The Role of Property in the Kosovo Conflict

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An examination of the contribution and limits of the rights-based approach to Housing, Land and Property to Peacebuilding in Kosovo

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Abstract

After examining the role of human rights in specific post-conflict initiatives it is clear that there has been a neglect and subordination of ESC rights in comparison to civil and political rights. The emerging of the development, security and human rights nexus and the progression of UN Missions from peacekeeping to peacebuilding has helped to stem the institutional neglect and subordination of human rights generally and ESC rights specifically. Vulnerable and/or marginalised groups such as internally displaced persons (IDPs), refugees and ethnic, religious and racial minorities whose participation is crucial to peacebuilding are particularly susceptible to those who exploit peoples socio-economic grievances and encourage them to take up arms. A rights-based approach is ideal for protecting them and emphasising a stateôs obligations regarding their welfare and providing remedies for violations. Whilst there has been little progress in treating economic, social and cultural abuses as violations of human rights and providing a legal remedy, property restitution based on the right to return to oneôs home of origin and the right to a legal remedy is an exception. Land and property issues figure prominently in conflict and a rights-based approach to these issues can contribution to peacebuilding including the supporting the rule of law, IDP and refugee returns, protection of vulnerable groups and reconciliation. The thesis examines the role of land and property issues in the Kosovo Conflict and the contribution and limits of a rights-based approach to these issues and particularly property restitution to peacebuilding in the country.

Acronyms

BiH	Bosnia and Herzegovina
CAVR	Commission for Reception, Truth and Reconciliation
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention of the Elimination of All Forms of Racial Discrimination
DDR	Disarmament, Demobilization and Reintegration
ESC Rights	Economic, Social and Cultural Rights
EULEX	European Union Rule of Law Mission
EUPT	European Union Planning Team for Kosovo
FAO	Food and Agriculture Organisation
KCA	Kosovo Cadastral Agency
KPA	Kosovo Property Agency
KPS	Kosovo Police Force
HLP	Housing, Land and Property Rights
HPCC	Housing and Property Claims Commission
HPD	Housing and Property Directorate
IASC	United Nations Inter-Agency Standing Committee
ICESCR	International Covenant on Economic, Social and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia (ICTY)
ICR	International Civilian Representative (ICR)
IDPs	Internally Displaced Persons
IDMC	Internal Displacement Monitoring Centre
IHL	International Humanitarian Law
MEST	Kosovo Ministry of Education, Science and Technology
MRLA	Malayan Races Liberation army
ORC	United Nations Office for Returns and Communities
OSCE	Organization for Security and Co-operation in Europe
RAE	Roma, Ashkali and Egyptian
RPF	Rwandan Patriotic Front
SMES	Serbian Ministry of Education and Sport
SOEs	Socially Owned Enterprises
SRSG	Special Representative of the Secretary-General
SSR	Security Sector Reform
UDHR	Universal Declaration of Human Rights
UN Habitat	United Nations Centre for Human Settlements
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo

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An examination of the contribution and limits of the rights-based approach to Housing, Land and Property to Peacebuilding in Kosovo

Introduction

This thesis will examine the contribution and limits of the rights-based approach to housing, land and property to peacebuilding by doing the following. It will show that human rights have always been seen as an important tool for peace and conflict prevention but in post-conflict contexts, economic, social and cultural rights have faced neglect and subordination in favour of civil and political rights despite their importance to peacebuilding. The thesis will explain some of the areas where human rights operate in post-conflict contexts, their role and where economic, social and cultural rights should have more involvement. It will then examine how and why land and property issues are connected with conflict and then look at how this relates to Kosovo. The human rights laws that concern housing, land and property will be outlined and as well the developments in international housing, land and property rights protections. It will focus on one remedy for housing, land and property rights violations - property restitution and the rights upon which it is based. The thesis will explain the issues that need to be dealt with in post-conflict contexts as a result of these violations of land and property rights and then examine the Kosovo case specifically with respect to this. It will then examine the contribution Housing, Land and Property can make to Peacebuilding and the developments in the way they are dealt with in post-conflict environments. It will continue with a study of the Kosovoôs Housing and Property Directorate and Claims Commission (HPD/CC) and its successor the Kosovo Property Agency (KPA), before explaining and analysing what it has done to resolve land and property issues and if it has been successful. Finally, the thesis will examine the contribution of the HPD/CC and the KPA to peacebuilding particularly to the rule of law, returns of IDPs and Refugees to their homes of origin, protection of vulnerable groups and towards reconciliation. It will argue that that the HPD/CC and KPA are broadly following a rights-based approach by harnessing the right to return to ones home of origin and the right to legal remedy and have contributed to peacebuilding in many ways. However, they are limited by the political and security situation and the performance of other agencies both of which they are

not responsible. Additionally, it will argue that their role and effectiveness towards peacebuilding is dependent on their mandate.

Chapter 1: Economic, Social and Cultural Rights and Peacebuilding

A). Neglect of Economic, Social and Cultural Rights in Post-Conflict Environments

Shedrack C Agbakwa notes that from the very beginning the architects of the United Nations and the Universal Declaration of Human Rights ñwere convinced that respect for human rights and the dignity of the individual was essential to peace and conflict preventionò.[1] The document included both economic, social and cultural rights (ESC rights) and civil and political rights. Despite this, Agbakwa states that ESC rights have been neglected in favour of civil and political rights with the latter considered more important.[2]

Louise Arbour states that one reason for this is that there is a belief that such rights ñwill automatically flow from the enjoyment of civil and political rightsò[3] and because there is little respect for the indivisibility of human rights; the idea that ñcertain rights can be realized in isolation from othersò.[4] Arbour states that this is in fact contrary to what human rights law and experience tells us.[5] Indeed, the International Covenant on Economic, Social and Political Rights (ICESCR) (which for the first time binds economic, social and cultural into international law for those states that ratify it) states that freedom from fear and want requires both ESC and civil and political rights to be achieved.[6] Additionally, the Limburg Principles (1987) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) state that ñall human rights are indivisible, interdependent, interrelated and of equal importance for human dignity.ò[7] Despite the clear distinction between civil and political and ESC rights, neither should be inferior to the other and since they are indivisible they should be given equal attention.

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[1] Shedrack C. Agbakwa, ó*A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa*ô, *Journal of African Law*, 47:1 (2003), p. 38

[2] Ibid, p.39

[3] Louise Arbour, ó*Economic and Social Justice for Societies in Transition*ô, 4,0 *N.Y.U. J. INT"L. L. & POL,* 1, 26-27 (2007), p.10

[4] Ibid, p.10

[5] Ibid, p.10

[6] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Preamble, p. 3, available at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html [accessed 19 May 2011]

[7] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, paragraph 4, last accessed on 25.5.11 at: http://www.unhcr.org/refworld/docid/48abd5730.html

Arbour states that the neglect of economic, social and cultural rights generally and in post-conflict environments ñreflects the hidden assumption that these rights are not entitlements but aspirational expectations to be fulfilled by market-driven or political processes aloneò.[8] This is referring to the neo-liberal development doctrine that a free market economy will facilitate economic growth that will benefit the whole of society, even the poorest. Essentially the idea is that, though such doctrine might not have socio-economic protective mechanisms for the most vulnerable, they should not require it as the fruits of GDP growth will ñtrickle downò[9] from the elites to the poorest and raise them out of poverty. But as Lisa Laplante explains, this is ñnot sufficient to reduce poverty and inequalities, and thus to prevent conflicts.ò[10] Clearly, one cannot hope that the most vulnerable will benefit from economic growth and so economic and social rights must be enshrined in law with protection mechanisms with the possibility of redress for any violations of such rights.

