and rent inflation caused by the international presence, and urged further work on the proposal by the Conference's Implementation Group.[23] Oxfam International also took the opportunity to raise similar concerns, noting in the leadup to the Tokyo Conference that "Reconstruction funds bring with them the risk of rent and wage inflation, as the number of agencies and actors proliferate."[24]

Clearly, the issue of UN inflation has arrived on the international agenda as a subject for discussion and debate. What continues to need further development is the concrete policy-level work that will ensure that international organizations can operate effectively "in the field" while at the same time ensuring that their presence does not compromise the realization of the economic, social, and cultural human rights of local residents.

[22] United Nations Development Programme, "Donors Pledge $4.5 Billion in Tokyo," 22 January 2002.

[23] Id. The Implementation Group (IG) was comprised of the following actors: "The Afghan Interim Authority will chair the IG. The World Bank, UNDP, Asian Development Bank, Islamic Development Bank, and the Afghan Support Group (ASG) Chair will serve as vice-chairs of the IG." The Ministry of Foreign Affairs of Japan, "Co-chairs' Summary of Conclusions of the International Conference on Reconstruction Assistance to Afghanistan," 21–22 January 2002.

[24] Oxfam International, "Winning the Peace? The Tokyo Conference: A Challenge to Donors," January 2002.

Inching Out the Poor: Some Additional Issues to Consider

From "UN Inflation" to "UN Gentrification"?

It is perhaps interesting to note within the scope of this discussion that many urban communities in both developed and developing nations are familiar with the issue of gentrification, a phenomenon commonly defined as a process in which previously low-cost, physically deteriorated neighborhoods experience physical renovation and an increase in property values. Often accompanying this urban renewal is an influx of comparatively wealthier residents who displace prior residents, who are often less economically affluent. In post-conflict countries with emerging tourist industries, and where interest in real estate development and investment is high, housing markets may also suffer a similar experience. Gentrification and the concomitant displacement of the poor, these days, can certainly be spurred on by global as well as local factors.

Gentrification may provide an interesting frame of reference for the examination of the impact of UN peace operations on local housing markets. From the information examined here, it seems that in some cases the affect of UN inflation on local housing markets, and the experience of gentrification, are at least somewhat analogous. Both processes are characterized in part, in the words of the DPKO-sponsored study, by a "renovation of housing stock," in the first case aimed at meeting the tastes of more affluent locals, and in the second case aimed at meeting international staff expectations.[25] The end result, however, maybe somewhat the same in terms of ultimately compromising the ability of poor and moderate income people to live in communities and neighborhoods where they were once able to afford homes.

It may therefore be the case that the presence of international staff itself may serve as a catalyst for a kind of community gentrification, and there may in fact be a more direct (and not only analogous) relationship between these two phenomena. The controversies over gentrification regarding the relative costs and benefits – displacing poor residents on

[25] Michael Carnahan, William Durch, and Scott Gilmore, *Economic Impact of Peacekeeping: Final Report*, prepared as part of the Economic Impact of Peacekeeping Project of the Peacekeeping Best Practices Section (PBPS) of the UN Department of Peacekeeping Operations (DPKO), March 2006.

the one hand, while improving housing stock and stimulating economic growth on the other – are also relevant to the debate surrounding the positive and negative economic effects of an international presence in the post-conflict period.

This way of looking at the issue also perhaps suggests some potential ways to ameliorate at least some of the detrimental effects of UN inflation and the distortion of local housing markets. For example, communities have sought to battle the negative consequences of gentrification by encouraging rent control or rent stabilization and other measures that would ensure that low and moderate income residents are not priced out of the local housing market. Others have supported the establishment of community land trusts, which serve to effectively remove land from the open market, thereby combating one of the main factors underpinning gentrification and rising housing costs: speculation in land prices. Still other communities have adopted "inclusionary zoning" approaches, which require that a certain percentage of affordable housing units be created alongside more high-end housing developments. Theoretically, all of these and other solutions could similarly be used to combat some of the negative effects of an international presence on local housing markets.

UN Peace Operations and the Prospects of Housing, Land, and Property Restitution

Another question that is related to the question of local housing markets, and which also merits further consideration, has to do with the potential of international peacekeeping operations to either disrupt or facilitate the effective return of displaced persons to their former homes and lands. In cases where the available housing stock is very limited, where conflict has led to the "abandonment" of previously occupied housing, or where secondary occupation has been widespread, international agencies must be especially sensitive to the restitution rights of those displaced by conflict. At the very least, in their efforts to house mission personnel, international agencies and their staff must be sure not to unintentionally occupy buildings and homes that actually belong to displaced persons, thereby complicating or eclipsing the process of timely housing, land, and property restitution.

The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons provide some relevant guidance on the role of the international community, including international organizations and peacekeeping missions, in promoting restitution rights.[26] As an overarching approach, the principles stipulate that the international community should promote and protect the right to housing, land, and property restitution, as well as the right to voluntary return in safety and dignity.

More specifically, the principles call on international organizations to work with national governments and share expertise on the development of national housing, land, and property restitution policies and programs and help ensure their compatibility with international human rights, refugee, and humanitarian law and related standards. International organizations should also support the monitoring of their implementation. Beyond this, international organizations, including the United Nations, should also "strive to ensure that peace agreements and voluntary repatriation agreements contain provisions related to housing, land and property restitution, including through the establishment of national procedures, institutions, mechanisms and legal frameworks."

The principles also recognize the special role of peace operations in facilitating successful restitution schemes. Indeed, the principles state that international peace operations, in particular, should help to maintain a secure and stable environment wherein appropriate housing, land, and property restitution policies and programs may be successfully implemented and enforced. In fact, the principles also advocate going one step further, and note that depending on the mission context, international peace operations should be requested to actively support the protection of the right to housing, land, and property restitution, including through the enforcement of restitution decisions and judgments.

While the question of UN inflation is not itself addressed, the principles do state that "international organizations and peace operations should avoid occupying, renting or purchasing housing, land and property over which the rights holder does not currently have access or control, and should require that their staff do the same."[27] Similarly, international

[26] United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, annex to UN Doc. E/CN.4/Sub.2/2005/17, 28 June 2005.
[27] Id.

organizations and peace operations should ensure that agencies or processes under their control or supervision do not obstruct the restitution of housing, land, and property.[28]

Conclusions and Recommendations

The international community has long understood the right to adequate housing to be a fundamental human right. Yet, while there now exist several international instruments that recognize and protect housing rights, much work remains to make the full enjoyment of housing rights a reality for the world's poor.[29] The marked disparity between the very positive international legal norms recognizing housing as a human right, on the one hand, and the massive scale of housing deprivation, on the other, remains a persistent reality in all parts of the world.

Peace operations also have a special role to play in protecting and upholding the housing rights of local residents. Peace settlements often seek to rebuild social stability after periods of violent disruption. Indeed, as the DPKO-sponsored study notes:

> Complex peacekeeping operations are designed primarily to restore and maintain basic initial security in their mission areas. This is their largest single contribution to development since, in the absence of peace and security, there is no incentive for people to invest in the legal economy. Restoration of peace and security makes the legal economy viable again. A stronger legal economy, in turn, supports peace and security objectives by generating employment opportunities and making more and more citizens stakeholders in peace.[30]

Battling the effects of unjust and arbitrary displacement, while at the same time fostering greater social integration, are key components of

[28] Id.

[29] See United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1995/27 "Promoting the Realization of the Human Right to Adequate Housing" (24 August 1995); see also United Nations Commission on Human Settlements, Resolution 14/6 "The Human Right to Adequate Housing" (5 May 1993).

[30] Michael Carnahan, William Durch, and Scott Gilmore, *Economic Impact of Peacekeeping: Final Report*, prepared as part of the Economic Impact of Peacekeeping Project of the Peacekeeping Best Practices Section (PBPS) of the UN Department of Peacekeeping Operations (DPKO), March 2006.

sustainable peacebuilding. However, as this chapter has illustrated, the economic affects of a peacekeeping operation, or a similar "international" presence, may be hazardous to a local housing market. Among the potential risks of UN inflation in the housing sector are decreased affordability of housing for locals and increased displacement of residents, this time based on their economic status. Similarly, poor management of peacekeeping operations can also jeopardize the possibility of housing, land, and property restitution for returning persons and potentially undermine the broader credibility of the international presence.[31]

As we have seen, it is clear that peace operations *do* have an impact on local housing markets. This impact leads, at least in some cases, to increased housing costs, although the evidence varies with respect to how far this phenomenon reaches. Comparing the findings of the IPA study with those of the DPKO-sponsored study, it is clear that there continues to be controversy about the true nature of the economic impact of peacekeeping and the balance of the positive and negative consequences.

While discrepancies and gaps exist, it is wholly sensible for the international community to be aware of the potential for UN inflation, and to take measures to mitigate its potential negative effects. In relation to housing in particular, peacekeeping operations should be encouraged to include an analysis of the local housing market in their "needs assessment" phase. Such an analysis would provide information on the structure of the local housing market, the status of housing stock, and the ability of the local housing market to absorb international clientele without creating undue inflation. An analysis at this early stage would also provide a baseline of information that would be useful for comparative purposes further down the road. Peacekeeping operations should be accompanied by a commitment from international agencies to monitor trends in local housing markets over the longer term, so that they can track the real economic effects of the international presence and work to ensure that these are as positive as possible.

[31] "The visibility of expatriates in their white foreign vehicles, at expensive restaurants reoriented to foreign clients, and subsidized stores generates greater resentment by locals over their own economic hardships." See Susan L. Woodward, *Economic Priorities for Peace Implementation*, International Peace Academy (IPA) and Center for International Security and Cooperation at Stanford University, IPA Policy Paper Series on Peace Implementation, October 2002, New York.

In their advocacy work, international organizations should also prioritize affordability and access to adequate housing for the poor, integrating housing concerns into their work to foster social stability and integration. Similarly, international organizations should ensure compatibility between their activities and with respect for the housing, land, and property restitution rights of potential returnees.

Many questions remain unexamined and are fertile ground for future research, and economic analysts should be encouraged to gather evidence that continues to illuminate our understanding of these issues.

PART

III

CONCLUSIONS

10

Possible Components of a Unified Global Policy on Housing, Land, and Property Rights in UN Peace Operations*

Scott Leckie

Each of the previous chapters have convincingly shown that despite differences in severity, scale, and frequency, housing, land, and property (HLP) rights challenges are common to all countries and territories undergoing the transition from conflict to post-conflict reconstruction. Restoring HLP rights to returning refugees and displaced persons, resolving ongoing HLP disputes, re-establishing an HLP rights registration system, rebuilding damaged or destroyed homes, protecting the HLP rights of vulnerable groups, securing equal inheritance rights for women, and many other HLP issues invariably face the international community whenever it composes UN peace operations to assist countries emerging from the throes of conflict.

In spite of these common themes and the gradual recognition by UN peace agencies of the importance of addressing HLP and peace concerns as part of the same comprehensive policy framework, the policies and approaches of UN peace operations designed to address these issues have varied widely during the past two decades. These range from reasonably extensive involvement in addressing HLP rights concerns to treating these matters as less vital to peace and security concerns than other issues with which the UN is more familiar. While differing circumstances on the ground, combined with political, financial, and other factors, have some role to play in these divergent approaches, and as the preceding chapters

* This chapter draws from an earlier paper prepared by the author upon the request of UNHCR entitled Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework, published in the Legal and Protection Policy Research Series by the Department of International Protection of UNHCR in March 2005 (PPLA/2005/1).

have conclusively shown, in no single UN peace operation – ever – has the full spectrum of HLP rights issues been adequately and comprehensively addressed. As a result, people in some countries or territories have seen some of their HLP rights and entitlements taken with a degree of seriousness by peace operations, in particular as these relate to HLP restitution and the security of tenure gained through the establishment or re-establishment of a cadastre or other HLP registration system. In other countries or territories, however, people who may have faced precisely the same violations of HLP rights have endured the presence of UN peace operations in which their HLP rights were effectively overlooked.

In terms of policy, therefore, victims of the full spectrum of possible HLP abuses continue to face what are essentially ad hoc and personality-driven approaches to the design and implementation of UN peace operations. This has the obvious result that some citizens are able to eventually exercise many of their HLP rights, while others find their HLP rights taken less seriously than they should be. As many of the preceeding chapters have revealed, *all* UN peace operations to date have failed to one degree or another in treating HLP issues as *rights*, and few have even maintained staff, programs, projects, or policies addressing HLP challenges in anything other than a piecemeal fashion.

While we may never know what the outcome of past UN peace operations may have been had they fully embraced HLP concerns, it is difficult to imagine that they could not have better addressed HLP challenges. We will never know what the HLP rights situation in Cambodia might be like today, for instance, were HLP rights deemed important enough to have been addressed by UNTAC or how an embrace of HLP issues by UNAMA might have had a palliative impact on what is today a rapidly declining security situation in Afghanistan, due in part to rising conflicts over land. But we certainly can conclude that past practice indicates that peace operations ignored housing, land, and property rights challenges not only at their own peril, but, more importantly, to the detriment of the local population in the country or territory concerned. Failing to address and face the often complex and immense challenges posed by the housing, land, and property sectors may initially seem the simplest and least threatening way of dealing with these controversial issues. Even when they are addressed, it may appear that purely humanitarian activities will resolve these challenges by themselves. However, as history has amply borne

witness, HLP rights problems tend not to go away on their own, and thus often require the explicit attention of the authorities concerned, including UN peace operations.

While UN peace operation performance on HLP issues has been far from ideal, it is at the same time clear that after six decades of UN engagement in post-conflict situations, the time has surely come to incorporate structural, systematic attention to HLP problems facing countries emerging from conflict. While imperfect, the experience of UN peace operations gained, particularly since the end of the Cold War, is now clearly sufficient to develop an effective, clear, and affordable UN policy on these issues. The absence of any agreed-upon UN policy framework for addressing the fundamental issue of how and in which circumstances people live has contributed to the very different ways that these concerns have been tackled, and in effect has left far too many people without HLP assistance or protection.