The óaspirationalô aspect that Arbour refers to is the assumption that economic, social and cultural rights are rather ñentitlementsé [or worse] aspirational goalsò.[11] The logic is that unlike civil and political rights (e.g. the right to life), ESC rights ñdepend on available resources and are provided by states over time, subject to priorities established in the political arenaò.[12] Additionally, it is difficult to hold a party accountable for success or failure in protecting or facilitating such rights.[13] For this reason, ESC rights are ñoften not understood to be rights imposing legally-binding obligations on statesò.[14]

However, the legally binding obligation and to whom it applies is clear when the ICESCR commits all state parties ñto take stepsé to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenantò.[15] The UN Committee on Economic, Social and

[8] Arbour, óEconomic and Social Justiceô, p.4
[9] Lisa J Laplante, óTransitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Frameworkô, *The International Journal of Transitional Justice*, Vol. 2, 2008, p.340
[10] Ibid, p. 343
[11] Arbour, óEconomic and Social Justiceô, p.11
[12] Arbour, óEconomic and Social Justiceô, p.11
[13] Ibid, p.11
[14] Ibid, p.11
[15] ICESCR, Article 2 (1)

Cultural Rightsô General Comment No. 3 (1990) óOn the Nature of States Parties Obligationsô clarifies this perhaps ambiguous statement. The document states that there are two obligations of ñimmediate effectò;[16] the first is the prohibition of discrimination in the protection of ESC rights and the second to ótake stepsô which the document notes that the French translation, óto actô elucidates the immediacy of the concept.[17] The General Comment also utilises for the first time a very important phrase that challenges the idea that ESC rights are simply aspirational and hence not legally binding. The document states that ña minimum core obligation to ensure satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State partyò[18] and failure to do so amounts to a violation. So the term óprogressively realiseô is intended to show that whilst fully realising ESC rights obligations will take time there remain immediate obligations to this end.[19] The Maastricht Guidelines challenge the idea that the fulfilment of state obligations in this area are subject to resources and political priorities by holding that the ñminimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors or difficulties.ò[20] Many of the Maastricht guidelines have since been accepted by subsequent UN Conventions including the General Comments.[21] There is also nothing in the UN Conventions dealing with ESC rights that permit derogation in a state of emergency.[22]

To understand the nature of state obligations, the fallacy that civil and political rights have an immediate legal obligation whereas ESC rights do not, one must realise that state obligations are split into three types; to respect, protect and fulfil.[23] This distinction was first used by General Comment 12 on the Right to Adequate Food (1999) and is another example of UN Committee on Economic, Social and Cultural Rights adopting the

[16] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, Article 2 (1), last accessed on 4.6.11 at: http://www.unhcr.org/refworld/docid/4538838e10.html
[17] Ibid, Article 2 (2)
[18] Ibid, Article 10
[19] Asbjørn Eide, óEconomic, Social and Cultural Rights as Human Rightsô, in: Eide, A./Krause, C./Rosas, A. (eds.), *Economic, Social and Cultural Rights – A Textbook* (2nd Revised Ed.), Martinus Nijhoff Publishers, Dordrecht, 2001, pp.9-28
[20] ICJ, óMaastricht Guidelinesô, Paragraph 9
[21] Eide, óEconomic, Social and Cultural Rightsô, p.26
[22] Christine Chinkin, óThe Protection of Economic, Social and Cultural Rights Post-Conflictô, Report commissioned by the Office of the High Commissioner for Human Rights (OHCHR), p.27, available at: http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf.
[23] UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1990) on the Right to Adequate Food, Article 15

terminology of the Maastricht Guidelines. 'Respectô obliges states to not interfere with the ESC rights of their citizens and óProtectô obliges states to stop interference by third parties.[24] The óFulfilô obligation is split into two, the obligation to ófacilitateô and the obligation to óprovideô resources and measures to realise ESC rights.[25]

Whilst individuals do not have access to the ICESCR regarding grievances or violations,[26] Eide notes that the óprotectô aspect of state obligation is part of legal legislation and hence *part* of ESC rights are justiciable, at least by national or regional courts and protection mechanisms.[27] Eide states that the only circumstance in which the charge that ESC rights need resources and civil and political rights do not is when an ESC right is dealing with the obligation to fulfil and the civil and political right concerns the obligation to protect which is entirely circumstantial and this situation could just as easily be reversed.[28]

As Arbour states, many ESC rights can be realised and she gives the example of forced eviction (obligation to protect) which ñrequires the same type of immediate action and redressò[29] as civil and political rights like the prohibition of torture.[30] Whilst some ESC rights do need óprogressive realisationô and financial resources so do some civil and political rights. She gives the example that for post-conflict states the provision of basic free and universal healthcare or education in line with the relevant human rights provisions will be just as taxing as the formation of a criminal justice system.[31] So it is clear that ESC rights are legally binding and have clear obligations on States parties and have immediate obligations.

Another reason for the neglect of ESC rights in post-conflict contexts is that given the criticisms of ESC rights outlined above and (subsequently refuted) they are viewed as ñinherently non-justiciableò.[32] But as Arbour correctly states, ñif violations can be

[24] ICJ, óMaastricht Guidelinesô, paragraph 6
[25] Eide, óEconomic, Social and Cultural Rightsô, p.23
[26] Chinkin, óThe Protection of Economicô, p.33
[27] Eide, Economic, óSocial and Cultural Rightsô, p.24
[28] Ibid, pp.24-25
[29] Arbour, óEconomic and Social Justiceô, p.12
[30] Ibid, p.12
[31] Ibid, p.12
[32] Chinkin, óThe Protection of Economicô, p.17

established, then judicial protection and enforcement are possibleò.[33] The Maastricht Guidelines have clearly identified types of violations for ESC rights and these prescriptions have been adopted in subsequent UN documents including the General Comments on Food (1999) and Water (2002). The Guidelines hold that there are two main types of violations, those committed by ñdirect actionò[34] and those through ñomissionò[35]. The first are attributed to states or third parties not properly regulated by states. Examples of this type of violation include ñthe formal removal or suspension of legislation necessary for the continued enjoymentò[36] of ESC rights, ñactive denial of such rights to particular individuals, whether through legislated or enforced discrimination [and] the adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rightsò.[37] Acts of omission include ñthe failure to take appropriate steps as required under the covenantò[38] and ñthe failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the covenantò.[39] Clearly, with clear violations outlined in the Guidelines and ESC General Comments they can be protected and enforced.

Although the ICESCR and General Comment No. 3 do not include access to remedy[40], the Maastricht Guidelines establish measures that include ñeffective judicial or other appropriate remediesò[41] for victims of violations of ESC rights who are ñentitled to adequate reparationò[42] including restitution and compensation. Accordingly, a year after the publication of the Guidelines, General Comment No. 9 (1998) ôThe domestic application of the Covenantô established justiciability and judicial remedy when necessary as well for specific ESC Rights in most General Comments.[43] Christine Chinkin writes that ñthere is a growing jurisprudence on economic and social rights from regional human rights bodies and some national jurisdictions, which dispels the myth of non-justiciability of economic and social rightsò.[44] Importantly, the UN General

[33] Arbour, ôEconomic and Social Justiceô, p.12
[34] ICJ, ôMaastricht Guidelinesô, paragraph 14
[35] Ibid, paragraph 15
[36] Ibid, paragraph 14 (a)
[37] ICJ, ôMaastricht Guidelinesô, paragraph 14 (b-c)
[38] Ibid, paragraph 15 (a)
[39] Ibid, paragraph 15 (b)
[40] Chinkin, ôThe Protection of Economicô, p.33
[41] ICJ, ôMaastricht Guidelinesô, paragraph 22
[42] Ibid, paragraph 23
[43] Chinkin, ôThe Protection of Economicô, p.33
[44] Ibid, p.33