Prior to proposing a series of policy measures designed to rectify these gaps, it may be useful to anchor these within a range of important lessons learned during previous decades on the inherent links between HLP rights and conflict prevention and resolution. Any successful policy needs to be grounded in the ever improving understanding about the nature of HLP rights in conflict and how attention to these concerns can assist in building a sustainable peace. Eight steps in particular will assist in informing the policies needed to guide international peace operations in better addressing HLP rights concerns:

Recommendation 1. Include HLP Rights Issues Directly Within Peace Agreements, Security Council Resolutions, and Other Policy Documents Defining the Post-Conflict Normative and Institutional Frameworks

Although all UN peace operations could, if authorized and if they so wished, deal more structurally with HLP rights challenges, in none of the resolutions and other agreements outlining the authority and competencies of the various operations that have functioned in the Balkans, East Timor, Central America, and elsewhere have HLP rights concerns figured as prominently as they might have. In no operation has a full-spectrum approach to HLP rights been undertaken. Even in the case of the Dayton

Agreements, which in Annex 7 clearly enshrine the rights of displaced persons to return to their original homes, most of the HLP rights activities pursued by the international community in Bosnia-Herzegovina were not envisaged when Dayton was signed in 1995. Where interesting formulations of HLP initiatives have been enshrined in peace agreements, including those in Guatemala, El Salvador, and Sudan (South), their implementation – in particular where land reforms measures were envisaged – has all too often fallen well short of expectations. On the other hand, and in response to the security, stability, legal, economic, social, and other problems that invariably emerge in all post-conflict settings when HLP rights concerns are not addressed, some important peace operations did, *ex post facto*, begin to take at least some steps to face the more severe HLP rights challenges once staff on the ground began to comprehend the seriousness of HLP issues to overall peace and security. These would include peace operations in Kosovo, East Timor, and Afghanistan.

Were HLP rights competencies written directly into all the peace agreements and Security Council resolutions that lead to the deployment of peace operations, these operations would be in a far better political and legal position to address HLP requirements and be able to do so at much earlier stages in the peacebuilding process. All of this would assist in developing a clear and objective policy and institutional framework on HLP rights.

Recommendation 2. Include HLP Rights Competencies Within the Organizational and Administrative Structures of Future Peace Operations

Once it is decided at a political level that a peace operation will be established, future peace operations should explicitly include HLP rights competencies within their overall operational and administrative design. The HLP rights mandate should be clearly elaborated, adequately financed, and form part of the broader political structures and strategies in the country/territory concerned. Any peace operation that fails to incorporate these issues into the operational design framework should be asked to demonstrably show why attention to HLP issues is not required, and on which evidentiary basis such a decision was made.

Recommendation 3. Understand That Addressing HLP Rights Is Not Discretionary if the Protection and Promotion of Human Rights Are Key Objectives of the Peace Operation

HLP rights should no longer be treated as discretionary concerns within any UN peace operation working within post-conflict settings. All governments of the world maintain official competencies to regulate matters relating to housing, land, and property, and while the stature of UN peace operations is surely unique vis-à-vis governments, there is no valid reason why peace operations themselves cannot incorporate similar responsibilities into their structures, particularly when performing a governance role. Indeed, if peace operations are formally entrusted with restoring and protecting human rights, and this is recognized within the relevant foundational documents, as is now almost invariably the case, then HLP rights simply cannot be ignored and should be fully mainstreamed within the functions of the peace operation concerned.

Recommendation 4. Plan Early, Appropriately, and Integrally

HLP rights issues should be addressed as early as possible and in an appropriate and integral manner within the peacebuilding process. Establishing a Housing, Land, and Property Rights Unit within one of the leading peace UN agencies (DPKO, DPA, PBC, or elsewhere) for dealing quickly and consistently with HLP rights issues within post-conflict environments would allow numerous research, institutional planning, and other activities to be carried out prior to the start of all future operations, thus saving valuable time and allowing HLP rights programs and measures to start far earlier than has been the case to date. The development of an Integrated Mission Task Force (and the inclusion of an HLP Rights Unit within it), coupled with greater attention to HLP issues within the UN's Cluster System for humanitarian missions, would assist in this process.

Recommendation 5. Determine the Applicable HLP Legal and Policy Framework During the Planning Process

Valuable months are often spent during the initial periods of peace operations identifying local laws, compiling these, translating them, and trying

to understand how the entire domestic legal framework fits together with respect to HLP rights. This is especially true in countries where land relations are governed according to customary law. Additional time is frequently spent examining the compatibility of domestic laws with the international human rights legal framework, suggesting which laws may need repeal, which require amendment, and which new laws may be needed. Much of this work could be done during the peace operation planning process or even earlier if databases containing this information could be established by whatever UN agency eventually takes the lead on HLP issues within future UN peace operations.

Recommendation 6. Establish an HLP Rights Expert Standby Network

The limited amount of HLP rights expertise within the UN Secretariat and other UN agencies involved in post-conflict peace operations, and the lack of any personnel within the Department of Peacekeeping Operations, the Peacebuilding Support Office, or the Department of Political Affairs with particular HLP rights expertise, has meant that when these rights have been addressed in peace operations, this has generally been done by external consultants. Recruiting and hiring consultants can be time-consuming, resource-intensive, and lead to considerable delays; problems with follow-up can affect the overall effectiveness of the peace operations involved. Due to the HLP rights activities that took place in Bosnia-Herzegovina, East Timor, Kosovo, and in a number of countries in Africa, however, there is now a reasonably large group of HLP rights practitioners available who have had direct experience in post-conflict settings.[1] The establishment of a standby expert civilian capacity, including HLP rights expertise, within or available to the lead UN agency in these matters would assist in expediting attention to HLP rights concerns and assure that these issues were appropriately addressed at the earliest stages of the planning process.

[1] The establishment of Displacement Solutions and the coordination of an HLP Expert Registry is one recent effort designed to provide a permanent pool of HLP expertise that can be deployed at short notice to the field, including UN peace operations. See http://www.displacementsolutions.org/.

Recommendation 7. Recruit Local Lawyers and HLP Experts First

Understanding the history, social attitudes, legal status, regulatory framework, and cultural significance of housing, land, and property issues in post-conflict countries and territories is not possible without the full involvement of the local population from the planning process onward. Progress on these issues will simply not be possible without the extensive involvement of local lawyers and experts. Hiring local citizens to guide the HLP rights implementation process is not only appropriate, but will ensure that mistakes are not made by overzealous (or inexperienced) international staff in determining how best to proceed toward HLP rights realities, and that realism and common sense can be combined with international law and principle to generate the best possible policy framework. While care needs to be taken by peace operations to ensure objectivity and independence by local lawyers and HLP rights experts, and to protect against biased decision-making or policy prioritization (particularly in situations following ethnic conflict), international expertise can never replace local awareness and understanding. International and local experts working together to address HLP rights challenges, however, can provide an ideal means of ensuring that these issues are tackled in the best possible manner. In addition, the presence of local lawyers and experts can assist in preventing excessive local expectations as to the speed and scale of resolving all HLP rights challenges facing the country or territory in question.

Recommendation 8. Reverse HLP Rights Violations to the Maximum Possible Extent

Peace operations need to be aware from the outset that reversing HLP rights violations (such as illegal occupations of private homes, the confiscation of residential land, or obstructive local officials who refuse to implement HLP rights laws) will be difficult and sometimes dangerous. Such operations, however, must find effective ways – preferably at the earliest possible time in the lifespan of the operation – to assert political and (to the extent possible) physical control over the HLP environment of the country or territory with a view to achieving residential and HLP justice for victims of HLP rights violations. The HLP components of

peace operations need to be able to rely upon the support of both the political leadership of the operation as well as military leadership to enforce HLP rights provisions and restore HLP rights to those whose rights have been recently, or not so recently, violated.

A Proposed UN HLP Policy and Institutional Framework

The common lack of comprehensive attention given to HLP issues by UN peace operations in the past is giving way to growing recognition that these problems plague all post-conflict settings to one degree or another, and that addressing these fundamental challenges is no longer simply a discretionary choice of the UN, but a core responsibility of effective peacebuilding. Incorporating the just-noted eight recommendations will assist in providing the foundations required to improve UN performance in addressing HLP concerns. As the legal stature and enforceability of individual housing, land, and property rights continue to expand, ignoring or side-lining HLP rights concerns in peacebuilding operations has become increasingly difficult to justify.

But precisely what form should sustained UN involvement take? Which institution or institutions should play the lead agency role? What common HLP policy and institutional features could future peace operations maintain? In essence, answers to these and other questions, as well as two key political decisions are required from the United Nations before we can expect vastly improved HLP performance by UN peace operations. In terms of politics, we need to determine: (1) Which agency will lead post-conflict HLP efforts? (2) What precisely will this agency do in this regard?

As far as agencies are concerned, there are many possible ways by which HLP rights can be inserted into the broader UN framework. Giving overall HLP responsibility to the new UN Peacebuilding Commission is one of the possible entry points for sustained UN action, as would be efforts to empower DPKO, DPA, UN Habitat, and others.[2] Each of these and other

[2] In Kofi Annan's *In Larger Freedom*, the then Secretary-General outlined what he sees as the six key functions of the Peacebuilding Commission: (1) To improve United Nations planning for sustained recovery, focusing on early efforts to establish the necessary institutions. (2) To help to ensure predictable financing for early recovery activities, in part by providing an overview of assessed, voluntary, and standing funding mechanisms. (3) To improve the coordination of the many post-conflict activities of the United Nations funds, programs, and agencies. (4) To provide a forum in which the United Nations, major bilateral donors, troop contributors, relevant regional actors and organisations, the international financial institutions, and the

UN agencies maintains permanent or ad hoc HLP competencies, combined with permanent or ad hoc involvement in post-conflict peacebuilding. It is difficult at this juncture to determine which of these or perhaps other agencies might be best placed to take the lead role in this regard, but given their lead agency status with the Humanitarian Cluster System on HLP issues under both the Protection and Recovery Sub-Clusters, it would seem appropriate if serious consideration were given to UN Habitat as a first choice. Although a comparatively small UN agency, without the clout or stature of some of the larger and more influential agencies, UN Habitat has led the way in advancing HLP concerns within a growing number of UN peace operations, and their mandate as the UN Housing Agency and UN City Agency places them in perhaps a better position than many of the other agencies in this respect.

Turning to the second question, it would seem advisable that whenever a resolution authorizing the United Nations to undertake peacekeeping operations in a country or territory is prepared, the UN Security Council should routinely incorporate HLP competencies within the terms of reference of the peace operation concerned, and identify the lead agency responsible for implementing the objectives of the mission. A first step in this regard would involve the adoption of common policies outlining the design, staffing, and structure of all future UN peace operations. This would be a simple and concrete means to ensure consistency and comprehensiveness in terms of attention to HLP issues. It would imply overall clarity with respect to both the lead agency and the assurance that HLP questions would always receive attention when new UN peace operations were under discussion.

The Housing, Land, and Property Rights Directorate

In institutional terms, the lead agency would ensure that HLP competencies were included within the operational design of the UN mission and that the same agency would be responsible for establishing a *Housing, Land, and Property Rights Directorate (HLPRD)* within the framework of

national or transitional government of the country concerned can share information about their respective post-conflict recovery strategies, in the interests of greater coherence. (5) To periodically review progress toward medium-term recovery goals. (6) To extend the period of political attention to post-conflict recovery. Each of these six objectives forms a solid basis for justifying the systematic inclusion of HLP rights competencies in future UN peacebuilding initiatives as a matter of common sense.

the peace operation concerned to ensure that structural institutional attention is paid to all HLP rights issues. The HLPRD would always start out as purely a UN institution, but would then evolve into an institution that combined UN programs and projects with existing national institutions (ministries, etc.). The precise form the HLPRD eventually takes will be important, but it is in ensuring that all relevant HLP issues are fully addressed that remains the primary concern.

The proposed institutional and policy frameworks elaborated below are premised on a series of lessons learned since 1990 in terms of attention to HLP rights concerns within peace operations. Future UN peace operations may not be able to solve all housing, land, and property problems in the short term, however, a fully functional HLPRD will assist in providing a measure of political certainty with regard to housing, land, and property rights issues and put post-conflict societies in a far better position to secure HLP rights for all.[3] A consistent, transparent, and effective HLP institutional and policy framework should considerably improve the effectiveness of UN peace operations.[4] It will assist in providing greater political stability, expand the prospects for economic development, and expedite the re-establishment of national capacities to restore peace, justice, governance, and rule of law.

The establishment of an HLPRD within each UN peace operation would be one important means of developing the institutional framework required to comprehensively address all HLP concerns. It would act as the official institution responsible for all matters relating to housing, land, and property policy and for assessing, adjudicating, and enforcing housing, land, and property claims. To achieve this status it should be formally appointed to coordinate all relevant HLP rights-related activities of the peace operation in question, including the relevant activities of other international agencies, NGOs, and others.

[3] For instance, one typical volume dedicated to these matters, *Peace-Building: A Field Guide*, fails to even mention the term housing, land, property, or even shelter. See L. Reychler and T. Paffenholz (eds), 2001, *Peace-Building: A Field Guide*, Lynne Rienner Publishers, Boulder, CO.

[4] Although no formal policy yet exists, several UN agencies and analysts are beginning to take steps toward this end. For instance, UNHCR and the UN Habitat Programme signed an MOU in December 2003 entitled "Closing the Gap Between Relief, Reconstruction and Development Efforts in Post-Conflict and Post-Disaster Areas." This MOU opens up operational linkages between the agencies and addresses specific areas of collaboration that include shelter solutions for refugees and returnees, settlement planning and management, land and property rights, restitution and administration, and infrastructure planning and development.

To function effectively, the HLPRD will require staffing levels commensurate to the scale of the HLP rights challenges it faces. The HLPRD should be headed by an Executive Office comprised of an Executive Director and Deputy Director and legal and support staff. Each department within the HLPRD should be headed by a Department Coordinator, who in turn would be responsible for determining precise staffing needs in each area of competence. Ideally, staffing should be comprised of nationals of the country concerned, with technical assistance and advice provided by the UN and international experts.