Assemblyôs Resolution (2006), óBasic 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 Lawô establishes that such violations require remedies including access to justice and reparations[45] including ñrestitution, compensation, rehabilitation, satisfaction and guarantees of non-repetitionò.[46]

According to Chinkin there are a number of reasons why ESC rights are not a feature of post-conflict reconstruction efforts. The first is that re-establishing security and the cessation of violence is the first priority for both domestic and international actors. So, programmes such as Disarmament, Demobilization and Reintegration (DDR), Security Sector Reform (SSR), mine clearance and dealing with humanitarian emergencies are prioritised to this end.[47] Another reason is that even if there is the political will to deal with economic and social rights violations, often there is not enough legislation or enforcement and remedy mechanisms to implement State parties obligations.[48]

A similar reason for the neglect of economic and social rights is that they have sometimes been considered to be part of ñdevelopment rather than as being central to establishing political stability and securityò[49] and therefore considered ñsubsidiary to political securityò.[50] However, the perception that development is subordinate to the political and security arena and separate from each other has changed. Kofi Annanôs much quoted phrase in ó*In Larger Freedom*ô states that ñwe will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rightsò[51] shows the inter-dependence of these concepts and their equality with one another. The development and political realms are no longer considered to be distinct and separate.

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[45] UN General Assembly, 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 : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, Article 11 (a-b), available at: http://www.unhcr.org/refworld/docid/4721cb942.html [accessed 1 June 2011]
[46] Ibid, Article 18
[47] Chinkin, ó*The Protection of Economic*ô, p.7
[48] Ibid, p.8
[49] Ibid, p.8
[50] Ibid, p.8
[51] UN General Assembly, In larger freedom : towards development, security and human rights for all : report of the Secretary-General, 21 March 2005, A/59/2005, available at: http://www.unhcr.org/refworld/docid/4a54bbfa0.html [accessed 1 June 2011], P.6

This theoretical development has been matched operationally with a progressive shift in UN interventions after the end of the Cold War from peacekeeping to peacebuilding.[52] I am going to use Cedric DeConingôs definition of peacebuilding as a ñcollective framework under whichéé peace, security, humanitarian, rule of law, human rights and development dimensions can be brought together under one common strategy at country levelò.[53] This has happened in the shape of óIntegrated Missionsô which were the result of the recommendations of the óReport of the Panel on United Nations Peace Operationsô also known as the óBrahimi Reportô which called for more coherence between UN agencies.[54] Cecilia Hull defines an Integrated Mission as a situation when ñthe wider UN system is integrated into one single structure in pursuit of an inclusive and coherent operationò[55] specifically, when development and humanitarian agencies are integrated with the political and military aspects of a UN operation.[56] This integration of development and human rights with the other aspects of UN civilian and military crisis missions has made the neglect of human rights and economic, social and cultural rights specifically, less admissible.

Annanôs conception of the development, security and human rights nexus and the change in the structure and organisation of UN Missions towards greater coherence and integration shows the importance of human rights to post-conflict peacebuilding generally.

But why should economic, social and cultural rights specifically be part of peacebuilding strategies?

The most important reason is that protection of ESC rights and particularly redressing their war-time violations will help to prevent another outbreak of violence. This is because, as Van Zyl states ñwar-induced grievances are a significant cause of a return to

[52] Cedric DeConing, Coherence and Coordination in United Nations Peace building and Integrated Missions: A Norwegian Perspective. Oslo: Norwegian Institute of International Affairs. Security in Practice Report No. 5, 2007, p.2
[53] Ibid, p.3
[54] Cecilia Hull, óIntegrated Missions ï A Liberia Case Studyô, User Report, Swedish Defence Research Agency, August, 2008, p.13
[55] Hull, óIntegrated Missionsô, p.12
[56] Ibid, p.15

hostilities in post-conflict societiesò.[57] Agbakwa states that without adequate protection of ESC rights and/or a mechanism with which to redress related injustices ñpeople have traditionally gravitated toward rebellion to compel a change.ò[58] So the great utility of enforcement mechanisms for economic, social and cultural rights to peacebuilding ñis that by giving voice to the voiceless - the oppressed - enforceable socio-economic rights provide an outlet or platform to ventilate bottled-up grievancesò.[59] Additionally as Laplante notes, it prevents warmongers from ñtap[ing] into the frustration of populations whose historic socioeconomic grievances largely have been ignored by the state.ò[60] Van Zyl states that as a result of these points, post-conflict activity must deal with and remedy such grievances[61] and clearly one of the best ways to do so is the using a human rights framework which will place emphasis on the states obligation to remedy violations.

Agbakwa considers that the legal protection of economic, social and cultural rights is a way of ñredistributing powerò[62] that would place such rights ñbeyond the depredations and predilectionsò[63] of a government so they are no longer dependent on the whim of politicians. This act of redistribution would in turn ñreduce the pool of recruits that otherwise would have been available to be used by agents of destabilization.ò[64] So peacebuilding strategies must include ñthe totality of conflict motivationsò[65] and ñall vital issues of concern to the target societyò[66] which obviously necessitates the inclusion of economic and social grievances. Therefore, economic, social and cultural rights need to be given the same protection and attention as civil and political rights in post-conflict contexts.

Chinkin also sees the danger of peopleôs grievances becoming possible destabilising agents in post-conflict contexts. Such groups include internally displaced persons (IDPs), refugees and ethnic, religious and racial minorities. She states that the ñinclusion of

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[57] Paul Van Zyl, óPromoting Transitional Justice in Post-Conflict Societies,ô in *Security Governance in Post-Conflict Peacebuilding*, ed. Alan Bryden and Heiner Hanggi (Geneva: Centre for the Democratic Control of Armed Forces, 2005), p.218
[58] Agbakwa, óA Path Least Takenô, p.39
[59] Ibid, p.58
[60] Laplante, óTransitional Justice and Peace Buildingô, p.337
[61] Van Zyl, óPromoting Transitional Justiceô, p.218
[62] Agbakwa, óA Path Least Takenô, p.61
[63] Ibid, p.61
[64] Ibid, p.61
[65] Agbakwa, óA Path Least Takenô, p.62
[66] Ibid, p.63

economic and social rights is especially important with respect to the security of vulnerable persons who can become marginalised by post-conflict settlementsò.[67] If socio-economic grievances are not catered for such groups, they will not feel inclined to cooperate in rebuilding, reconciliation and could even recommence or support conflict.[68] Since a rights-based approach ñgives more attention to issues of exclusion, disparities and injustice, and address the basic causes of discriminationò[69] ESC rights are therefore a crucial aspect of post-conflict peacebuilding.

Agbakwa also notes that with enforcement mechanisms for ESC rights there is likely to be an independent review body which has two uses for peacebuilding.[70] The first is that the body can scrutinize state policies and action and ensure that they cohere with ESC obligations.[71] Second, such a body would help to facilitate ñaccountability and good governanceò[72] because a state has to justify its actions and this is likely to restrain policy that is not consistent with ESC obligations and encourage well thought out legislation.[73]

This section has shown that human rights have always been seen as an important tool for peace and conflict prevention. However, the conceptual division of human rights into two categories first evidenced in the two Covenants of 1966 has caused a number of problems for the protection, respect and fulfilment of economic, social and cultural rights.

The idea that ESC rights will follow from civil and political rights and that they are óaspirationalô entitlements and not in fact rights to the perception that they are non-justiciable has caused the neglect of such rights. The Maastricht Guidelines and General Comments have cleared much of the ambiguity about state obligations and justiciability. The emerging of the development, security and human rights nexus and the progression of UN Missions from peacekeeping to peacebuilding has helped to stem the institutional neglect and subordination of human rights generally and ESC rights specifically. The General Comments and UN General Assemblyôs Resolution (2006), óBasic Principles

[67] Chinkin, óThe Protection of Economicô, p.10
[68] Ibid, p.10
[69] O Sandkull, óStrengthening inclusive education by applying a rights-based approach to education programmingô, Paper presented at ISEC Conference, Glasgow, 2005, p.6
[70] Agbakwa, óA Path Least Takenô, p.58
[71] Ibid, p.59
[72] Ibid, p.60
[73] Agbakwa, óA Path Least Takenô, p.60

and Guidelines on the Right to a Remedy and Reparationô have established that the right to remedy for victims of human rights violations including economic, social and cultural rights.

ESC rights should be part of peacebuilding strategies because by their protection and particularly redressing their war-time violations will help to prevent another outbreak of violence by will preventing óspoilersô from exploiting peoples socio-economic grievances and encouraging them take up arms. Vulnerable and/or marginalised groups such IDPs, refugees and ethnic, religious and racial minorities whose participation is crucial to peacebuilding are particularly susceptible to spoilers and a rights-based approach is ideal for protecting them and emphasising a stateôs obligations regarding their welfare and providing remedies for violations.

Chapter 1: Economic, Social and Cultural Rights and Peacebuilding

B). Economic, Social and Cultural Rights and Transitional Justice

Now that we have established why ESC rights should be part of peacebuilding strategies, where specifically do human rights operate in post-conflict contexts and where should economic, social and cultural rights have more involvement?

Initially, economic, social and cultural rights need to be ratified into domestic legislation by the post-conflict government and in doing so be constitutionally recognised and judicially enforced in order for the state to meet its obligations to the international human rights legislation of which it is a signatory.[74] Regarding their place in post-conflict peacebuilding initiatives, human rights form a central part of Transitional Justice measures. Transitional Justice for Van Zyl is the ñattempt to build a sustainable peace after conflict, mass violence or systematic human rights abuse.ò[75] Michael Humphrey explains the relationship between human rights and transitional justice well by stating that ñfrom the top-down perspective transitional justice has been about the recovery of the rule of law and State legitimacy, from the bottom up the realization of the human rights of victims.ò[76] Transitional measures that involve human rights in various ways include prosecution for human rights offenders, truth commissions and reparations for victims.

Traditionally, ESC rights have been neglected in transitional justice in favour of civil and political rights and specifically the violations of such rights.[77] Arbour and Laplante explain that this is because of the conception of justice that is being applied.[78] Arbour writes that transitional justice is ñat its root modelled on criminal justiceò[79] originating from the Nuremburg Trials after the Second World War and specifically concerned with

[74] Arbour, ôEconomic and Social Justiceô, p.21
[75] Van Zyl, ôPromoting Transitional Justiceô, p.209
[76] Michael Humphrey, ôHuman Rights Politics & Transitional Justice', Law and Society Association Australia and New Zealand (LSAANZ) Conference 2008, ôW(h)ither Human Rightsô, 10-12 December, University of Sydney, p.6
[77] Laplante, ôTransitional Justice and Peace Buildingô, p.333
[78] Arbour, ôEconomic and Social Justiceô, p.5
[79] Ibid, p.2

ñindividual criminal responsibility for international crimesò.[80] Contemporary transitional justice often still adheres to ña more traditional dispute resolution framework that primarily focuses on violations of civil and political rights.ò[81] For Arbour the marginalisation of ESC rights results from ña deep ambivalence within justice systems about social justice.ò[82]

Arbour defines social justice as referring to ñto minimum legal standards guaranteeing substantive equality (as reflected in international human rights instruments prohibiting discrimination and protecting economic, social, and cultural rights) in the fulfillment of the idea of freedom from want.ò[83] In this way social justice is inseparable to human rights.

Laplante states that social justice should be part of transitional justice because the latter would then have a mandate to examine the ñentrenched socioeconomic conditions that cause poverty, exclusion and inequalityò.[84] This would then allow the remedy and redress of socio-economic grievances that might lead to a resurgence of conflict.[85] Clearly, if social justice should to be part of transitional justice, the protection, enforcement and redress of ESC rights is an excellent way to achieve this.

I now wish to examine some specific transitional justice mechanisms, the relationship of human rights to them and how ESC rights can be implanted into the application and have a greater influence over such mechanisms.

Human Rights are central to Truth Commissions since they include the examination of ñthe causes, consequences, and nature of gross human rights violationsò[86]. The importance of human rights to peacebuilding is clearly identified by Van Zyl who states that a post-conflict peacebuilding strategy must be founded on such an examination.[87]

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[80] Arbour, ôEconomic and Social Justiceô, p.2
[81] Ibid, p.4
[82] Ibid, p.5
[83] Ibid, p.5
[84] Laplante, ôTransitional Justice and Peace Buildingô, p.333
[85] Arbour, ôEconomic and Social Justiceô, p.8
[86] Arbour, ôEconomic and Social Justiceô, p.14
[87] Van Zyl, ôPromoting Transitional Justiceô, p.216

The Truth Commissions findings, which often include systematic and grave human rights abuses, will help all parties to understand the seriousness and harm of such violations[88] but also enhance the legitimacy and ease with which a post-conflict government can ñimplement real reforms to ensure the promotion and protection of human rightsò.[89] They can also recommend the adoption of UN or regional human rights treaties to better protect human rights in a post-conflict environment as was the case with Guatemalaôs Truth Commission.[90]

Van Zyl writes that truth commissions ñalso examine the social, structural and institutional causes of conflict and human rights abuseò[91] and then make recommendations of ways to address them as part of a peacebuilding strategy.[92] Truth commissions seem to be incredibly useful for human rights protection including ESC rights but this is one area of transitional justice where they have again been overshadowed by civil and political rights. Laplante writes that in their infancy truth commissions ñlimited their study to crimes that constitute violations of civil and political human rights and overlooking, avoiding or otherwise ignoring the socioeconomic causes of conflictò[93] and consequently ESC rights abuses too. This was the case for the truth commissions of Argentina (1984), Chile (1991) and El Salvador (1993).[94] There was some development with the truth commissions for Guatemala (1999) and Peru (2003) which examined the ñhistorical context as a cause of the warsò[95] which included the socio-economic factors, but tellingly, they did not ñframe their analysis in terms of violations of economic and social rightsò.[96]

In order for transitional justice to take social justice seriously, Laplante argues for an expansion in the role of truth commissions that should investigate socio-economic deprivation and classify them as ESC rights violations in the same way that civil and political deprivations are.[97] The author states that violations of human rights need to be

[88] Van Zyl, ôPromoting Transitional Justiceô, p.212
[89] Ibid, p.213
[90] Arbour, ôEconomic and Social Justiceô, p.17
[91] Van Zyl, ôPromoting Transitional Justiceô, p.216
[92] Ibid, p.216
[93] Laplante, ôTransitional Justice and Peace Buildingô, p.335
[94] Ibid, p.335
[95] Ibid, p.335
[96] Ibid, p.335
[97] Ibid, p.333

in presented in final reports along with ñrecommendations for how a state should redress them.[98] For the author, this addition would allow truth commissions to ñtreat the root causes of political violenceò[99] and using a human rights framework, to present them as ñstate obligations that were not fulfilled and thus require redressò.[100] Consequently, it would make states remedy such violations as it is their responsibility and obligation to do so.[101] Another benefit is that using the ñrights-based approach would allow grievances to be channelled through democratic mechanismsò[102] as opposed to violence or other criminal means and so is a good conflict prevention mechanism. Finally, the recommendations of a truth commission that used a rights-based framework could ñset reform agendas for longer-term conflict recovery effortsò[103] furthering the protection, respect and facilitation of ESC rights.