The financial requirements of the HLPRD should be included within the overall budget of the peace operation, and listed as a separate budget line item. Specific funding requests should be developed by the HLPRD to supplement ordinary budgetary allocations. Financing HLP activities has proven difficult in the past, and new methods need to be found to adequately resource these new bodies. Adequate office space for the HLPRD central office should be identified in the capital city. Once secured, additional office space should be sought in other major population centers in the country concerned. Additional offices may be required in other countries where refugees are currently resident.

In terms of chains of command, the Executive Director of the HLPRD would report directly to the executive organs of the peace operation and relevant national governmental officials, whether working within a UN Transitional Administration or in the context of UN support operations assisting national authorities. The lead agency responsible for the HLPRD would coordinate the relevant roles of other UN agencies with HLP competencies. The HLPRD would work closely with all existing national institutions involved in HLP matters where these were still functioning, combined with other inputs as appropriate.

In terms of functions, the HLPRD would be comprised of seven departments: Legal; Policy; Housing; Land; Construction; Claims; and Records. Each of these departments would perform the following functions.

Policy Department

The *Policy Department* would carry out housing, land, and property rights policy initiatives and develop or assist local authorities with the development of HLP policies consistent with international law, and which are

designed to promote and protect HLP rights to the fullest possible extent. It would promote an approach to HLP issues that takes as its starting point the universal application for everyone of the right to adequate housing (and related land and property rights) as established pursuant to a range of international human rights treaties.

The Policy Department would also be responsible for publicizing the HLP rights activities of the peace operation during the first months of operation. Doing so will engage and inform the local population and show the intention of the peace operation to address HLP rights issues from the outset. This will raise public confidence in this regard. The production of information leaflets, posters, videos, TV and radio commercials, and other means of transmitting the HLP rights message and plan of action to the wider public will both create transparency as well as assist in the assertion of public control over the housing, land, and property sectors.

The Policy Department would seek to ensure that HLP issues were kept high on the political agenda. While security, political, and economic concerns are often treated as the priorities of peace operations, the history of post-conflict governance and other peacebuilding efforts suggests that the sooner HLP rights issues are addressed at the political level, the more rapidly related disputes and policy inadequacies can be amicably resolved without developing into violence or instability. This applies both to issues requiring mediation or adjudication (such as housing, land, and property disputes) as well as broader issues relating to the rights of the homeless, women, displaced persons, and other groups that are particularly vulnerable. Although there may be a temptation to delay decision-making on many of these issues, and perhaps an even greater reluctance to address these issues at all, practice clearly shows that neglecting to address HLP rights leaves people living in post-conflict countries in increasingly volatile economic and political circumstances.

Convening *National Housing, Land, and Property Rights Consultations* would be another key function of the Policy Department. All stakeholder national consultations on HLP rights should be held early on and involve local institutions such as the housing, land, finance, and other relevant ministries, and all UN and other international agencies including UN Habitat, UNHCR, OCHA, the military component of the operation, NGOs, and representatives of political parties and civil society

organizations.[5] These consultations should develop into a national discussion on the most effective means of addressing HLP rights issues within the institutional framework being put into place and the contours of a national legal and policy framework on housing, land, and property rights matters.

Following the national HLP consultations, a mutually agreed-upon *Housing, Land, and Property Rights Plan of Action* should be concluded by the Policy Department. The population in the country concerned needs to be informed as soon as possible on the plans of the peace operation to address housing, land, and property rights issues. While the specifics of many elements of the final policy will take time to develop and require local inputs and direct experience in the country or territory concerned, the basic tenets of the policy should be publicly announced to the local populace at the earliest possible moment. The policy should be grounded in human rights principles and international best practice, and outline the terms of any peace settlement and the manner by which HLP rights issues were addressed, and the local, national, and international laws that will guide the process of implementing these rights. The policy should also explicitly indicate that:

- The Housing, Land, and Property Rights Directorate will be the primary body entrusted with addressing outstanding housing, land, and property issues.
- HLP rights and related provisions in human rights and other treaties ratified by the state concerned will be recognized and respected in full.
- All persons will be protected against arbitrary or unlawful forced evictions or the confiscation of homes or land and against situations of homelessness due to forced eviction or displacement.
- Permanent housing, land, and/or property solutions will be sought for everyone within the shortest possible timeframe.
- An emergency policy response to address homelessness and landlessness will be approved.

[5] In Sri Lanka, for instance, the UNHCR sponsored a series of workshops on land and property rights of internally displaced persons designed to get local inputs into these issues and to assist in the development of a plan of action to address these concerns within the context of the ongoing peace talks. As a result, the UNHCR and the Human Rights Commission of Sri Lanka prepared a policy paper in 2003 proposing the establishment of a Sri Lanka commission on land, housing, and property rights.

To ensure public support for the policies that emerge, the Policy Department will need to ensure that residential disruption is minimized to the maximum possible extent by preventing the ordering, carrying out, or tolerance of forced evictions of people from their present homes, unless truly extraordinary circumstances so warrant, and even then, only once basic conditions of stability have emerged. While eviction may be required in order to return a home to its legitimate owners or tenants – following the conclusion of a judicial process and subsequent judicial order – it is advisable to allow those currently occupying state property or land purely for humanitarian purposes (e.g., there is no other available and affordable housing for those in need) to continue to temporarily reside where they are, and to develop means of improving their living conditions, rather than evicting them and forcing them to find even worse places to live, and adding to the probably already large homeless population.

Local citizens need to be assured that functioning peace operations will not worsen an already poor HLP rights situation. Peace operations need to address the impacts that their very presence will have upon the local housing, land, and property markets. Appropriate steps need to be taken by peace operations to prevent the hyperinflation in housing markets that is invariably created when large numbers of international personnel arrive in countries of operation. While addressing this problem will be a difficult one (in part because property owners renting to international staff can benefit financially), if the majority of the local population that does not directly benefit clearly senses that there has been at least an attempt by the peace operation to confront this issue, it may be more willing to support the mission's broader objectives.

Finally, the Policy Department should sponsor HLP rights training programs for local officials to ensure that people are aware of the HLP rights policy and activities, and that they have a role to play in securing these rights for everyone. Efforts could be made to cooperate with national institutions, including universities and research institutes. In-house HLP rights training within peace operations would also expand attention to these issues by peace operations staff.

Legal Department

The *Legal Department* within the HLPRD would be responsible for developing a democratic, fair, and equitable legal framework on HLP

rights themes, fully consistent with international human rights and humanitarian laws and other relevant legal standards and norms. It would monitor the implementation of relevant law, identify laws in need of repeal or amendment, draft new legislation, and undertake any other measures to develop a consistent legal framework. Moreover, it could be entrusted with urging local government officials to apply HLP rights laws and policies in a neutral manner, and to prevent local authorities from actively violating these laws. The Legal Department could also be responsible for developing an HLP Rights Law Implementation Plan (modeled, perhaps, on the Property Law Implementation Plan [PLIP] in post-war Bosnia-Herzegovina) designed to expedite the implementation of HLP rights laws at the local level. The Legal Department could also guide future HLP rights policy- and law-making.