Laplante holds that if truth commissions presented ñsocioeconomic roots of violence in terms of human rights violationsò[104] it would help the chances of a sustainable peace in two ways. First, it would make it more difficult for hostile governments to portray such actors as ódissidentsô or somehow óillegitimateô and attempt to stifle their grievances.[105] Additionally, truth commissions that have embraced the ESC rights framework will give greater legitimacy to those who are campaigning for social justice and also equip them with the language and narrative to successfully argue their case for reform.[106] Finally, it would make social justice itself ña legitimate priority in post conflict recovery.ò[107]

Laplante cites East Timorôs Commission for Reception, Truth and Reconciliation (CAVR) as a good example of a TC that adopted a human rights framework and ñdiagnostic approachò to economic and social causes of the conflict. However, the Commission did not view the victims of ESC rights violations as needing reparation

[98] Laplante, óTransitional Justice and Peace Buildingô, p.333
[99] Ibid, p. 334
[100] Ibid, p.334
[101] Ibid, p.351
[102] Ibid, p.334
[103] Ibid, p.347
[104] Ibid, p.342
[105] Ibid, p.334
[106] Ibid, p.342
[107] Ibid, p.351

which shows that such rights are yet to be treated similarly to civil and political rights which usually have reparations/remedies in response to violations.[108]

Whilst truth commissions have made good progress in examining socio-economic causes of conflict and viewing them as ESC rights violations, they have not yet made the step of recommending remedies/reparations for violations. This is strange as once something is classified as human rights violation, the Maastricht Guidelines, General Comments and UN Resolution on the Right to Remedy (in the case of a gross/serious violation of international human rights/humanitarian law) state that a remedy is required when applicable. Once this becomes a standard part of recommendations, finally, the protection and enforcement of ESC rights will be on a par with civil and political rights.

Another aspect of transitional justice that involves human rights is the prosecution of those who have violated such rights. Van Zyl notes that prosecutions of human rights violators help post-conflict peace-building by deterring violations in the future, showing that perpetrators will be found, investigated and held to account for their crimes and in the process embedding human rights standards in government and to the public.[109] Additionally, it can contribute to preventing victims from taking the law in their own hands.[110]

Prosecution can be through domestic, regional or international courts/tribunals though they mainly deal with civil and political rights violations which reach the threshold of international crimes.[111] However, Arbour sites the International Criminal Tribunal for the Former Yugoslavia (ICTY) which found that intentional housing and property rights violations could be classified as crimes against humanity in the Kupreskic case.[112] Arbour argues that for international courts to routinely arbitrate ESC violations, international criminal law will have to be expanded to protect ESC rights and provide redress for their violations.[113] National courts of course would not need an ESC violation to be an international crime for it to be adjudicated, though international human rights law would have to have been incorporated into national legislation for this to be possible.

[108] Arbour, ôEconomic and Social Justiceô, p.13
[109] Van Zyl, ôPromoting Transitional Justiceô, p.211
[110] Ibid, p.217
[111] Arbour, ôEconomic and Social Justiceô, p.15
[112] Ibid, p.15
[113] Ibid, p.16

Reparations programs represent an additional transitional justice measure that directly deals with human rights obligations. As Van Zyl writes, states are obliged under international law ñto provide reparation to victims of gross violations of human rightsò[114] and this should be the case for both civil and political and ESC rights. They are an excellent way through which victims of violations can regain their assets and services.[115]

Interestingly, Van Zyl implicitly recognises that reparations for ESC rights, far from being routine are subject to much debate as to whether such violations are worthy of reparations and will depend on the ñdefinition of victimhoodò.[116] He does not preclude reparations in response to violation of ESC rights but states that reparations should be financially viable and ñneither create nor perpetuate divisions amongst different categories of victimsò.[117] However, for victims of civil and political rights violations like torture who routinely get access to remedy and victims of ESC rights violations like forced eviction who have not traditionally had such reparations there is already a division and probably understandable grievance.

But there have been developments in this area and Arbour notes that there are a growing number of reparations programmes that concern ESC rights, particularly housing and property restitutions (which I will examine at length in the next chapter) citing the examples of South Africa, Guatemala and Bosnia and Herzegovina.[118]

This section has showm some of the areas where human rights operate in post-conflict contexts, their role and where economic, social and cultural rights should have more involvement. It has briefly examined specific transitional justice mechanisms, the relationship of human rights to them and how ESC rights can be implanted into the application and have a greater influence over such mechanisms.

After examining the role of human rights in specific post-conflict initiatives it is clear that there has been neglect and subordination of ESC rights in comparison to civil and

[114] Van Zyl, ópromoting Transitional Justiceô, p.212
[115] Ibid, p.217
[116] Ibid, p.213
[117] Ibid, p.213
[118] Arbour, óEconomic and Social Justiceô, p.18

political rights. Transitional Justice measures are traditionally based on criminal justice that have focused on violations of civil and political rights. Whilst elements of social justice have increasingly been incorporated into TJ measures like Truth Commissions particularly examining the socio-economic causes of a conflict and using a human rights framework that includes ESC rights violations they have yet to recommend the provision of remedies for such violations.

Prosecutions (a form of remedy) through domestic, regional or international courts/tribunals have mainly dealt with civil and political rights violations which reach the threshold of international crimes. The ICTYôs decision that intentional housing and property rights violations could be classified as crimes against humanity in the Kupreskic case is an important precedent and represents an improvement in the recognition of ESC rights violations. But even if prosecution does start to include those who violate ESC rights, Van Zyl recognises that prosecution of human rights offenders can only be considered one element of tackling violations since ñthe overwhelming majority of victims and perpetrators of mass crimes will never encounter justice in a court of lawò.[119] So remedies for ESC rights violations show the weakest progress of ESC rights role in peacebuilding. Van Zylôs scepticism of reparations for ESC rights violations shows that this is still a moot point. One of the few areas of real progress has been in the area of housing and property restitution particularly in South Africa, Guatemala and Bosnia and Herzegovina. This is because of the emerging right to property restitution. The latest example of a country pursing remedies for land and property abuses is Colombia who with the largest IDP population in the world[120] has recently decided to financially compensate or provide property restitution for those who disposed of their housing and land.[121] Since this area represents the zenith of progress in ESC rights remedies I will now turn my attention to this area. Accordingly, I will begin with an examination of the role of land and property as a socio-economic grievance before discussing the rights protections in this area, how they can/are remedied and their contribution to peacebuilding.

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[119] Van Zyl, ôPromoting Transitional Justiceô, p.211

[120] Internal Displacement Monitoring Centre (IDMC), *Internal Displacement: Global Overview of Trends and Developments in 2010*, 23 March 2011, p.15, last accessed on 12.6.11 at: http://www.internal-displacement.org/publications/global-overview-2010

121 Sibylla Brodzinsky, ôColombia to compensate victims of armed conflictô, The Guardian, Tuesday 31 May 2011, Last accessed on 3.6.11 at: http://www.guardian.co.uk/world/2011/may/31/colombia-compensates-victims-armed-conflict

Chapter 2: Land and Property Issues in Conflict Environments

This chapter will examine how and why land and property issues are connected with conflict and then look at how this relates to Kosovo. Land and property is often a socio-economic cause of conflict or it can exacerbate tensions leading to conflict.[122] In fact for Alex de Waal, ñLand ownership is perhaps the oldest reason for organized conflictò.[123]