Peace operations will have varying degrees of legislative power and influence, which will determine the degree of involvement exercised by the Legal Department. In some instances, national authorities will remain the sole law-making power. In other cases, such as was the case in UN operations in Kosovo and East Timor, both UNMIK[6] and UNTAET had comprehensive mandates enabling them to exercise all legislative and executive powers. The Security Council resolutions establishing these transitional authorities set out the applicable law in general terms by determining that the law prevailing in both territories at the time would remain in place, unless it was manifestly inconsistent with international human rights law. For instance, UNMIK's Regulation 1999/1, On the Authority of the Interim Administration in Kosovo (25 July 1999),

[6] As one paper asserted: "UNMIK has a clear legal mandate to examine housing and property issues in Kosovo. This mandate is derived from the contents of UNSCR 1244 emphasizing the duty of UNMIK to protect and promote human rights (one of which is the right to adequate housing)"; see UNMIK Regulation Nos. 1999/1 and 1999/2 and any subsequent UNMIK regulation. The UN Secretary-General's report of 12 July 1999 indicates that "UNMIK will be guided by internationally recognized standards on human rights as the basis for its authority in Kosovo. UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions" (para. 42). UNMIK, therefore, must take into account and apply wherever possible, international human rights standards recognizing the right to adequate housing and related rights (Scott Leckie, 1999, *Housing and Property in Kosovo: Rights, Law & Justice: Proposals for a Comprehensive Plan of Action for the Promotion and Protection of Housing and Property Rights in Kosovo,* UN Habitat Programme).

determined applicable law and, by inference, determined how HLP rights would be approached by them.[7]

While most peace operations will operate with considerably less flexibility or influence than that given to UNMIK and UNTAET or other transitional authorities, all peace operations will need to generate or assist in generating a legal framework conducive to the implementation of an integral HLP rights policy. Legal regulations will need to be adopted in close collaboration with local lawyers and HLP experts. An effort will need to be made at the earliest possible time to outline the legislative framework and applicable law governing the HLP rights activities of peace operations and to identify steps to make this framework most effective.

Considerable research on relevant law can be carried out prior to peace operations beginning their work. At a minimum it should be possible to compile all relevant domestic housing, land, and property legislation prior to entering the country, and, depending on the lead time involved, considerable legislative analysis can also be carried out even before the peace operation begins to function. Once the legislative framework is known, the law can be analyzed from the perspective of human rights law to determine domestic and international legal compatibility and where local law may require amendment to conform to relevant human rights standards. Legislative domains that should be compiled and analyzed include:

- Constitutional law
- Human rights laws

[7] Sec. 1(1) Authority of the interim administration: All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General; Sec. 2 Observance of internationally recognized standards: In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.; Sec. 3 Applicable law in Kosovo: All laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK; Sec. 4 Regulations issued by UNMIK: In the performance of the duties entrusted to the interim administration under United Nations Security Council resolution 1244 (1999), UNMIK will, as necessary, issue legislative acts in the form of regulations. Such regulations will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement, as provided for in United Nations Security Council resolution 1244 (1999); Sec 6:

- Abandonment laws
- Housing, land, or property laws adopted during the armed conflict
- Landlord and tenant law
- Land laws
- Laws regulating eviction
- Laws regulating security of tenure
- Laws on adverse possession
- Laws concerning housing repairs and improvements
- Laws addressing housing credit and finance
- Laws governing state property including social housing resources
- Laws on public health and housing
- Laws concerning the restoration of housing or property rights
- Laws governing property sales, exchanges and leases
- HLP expropriation or compulsory purchase laws
- Laws determining succession rights to land and housing, particularly the rights of women
- Laws governing communal ownership of land or housing
- The position of formal law vis-à-vis customary land titles, ownership, use, and control.[8]

Determinations need to be made early on as to the compatibility of domestic HLP law with international human rights and other standards. To ensure compatibility, the repeal and reform of local legislation may be required. In Kosovo, the relevant UN authorities repealed a discriminatory housing law,[9] and in Bosnia-Herzegovina (at the request of UNHCR and others) several abandonment laws were repealed to pave the way for the implementation of the property restitution provisions of the Dayton Accords. Undertaking activities designed to promote compatibility between local and international laws also provides a good opportunity to expand attention to and understanding by municipal authorities and

State property: UNMIK shall administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo.

[8] For a detailed analysis of housing rights legislation, see UN Housing Rights Programme, 2002, *Housing Rights Legislation*, UN Habitat Programme and the Office of the UN High Commissioner for Human Rights.

[9] UNMIK Regulation 1999/10 (20 October 1999), On the Repeal of Discriminatory Legislation Affecting Housing and Property in Kosovo.

citizens of the manner by which international human rights and refugee law address issues relating to housing, land, and property rights, and how these norms can be incorporated into the national legal framework.

Finally, the Legal Department would encourage the national authorities in the countries concerned to adopt a *National Housing Rights Act* as a means of consolidating all relevant law affecting the enjoyment, in particular, of housing rights. Such an act would enable the development of a consolidated law governing all constituent guarantees comprised under the rights to housing, land, and property ensured under international law, and could provide a clear basis for coordinating joint international and local efforts toward protecting HLP rights. Among other things, the act should provide a legislative basis for land reform, creating a national housing environment free of discrimination and firmly entrenching housing, land, and property rights concerns within broader anti-poverty strategies, ensuring that HLP rights violators are prosecuted and that historical HLP rights violations are included within the mandate of truth and reconciliation commissions and other reconciliation bodies.

Housing Department

The *Housing Department* would coordinate additional activities in support of HLP rights, beginning initially with a nationwide *Housing, Land, and Property Rights Assessment*. UN peace operations have not always included reference to housing, land, or property rights issues within initial needs assessments carried out prior to or in the earliest stages of their presence. While patterns of housing damage are often monitored by UNHCR and other agencies, such measurements (as important as they are) tend to miss data that can be vital in the development of an effective HLP rights strategy. To perform effectively, one of the first on-site actions of UN peace operations should be carrying out initial housing rights needs assessments. Collating and analysing such information is the only actual basis upon which accurate and effective policy-making can take place. At a minimum, the type of information that needs to be collected includes:

(**A**) *Housing Stock Status*
- Proportion and total number of destroyed homes
- Proportion and total number of damaged homes

- Inventory and total number of abandoned (and currently unused) homes
- Housing-related infrastructure destruction and damage (water, electricity, etc.)
- Availability of social or public housing

(**B**) *Emergency Housing Needs*

- Number and location of homeless persons
- Number and location of persons with emergency housing needs
- Number and location of secondary occupants
- Number and location of those claiming adverse possession rights and squatters

(**C**) *Land*

- Total amount and location of abandoned land
- Total amount and location of State land reserves
- The presence of land mines in or near to housing sites, agricultural land or possible land for allocation

(**D**) *Housing Records*

- Housing, land, and property rights registration system
- Land cadastre
- Information on incomplete housing or land regularization programs
- Information on customary land laws and arrangements

(**E**) *Availability of Building Materials*

- Availability of locally produced building materials
- Overall building material requirements

Additional functions of the Housing Department would include identifying all abandoned housing and other public and private buildings that could be used for housing purposes, and allocating such premises (generally on a temporary basis) to displaced and/or homeless persons and families; the provision of other forms of transitional/emergency housing or land for those in need, including secondary occupants of refugee and displaced person's property; protecting all persons against forced evictions and other forms of arbitrary and unlawful displacement; identifying state land for use in constructing affordable social housing and for allocation to homeless and landless persons and families; administering and managing all public housing resources; monitoring housing affordability

and intervening within the housing market to keep residential prices at reasonable levels; and developing housing finance systems accessible to the poor to enable them to construct adequate housing resources and to repair damaged homes.