Governments or rebels can directly or indirectly use and manipulate land and property for their own political ends in a number of ways. Alex de Waal notes a number of ways in which this can happen directly. The first is simply that governments or other actors want or need the land or natural resources.[124] The second, is when land is used ñas a form of loot that can be freely allocated to its favoured agents and proxiesò[125] to give incentives to would-be supporters in order to help them achieve their political ends (e.g. crushing a rebellion). For Waal, Darfur is a prime example of this.[126] Many scholars also deem that this was one motivation for some Hutuôs involvement in the Rwandan genocide of 1994.[127] For Waal, another way land and property can be affected is ñEthnic cleansing and forced relocationò[128] for political ends that can involve forced displacement and eviction or dissolving land rights.[129] Another reason is ñcontrolling the populationò[130] through managing migration or taking possession of land and property.[131] Regarding the latter, Waal notes one method of Counter-Insurgency where ñauthoritiesé gather the civilian population, suspected to support the insurgents, in protected villages, where they can be subject to close surveillance and control.ò[132] However, this form of displacement does not always involve the deprivation of property. The successful British counter-insurgency operation against the Malayan Races Liberation army (MRLA) guerrillas is a

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[122] FAO, óAccess to rural land and land administration after violent conflictsô, *FAO Land Tenure Studies*, No.8, Rome, 2005, p.1, last accessed on 1.6.11 at: ftp://ftp.fao.org/docrep/fao/008/y9354e/y9354e00.pdf

[123] Alex de Waal, óWhy humanitarian organizations need to tackle land issuesô in *Uncharted Territory: Land, Conflict and Humanitarian Action*, edited by Sara Pantuliano (Rugby: Practical Action, 2009), p.12

[124] Ibid, p.12

[125] Ibid, p.13

[126] Ibid, p.5

[127] Laurel L. Rose, 'Land and genocide: exploring the connections with Rwanda's prisoners and prison officials', *Journal of Genocide Research*, 9: 1, 2007, p.54

[128] Waal, óHumanitarian organizationsô, p.15

[129] Ibid, p.15

[130] Ibid, p.16

[131] Ibid, p.16

[132] Ibid, p.16

case in point. The British moved hundreds of thousands of the mainly pro-MRLA Chinese minority (who did not own their land) living at the edges of the jungle into newly prepared villages with their own property title deeds.[133] So, in the Malayan case, part of the British counter-insurgency strategy involved the *giving* of land and property as a way of controlling the population. Land and property can also be affected in an incidental way without intent, where they represent ñlittle more than battlegroundò[134] leading to property being destroyed or people being displaced.[135]

Alternatively, land and property issues can be used indirectly in cases where such issues are coincidentally problematic but seized upon and exploited by governments or rebels who attempt to harness such grievances to their own ends. One such way is by politicising and ethicizing them.[136] A Food and Agriculture Organisation (FAO) report states that since land is related to social identity, when it is predominantly owned by a particular group, property issues are vulnerable to becoming politicised and, in turn, ethnicized.[137] Waalôs definition of ñcommunal land conflictò[138] between communities (including boundary disputes, competing land claims or overpopulation) can be used in this way.

A good example is the problem of land scarcity that contributed to conflict in Rwanda. Pre-1994 it had the highest population density in Africa, which adversely affected food production for the people of the country.[139] Chris Huggins et al. consider land issues in Rwanda to have been ñone of the structural causes of povertyò[140] and this was ñexploited by the organisers of the genocideò.[141] To demonstrate the level of land and property grievances, the victims of murder in one particular commune embroiled in land disputes

[133] Rupert Smith, *The Utility of Force* (London: Penguin, 2006), pp.203-4
[134] Ibid, p.16
[135] Ibid, p.16
[136] FAO, ó*Access to rural land*ô, p.5
[137] Ibid, p.5
[138] Waal, ó*Humanitarian organizations*ô, p.14
[139] Takele Sobaka Bulto, ó*The Promises of new constitutional engineering in post-genocide Rwanda*ô, *African Human Rights Law Journa,l* 8, 2008, p.190
[140] Chris Huggins, Herman Musahara, Prisca Mbura Kamungi, Johnstone Summit Oketch and Koen Vlassenroot, ó*Conflict in the Great Lakes Region ï How is it linked with Land and Migration?*ô, *Natural Resource perspectives*, Number 96, Overseas Development Institute, March 2005, p.1
[141] Ibid, p.1

before the genocide only included one Tutsi, the rest were Hutuôs ñresented by some people because they had large landholdings.ò[142]

The ring leaders exploited this situation by blaming the Tutsiôs for the overpopulation and arguing that less Tutsiôs would mean more land for those who remain.[143] This had happened previously with Tutsiôs being driven from their homes with the subsequently vacant land and property being redistributed amongst the Hutuôs.[144] Additionally, Hutu extremists played on fears that returning Tutsiôs including the Rwandan Patriotic Front (RPF) would reclaim the land they lost[145] and even went so far as to publish maps highlighting the land that would be lost should the advancing RPF get that far.[146] In these ways, overpopulation and land scarcity was politicised and ethnicized in order to facilitate and maintain the Rwandan genocide.

As well as the ñgrievances that consciously trigger the conflictò[147] (including land scarcity) Liz Alden Wily also claims that property issues can be ñthose that appear during the war due to a breakdown in normsò.[148] Laurel Roseôs point that ñsome Rwandansð both Tutsis and Hutusð used the uncertainty and insecurity about land ownership and rights during and after the genocide as an excuse to grab landò[149] is a great illustration of this.

[142] H Musahara, C Huggins, C, óLand Reform, Land Scarcity and Post Conflict Reconstruction: A Case Study of Rwandaô, *Eco-Conflicts,* 3 (3), 2004, p.275
[143] Bulto, óThe Promises of new constitutional engineeringô, p.190
[144] Ibid, p.191
[145] Ibid, p.190
[146] Huggins, óConflict in the Great Lakes Regionô, p.2
[147] Liz Alden Wily, óTackling land tenure in the emergency to development transition in post-confl ict states: From restitution to reformô in Uncharted Territory: Land, Conflict and Humanitarian Action, edited by Sara Pantuliano (Rugby: Practical Action, 2009), p.31
[148] Ibid, p.31
[149] Rose, óLand and Genocideô, p.54

Chapter 2: Land and Property Issues in Conflict Environments

A). Kosovo

Before discussing land and property issues in conflict of Kosovo, I will briefly give some context to the background of the conflict. The disputes and grievances between the two main ethnic groups the Kosovo Serbôs and Albanianôs as well as the non-majority groups (Roma, Ashkali, Egyptians and Gorani) are many and there has been tension between them for centuries. It is not within the scope of the essay, nor does the word limit allow me, to discuss the conflict unless directly relevant to housing, land and property (HLP) issues. But, Branislav Radeljic neatly explains the main dispute by explaining that ñFor Serbs, Kosovo is the core of the medieval Serbian kingdom. For Albanians, Kosovo is the cradle of their struggle for independence.ò[150] Kosovo was part of Yugoslavia and subject to the Yugoslav Federation Constitution of 1974. Marc Sommers and Peter Buckland explain that this ñprovided every republic and province in Yugoslavia with theoretical statehoodò.[151] However, the Yugoslav constitution was altered by Serbian leader Slobodan Milosevic in 1989 which subordinated all Kosovo state functions and organisation to Serbian control.[152]

In Kosovo, land and property issues represented a number of grievances for the Kosovo Albanians that contributed to and are the result of the conflict all of which stem from this change in the Constitution.[153] Grievances included discriminatory property laws restricting property transactions, forced evictions and destruction of housing.[154] Scott Leckie writes that during the 1990ôs violations of housing rights were endemic and the ñhousing and property sectors in Kosovo became bastions of ethnic discrimination.ò[155] Property and land policy were part of a piece of important Serbian legislation ironically entitled ôProgramme for Establishment of Peace, Liberty, Equality, Democracy and

[150] Branislav Radeljic, International & Interdisciplinary Conference, HUMAN RIGHTS, INDIVIDUALISM & GLOBALIZATION, April 10-12, 2008, Center for Spirituality, Ethics & Global Awareness, p.1
[151] Marc Sommers and Peter Buckland, ôParallel Worlds. Rebuilding the education system in Kosovoô, UNESCO, IIEP Paris, 2004, p.39
[152] Bellamy, A.J.. ôHuman wrongs in Kosovo: 1974-1979ô, In: Booth, K. (Ed.), *The Kosovo Tragedy: the human rights dimensions. (*London; Portland) 2001, p.113
[153] Scott Leckie, ôResolving Kosovo's Housing Crisis: Challenges for the UN Housing and Property Directorateô, *Forced Migration Review 1* (2000), p.12
[154] Ibid, p.12
[155] Ibid, p.13

Prosperity in the Autonomous Province of Kosovoô that served to ñconsolidateé the dominance of the minority Serb populationò.[156]

These housing and land rights violations cohere with De Waalôs categories of how and why property and land are used in humanitarian emergencies including conflict. The first is using property and land to control the population, which in the Kosovo case, was by controlling migration through restricting property transactions. The óLaw on Changes and Supplements on the Limitations of Real-Estate Transactionsô[157] served to ensure that the Serb minority in Kosovo was not further depleted. Under this law, all cross-ethnic property deals had to be approved by the Serbian Ministry of Finance.[158] The idea was to block any transaction that ñchanged the ethnic composition of the populationò.[159] It was therefore discriminatory to both Serbians and Albanians since the latter were often denied permission to buy or sell property[160] and the former ñwere prohibited from selling property in order to discourage and restrict Serb emigrationò.[161] The consequence was that it was ñvirtually impossibleò[162] for there to be property transactions between the Serb and Albanian communities. If a transaction proceeded without permission, whether permission was either denied or not sought, the parties of that illegal transaction could be sentenced to 60 days in prison.[163] This law was even applied to cross-ethnic transactions before the legislation came into force in 1991 and, as a result, ñsales of property to Albanians by departing Serbsò[164] were deemed null and void.

A further action involving land and property rights is Waalôs ñEthnic cleansing and forced relocationò[165] that can involve forced displacement and eviction or dissolving land rights.[166] Waal holds that this happens either during or in the lead up to conflict, and can either be the ñphysical removal of the targeted populationé [or] removing their land

[156] Leckie, óResolving Kosovoôs Housing Crisisô, p.13
[157] Hans Das, óRestoring Property Rights in the Aftermath of Warô, 53 *International and Comparative Law Quarterly*, (2004), p.434
[158] Ibid, p.434
[159] Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition (2009),* International Center for Transitional Justice, p.10
[160] Leckie, óResolving Kosovoôs Housing Crisisô, p.13
[161] Ibid, p.13
[162] Ibid, p.13
[163] Hans Das, óRestoring Property Rightsô, p.434
[164] Leckie, óResolving Kosovoôs Housing Crisisô, p.1
[165] Waal, óHumanitarian organizationsô, p.15
[166] Ibid, p.15

rights and political authoritiesö.[167] Both were the case for Kosovo. The genesis of the removal of land and property rights begins with a relic of the Communist era, the 1980 ó Law on Basic Property Relationsô.[168] Edward Tawil writes that this ñallowed people to own structures but not landö[169] instead they had ñuser rights to the landö.[170] This obviously applied to all the community groups in Kosovo but in 1992 the Serbian government created a law that permitted ñthe privatisation of residential apartmentsö.[171] However, the Serb directors of socially owned enterprises (SOEs) which owned the apartments dissolved many Kosovo Albanianôs ownership rights over these apartments once they had bought them.[172] Additionally when, because of ethnic discrimination, 135,000 Kosovo Albanians were made redundant at the beginning of the 1990ôs they were also evicted because ñoccupancy rights in socially owned housingé were invariably linked with employmentö.[173] Subsequently, the housing was re-distributed to ñSerbs and Montenegrins on preferential terms.ö[174] Finally, Leckie notes that under the ó Law on Changes and Supplements on the Limitations of Real-Estate Transactionsô ñAlbanian Housing and Occupancy Rights were arbitrarily annulledö.[175] These violations of property rights were however, nothing in comparison to what happened a few years later in 1999.

ó Operation Horseshoeô has been described by a report in The (UK) Observer as ñMilosevicôs final solution to the Kosovo problemö.[176] This was a massive escalation in violence and systematic human rights violations. It was an operation that involved the Serbian military and police who ó sweptô through Kosovo from three sides (hence the name Horseshoe). It was designed to eradicate the Kosovo Liberation Army guerrillas but also to expel all Kosovo Albanianôs from the territory and through ñthe open southwestern end of the horseshoe into Macedonia and Albaniaö.[177] The report states that

[167] Waal, ó Humanitarian organizationsô, p.15
[168] Tawil, ó Property Rights in Kosovoô, p.10
[169] Ibid, p.10
[170] Ibid, p.10
[171] Ibid, p.10
[172] Ibid, p.10
[173] Leckie, ó Resolving Kosovoôs Housing Crisisô, p.13
[174] Ibid, p.13
[175] Scott Leckie, Housing, Land and Property Rights in Post-Confl ict Societies: Proposals for a New United Nations Institutional Policy Framework, UNHCR, Geneva, 2005, p.14
[176] Peter Beaumont and Patrick Wintour, Milosevic and Operation Horseshoe, The Observer, Sunday 18 July 1999, last accessed on 1.6.11 at: http://www.guardian.co.uk/world/1999/jul/18/balkans8
[177] Ibid.

the operation succeeded in displacing in excess of one million people from their homes into those neighbouring countries ñamid appalling massacres and the deliberate destruction of Albanian property.ò[178]

Land and property was also adversely affected in an incidental way without intent, where they represent what Waal calls, ñlittle more than battlegroundò[179] and leading to property being destroyed or people being displaced.[180] Hans Das quotes international surveys, which hold that 103,000 units or nearly half of the Kosovo housing stock was ñdestroyed or uninhabitableò.[181] Obviously, this destruction was partly intentional through Operation Horseshoe, but would also have been a by-product of NATO bombing and fighting between the KLA and Serbian military.

Liz Alden Wily claims that property rights violations can also be ñthose that appear during the war due to a breakdown in normsò.[182] This is represents another aspect violations during the Kosovo conflict. All sides took advantage of the lack of law and order whether it was Serbian paramilitaries destroying Albanian property[183] or Kosovo Albanians claiming abandoned Serb properties once they had fled, KLA supporters given rewarded with Serb property or forced evictions and transactions.[184]

In summary, there were a number of land and property grievances in the form human rights violations that Kosovo Albanians experienced in the run up to, and during, the conflict. The examples show discrimination, favouritism (for Serbs and Montenegrins), destruction of property (intentional or not), forced evictions, loss of property rights, and annulled/severe restrictions on property transactions. These for Scott Leckie are ñfactors which substantially contributed to the subsequent conflict.ò[185]

[178] Beaumont, ôMilosevicô, Ibid.
[179] Waal, ôHumanitarian organizations, p.16
[180] Ibid, p.16
[181] Hans Das, ôRestoring Property Rightsô, p.433
[182] Wily, ôTackling land tenureô, p.31
[183] Tawil, ôProperty Rights in Kosovoô, p.11
[184] Hans Das, ôRestoring Property Rightsô, p.434
[185] Leckie, ôResolving Kosovoôs Housing Crisisô, p.13