In addition, the Housing Department will be responsible for the identification and organized temporary allocation of public and abandoned properties. In East Timor, for instance, UNTAET established procedures for the temporary allocation of abandoned buildings and land for terms of up to three months, medium-term allocations three to twelve months, and long-term between one and five years. As a result, abandoned housing and other public and private buildings that could be used for housing purposes were identified and allocated, on a temporary basis, to homeless persons and families.

The Housing Department should take concrete steps to increase levels of security of tenure for everyone, including public- and private-sector tenants and those living in informal settlements. This can include the development of quick and affordable measures for conferring security of tenure rights to slums and popular settlements currently without security of tenure; the issuing of public commitments allowing existing informal communities to continue to remain in place; and expanding national land and housing registration systems to allow for the inclusion of new tenure rights of the poor.

The Housing Department should ensure that lawful evictions carried out or ordered by agencies forming part of the peace operations are kept to a minimum.[10] While eviction as a last resort may be necessary to enforce HLP laws and to restore legitimate rights to returning refugees or IDPs, extreme care will need to be taken to protect the rights of those facing eviction. International law widely prohibits all but the most exceptional cases of forced eviction. However, international law does allow evictions to be carried out when a series of strict legal and procedural requirements are fully satisfied. In order to conform to international human rights law and standards (e.g., Committee on Economic, Social and Cultural Rights General Comment No. 7 on Forced Evictions [1997]), peace operations should ensure that no person, family, or community is made homeless as a result

[10] See, for instance, Order No. 6, On the Eviction of Persons Illegally Occupying Public Buildings (CPA/ORD/8 June 2003/06) issued by the Coalition Provisional Authority in Iraq.

of the resolution of a housing, land, or property dispute that requires eviction. A policy decision should be made that the forced eviction of residents will not take place unless alternative land and/or housing is made available to them.

The Housing Department should also promote housing finance programs for the poor, and ensure that public expenditure is commensurate to national housing requirements, and ensure that a reasonable portion of international development assistance, as appropriate, is earmarked for housing construction or improvements. UN peace operations should strive to provide assistance to low-income groups and encourage them to develop self-controlled housing finance and savings programs. Microcredit housing loan/grant programs could be established. Support mechanisms need to be created that will assist people in their rehabilitation and support them in whatever they are already doing to rebuild their lives and homes. In this respect, low-interest and long-term loan programs are urgently needed, so that people can purchase building materials to repair their damaged houses or to buy land to build new homes. The poor generally have little or no access to credit for such purposes, and it will fall on peace operations to ensure such access. The Housing Department should develop ways of providing stimulants to the private sector to construct low-income housing, including tax credit programs and other stimulants to encourage the construction of low-income housing.

The Housing Department should develop an appropriate response to the rights of the homeless. Homelessness warrants major policy responses by UN peace operations. Resources should be sought to assist the homeless and to begin the process of finding permanent housing solutions for them. Identifying vacant state property and allocating this for the temporary or permanent use of the homeless would be an immediate step that could be taken with very limited financial implications. Similarly, providing financial assistance or incentives to the construction industry could assist in inducing the rapid construction of affordable housing. Ensuring that women's rights to inherit housing, land, and property are fully respected – including the presence of proper registration procedures for registering HLP rights in women's names and promoting the adoption of special housing policies for vulnerable and other groups with special housing needs, including the disabled, the elderly, minorities, indigenous peoples, children, and others – are two equally important functions of the Housing Department.

Construction Department

The *Construction Department* would be responsible for the physical side of HLP rights efforts, including repairing infrastructure and services, repairing damaged or destroyed homes, assisting the housing construction sector to function optimally, and developing affordable building materials for lower income groups. The Construction Department will also be responsible for the transitional shelter sector.[11]

Support for the construction of new housing may also be a central component within peace operation efforts to address HLP rights concerns. Although this element of peacebuilding is often still perceived as too resource-intensive a task to undertake within post-conflict settings, the need for the construction of new social housing and other new dwellings has been recognized by some peace operations. The Stability Pact for South Eastern Europe, for instance, proposed the construction of some 60,000 social housing units and the reconstruction of tens of thousands of housing units as part of its regional return initiative.[12] While the actual building of new homes may be opposed by those favoring more minimalist approaches to peacebuilding, it is vital to remember that the physical reconstruction and expansion of habitable housing stock in a peace conflict environment must necessarily form part of a broader housing rights policy framework.

Once the national housing, land, and property needs assessments are completed and the precise scale of housing damage and destruction is determined, an intensive multiagency program of housing repair and reconstruction should be initiated by the Construction Department in collaboration with local authorities. In Kosovo, UNMIK called for a common approach to housing repairs and reconstruction that urged various international donors and agencies involved in repair and reconstruction of

[11] The "transitional settlement" sector is defined as "settlement and shelter resulting from conflict and natural disasters, recognizing that emergency response is the first step in a process towards durable solutions for those affected." Six specific types of transitional settlements exist: host families, rural self-settlement, urban self-settlement, collective centers (mass shelter), self-settled camps, and planned camps. Each of these six types of transitional settlements maintain dimensions relevant to the housing rights possessed by refugees and other displaced persons.

[12] Stability Pact for South Eastern Europe, 2001, *Agenda for Regional Action – Return and Integration 2001–2003*. See also UNHCR, 1998, *Review of the UNHCR Housing Programme in Bosnia and Herzegovina*, UNHCR Inspection and Evaluation Service.

houses to adopt a common approach to housing rehabilitation to make the best use of limited levels of assistance. In adopting such an approach, UNMIK urged that agreements be reached in terms of the beneficiary selection criteria (should combine the level of financial, material, and human resources available to the household, together with the availability of a house and level of the damage inflicted, as well as an assessment of the urgency of the situation of each household), common standards of rehabilitation, defining a mechanism for implementation of donor-assisted rehabilitation programs, and overall coordination.[13]

The Construction Department would also maintain responsibility within the UN peace operation for securing appropriate building materials for the repair and construction of residential dwellings. The production of affordable and local building materials should be strongly supported by peace operations. In all post-conflict situations, the housing construction sector will need to be assisted to function optimally by the peace operation involved. Special measures can be developed to encourage this sector to develop affordable building materials for lower income groups.

Land Department

The *Land Department* would maintain institutional competence on all matters relating to residential, agricultural, and commercial land, focusing in particular on issues of land administration, dispute resolution, and broader land policy, including possible measures of land reform and land demarcation. The Land Department would be mandated to address all HLP issues that were not in a structural way addressed by other

[13] UNMIK Press Release, 18 January 2000, UNMIK/PR/137. The OHR in Bosnia-Herzegovina issued a Code of Practice for Reconstruction and Repair in September 1998 setting out basic principles and procedures to be followed by reconstruction agencies to ensure that reconstruction projects, and the return of refugees and displaced persons to repaired housing units, take place on a sound legal basis. This code urges reconstruction agencies to obtain from the municipal authorities a list of pre-war residents of each of the individual properties or housing units on which work needs to be carried out and to corroborate the legal rights to the properties or housing units of the pre-war rightholders by means independent of the municipal authorities. It further urges that temporary occupants be required to sign a document acknowledging that the pre-war legal rightholder retains full legal rights to the property and that these rights are not affected by any reconstruction work done to the property before or during the period of the pre-war rightholder's absence.

departments within the HLPRD, in particular the Policy and Housing Departments, respectively. Issues relating to customary land allocation and control in areas governed by custom would also be overseen by the Land Department.

Claims Department

The *Claims Department* would be entrusted with collecting and processing HLP restitution claims, resolving HLP disputes linked to restitution claims, and the enforcement of successful claims in coordination with other bodies. The Claims Department would also be responsible for managing the work of any claims tribunal or commission that may require establishment to ensure the existence of an impartial and independent adjudicative body to issue binding decisions on restitution claims that could not be resolved through mediation and other means. In designing the functions of such a body, a host of complex issues will require consideration, including the jurisdiction of the restitution body; the types of claims that can be submitted to a given mechanism; who can present such claims; how far back in time the claims can go; whether a right to appeal decisions made by the mechanism concerned are available; what role, if any, will be played by traditional or nonjudicial methods of conflict resolution, especially in countries without an independent or functioning judiciary; to what extent the international community is required to assist the process; whether decisions are temporary or permanent; to what extent can administrative procedures achieve justice; and should decisions be legally enforceable or nonbinding.

All restitution claims that cannot be resolved amicably would be adjudicated by the tribunal/commission involved. In some countries, national and local judicial bodies may be the most appropriate for collecting and assessing claims, while in others international bodies will need to be established to carry out this vital task. The claims process should be designed to provide permanent HLP solutions for all returning refugees and displaced persons, including owners, tenants, and others with recognized rights. Claims forms should be available in languages understood by those likely to submit claims. Claims processing centers and offices should be established throughout the areas where claimants currently reside, such that it is easy to reach the nearest office. Restitution mechanisms

must have the capacity to assist potential claimants to fill in their claims forms in the proper manner, to provide answers to any questions claimants may have, and be able to provide legal counsel or direct representation to claimants requiring this assistance. Legal aid centers providing expert legal assistance to returnees seeking to invoke their rights to housing and property restitution can also prove a useful feature of an independent claims process. Restitution bodies must have free access to all property records and be required to accept many types of evidence.[14]

It will be important for Claims Departments to recognize that resolving HLP restitution questions requires that the institutions concerned have at their disposal an array of flexible remedies that can be deployed in adjudicating restitution claims. It will be equally important for refugees and displaced persons to have the right to choose the remedy that is best suited for them and consistent with their rights and wishes. Local or traditional dispute resolution processes should be examined, as should possible nonjudicial remedies such as arbitration and mediation, the possibility of facilitated sales, the granting of user or leasehold rights (rather than outright ownership), and property exchanges, and other options should not be excluded.

Claims bodies should be given the powers necessary to enforce their decisions and to ensure that governments and other relevant parties comply. Local and national governments should be legally obliged to accept decisions by restitution bodies. At the same time, while restitution rights need to be enforced, peace operations and restitution institutions should ensure that people do not become homeless due to the recovery of refugee housing, land, or property rights from a secondary occupant. Mechanisms need to be developed that allow the provision of alternative accommodation to those who are legally required to vacate homes over which they do

[14] A variety of evidence types, in addition to formal property records, are admissible in many of the existing restitution procedures. These include, for instance, verified sale contracts, verified gift contracts, inheritance decisions with legal validity, court decisions on ownership, valid decisions made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, construction licenses or building permits, usage permits, contracts on use of an apartment, excerpts from official records, decisions on the allocation of an apartment, decisions on apartment rent or rent levels, apartment rent slips, decisions by which apartments are declared abandoned, certificates of place of residence, bills (utility, phone, gas, etc.), pre-war phonebooks, eyewitness testimony, personal identity cards, car registration, census records, personal contracts, dismissal records, photographs, valuer reports, voting records, and others.

not hold legitimate rights and who are in need of accommodation. At the same time, holders of legitimate rights should not be continually prevented from repossessing their homes because of the failure of the state concerned to find alternative accommodations for current occupants. Most, if not all, peace operations have avoided the question of compensation, despite the clearly defined international legal principles relating to it. Compensation programs have been envisaged, such as within the Dayton Accords. However, even when mentioned explicitly within a peace agreement, no program was ever implemented. Compensation should not be seen as an alternative to restitution, but should be used as a remedy when restitution is not factually possible or when a claimant knowingly and voluntarily accepts compensation in lieu of restitution.

Records Department

The *Records Department* would be entrusted with re-establishing (or establishing) the housing, land, and property registration system; updating the national land cadastre; carrying out GIS surveys of the country or territory; and all other matters concerning the administration of the housing, land, and property arrangements. This department should also ensure that all public housing resources are properly administered and managed. Measures should be taken to ensure that any suggested privatization of such resources is made solely by the local population. Above all, the Records Department would be responsible for managing the housing, land, and property registration system, and the national land cadastre, which may require establishment, re-establishment, and updating. As appropriate, alternative titling and deeds systems should be proposed to expedite the conferral of security of tenure and official registration of housing rights.

Conclusions

Because UN peace operations are by their very nature temporary institutions designed to help nations in the transition from conflict to peace and development, no peace operation could ever hope to depart from a country or territory in the knowledge that housing, land, or property rights were enjoyed by the entire population. Sadly, this is probably too much to

expect at this stage. At best, a departing peace operation that embraced an HLP rights approach to the challenges it faces during its tenure in a post-conflict situation will leave behind a legal and policy legacy that places the country concerned in a far better position itself to find permanent housing, land, and property rights solutions for all people under its jurisdiction. If a widely felt sense of *residential justice* is the eventual outcome of a UN peace operation, and this still underemphasized form of justice begins to pervade the political culture of the country concerned, a positive result can be claimed.

Since the inception of the global human rights regime in 1948, human rights have been recognized as interdependent, inter-related, and indivisible with one another. On this basis alone, the time is surely right to formally recognize that housing, land, and property rights – as human rights – are important enough to peace, security, and stability in post-conflict settings to systematically include within the activities of all future UN peace operations. To date, the manner by which these rights have been approached in UN peace operations has been largely ad hoc, inconsistent, and only marginally successful in addressing the vast array of concerns found within the housing, land, and property sectors. It is hard to imagine just how much difference a UN systemwide peace operation HLP policy may make in improving the lives of those living in countries emerging from conflict, but it is easy to imagine the consequences of the continued failure of having a well-conceived policy in place.

With a growing understanding of the inherent linkages between conflict prevention, conflict resolution, peacebuilding, and the complexities of the housing, land, and property sectors viewed in full, the basis for discussing and adopting a UN policy on these issues has surely arrived. Some of the key components of such a policy have been outlined above. It is hoped that this volume will contribute to the debate on these themes and that this sharing of views will finally culminate in the emergence of a common policy on HLP issues that guides the HLP efforts of all future UN peace operations.

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