Chapter 3: Housing, Land and Property Rights

This section will outline the human rights laws that concern housing, land and property their justiciability and which of them the Kosovo government is bound by, if at all. Additionally, it will look at the developments international HLP protections. The Food and Agriculture Organisation of the United Nations distinguish between two aspects of land and property issues. They are land tenure and security of tenure. The FAO defines land tenure as the ñrelationship among people, as individuals and groups, with respect to land and other natural resourcesò[186] which essentially concerns access to land which can be split into user rights, control rights and transfer rights.[187] The second category, is ósecurity of tenureô which concerns the recognition and protection of oneôs property and land rights.[188] The Land and property rights in international human rights law and international humanitarian law come under both categories. There are a number of human rights that concern property under such laws. The first is Right to Adequate Housing. This is stipulated in Article 25 (1) of the Universal Declaration of Human Rights (UDHR) of 1948 and derived from the ñright to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, [and] housingò.[189]

The ICESCR states the same human right in Article 11 with the addition that ñstates parties will take appropriate steps to ensure the realization of this rightò.[190] The Convention of the Elimination of All Forms of Racial Discrimination (CERD) also includes the guarantee to the Right to Housing.[191]

[186] FAO, óAccess to rural landô, p.19
[187] Ibid, p.21
[188] Ibid, p.22
[189] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 25 (1), last accessed on 8.6.11 at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html
[190] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Preamble, p. 3, last accessed on 8.6.11 at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html
[191] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, Article 5 (iii), last accessed on 12.6.11 at: http://www.unhcr.org/refworld/docid/3ae6b3940.html [accessed 8 July 2011]

The Right to Adequate Housing is an important human right, indeed, the United Nations fact sheet on Adequate Housing notes that this is ñone of the most basic human needsò.[192] But it is not only important in and of itself, a number of other human rights are necessary for it to be achieved and a number human rights flow from it. The fact sheet recognises that the achievement of the Right to Adequate housing relies upon the ñright to human dignity, the principle of non-discrimination, the right to an adequate standard of living, the right to freedom to choose one's residence, the right to freedom of association and expression (such as for tenants and other community-based groups), the right to security of person (in the case of forced or arbitrary evictions or other forms of harassment) and the right not to be subjected to arbitrary interference with one's privacy, family, home or correspondenceò.[193] The factsheet also states that the right to housing aids the attainment of the right to environmental hygiene and the right to the highest attainable level of mental and physical health.[194]

The Right to Property is also a human right espoused in the UDHR as ñ(1) Everyone has the right to own property alone as well as in association with others. [Furthermore] (2) No one shall be arbitrarily deprived of his property.ò[195] CERD also charts the right to own property.[196] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) outlines;

ñThe same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.ò[197]

The UN Committee on Economic, Social and Cultural Rights has drafted two General Comments regarding Article 11 of the CESCR. General Comment No.4 (1991) on ôThe right to adequate housingõ outlines the aspects of the right that need to be catered for, of

[192] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 21, The Human Right to Adequate Housing*, June 1994, No. 21, p.2, last accessed on 16.6.11 at: http://www.unhcr.org/refworld/docid/479477400.html [accessed 8 July 2011]
[193] Ibid, p.5
[194] Ibid, p.5
[195] UDHR, Article 17 (1 & 2)
[196] CERD, Article 5 (v)
[197] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, Article 16 (h), last accessed on 12.6.11 at: http://www.unhcr.org/refworld/docid/3ae6b3970.html [accessed 8 July 2011]

which there are seven; Legal security of tenure, Availability of services, materials, facilities and infrastructure, Affordability, Habitability, Accessibility, Location and Cultural adequacy.[198] It also outlines state obligations, and aspects of the right that require domestic legal remedy. General Comment No.7 (1997) on ôThe right to adequate housing: Forced Evictionsô clarifies the nature of state obligations regarding ñsecurity of tenure which guarantees legal protection against forced

eviction, harassment and other threatsò.[199] The General Comment defines forced eviction as ñthe permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.ò[200] It stipulates that states should refrain from forced eviction and protect against its agents or third parties doing the same.[201] It also holds that forced eviction and house demolition as a ñpunitive measureé [are] inconsistent with the norms of the Covenantò.[202]

Beyond noting an ôinconsistencyô, several human rights bodies have proclaimed that forced evictions constitute gross human rights violations. The Sub-Commission on Prevention of Discrimination and Protection of Minorities (Resolution 1991/12) and the Commission on Human Rights (Resolution 1993/77) have both stated that forced evictions amount to a gross violation of the right to adequate housing[203] which would then oblige a legal remedy under the UN Resolution on the Right to Remedy.

International Humanitarian Law (IHL) also includes protection of property. The Geneva Conventions require all parties to a conflict to abide by its articles, which include the prohibition of destruction to private property (unless out of military necessity)[204], pillage

198 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, Paragraph 8 (a-g) last accessed on 20.6.11 at: http://www.unhcr.org/refworld/docid/47a7079a1.html

199 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, Paragraph 1, last accessed on 24.6.11 at: http://www.unhcr.org/refworld/docid/47a70799d.html

200 Ibid, Paragraph 3

201 Ibid, Paragraph 8

202 Ibid, Paragraph 12

203 OHCHR, Fact Sheet No.21, p.14

204 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 53, last accessed on 25.6.11 at: http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument

and reprisals against private property.[205] IHL also distinguishes between civilian and military objectives and prohibits ñdirect and indiscriminate attacks and other acts of violence against civilian objectives [and] using civilian property to shield military operations or objectivesò.[206] Such violations could be dealt with by the International Criminal Court if submitted by the UN Security Council or other courts such as the ICTY.

Obviously, given the land and property rights abuses in Kosovo shown in the previous chapter, such abuses are violations of a number of these international human rights law and IHL rights including destruction of property (intentional or not), forced evictions and loss of property and housing rights as well as discriminatory laws.

As has been discussed in the earlier chapter, justiciability is an issue for the human rights set out in the CESCR and the Right to Property is no exception. Whilst the CESCR does not have an individual complaints mechanism or formal complaints/petition procedure, states parties are obliged to submit a report every five years to explain the legislative an policy measures initiated to ensure their compliance with the CESCR.[207] It is clear that states parties to the CESCR and other international law should ratify such Covenants into domestic legislation thereby allowing violations of such rights to be remedied. Fact sheet No.25 notes that ñthe necessity of implementing international human rights obligations through domestic legislation is consistent with article 27 of the 1969 Vienna Convention on the Law of Treatiesò[208] concerning the prohibition of a state invoking domestic law as the reason why it is not fulfilling its treaty obligations. Additionally, as has been noted, the Maastricht Guidelines, General Comments and UN Resolution on the Right to Remedy (in the case of a gross/serious violation of international human rights/humanitarian law) state that a remedy is required when applicable.

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[205] Convention IV, Protection of Civilian Persons, Article 33

[206] Protection Cluster Working Group, Land and Property, (Part V.11), Handbook for the Protection of Internally Displaced Persons, PCWG, 2007, p.258, last accessed on 1.6.11 at: http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/Protection%20Handbook/land%20and%20property.pdf

[207] UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 25, Forced Evictions and Human Rights*, May 1996, No. 25, p.14, last accessed on 8.7.11 at: http://www.unhcr.org/refworld/docid/479477435.html

[208] Ibid, p.54

There has also been a development in the drafting of the óOptional Protocol to the International Covenant on Economic, Social and Cultural Rightsô.[209] The Protocol will only enter into force three months after the tenth country ratifies the document[210], which has not yet happened. The Protocol gives significant óteethô the CESCR by states parties allowing the Committee on Economic, Social and Cultural Rights to consider written communications (after the exhaustion of domestic remedies).[211] This is ñby or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violationò[212] of the rights in the CESCR. This also includes inter-state communications but only if both state are parties to the protocol or otherwise recognise the competence of the Committee to intervene.[213]

Regarding individual or group complaints against a state party, the Committee will contact the state party and the latter have six months in which to ñsubmit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Partyò.[214] The Committee will then respond to this communication with its recommendations and, in turn, the State Party will then submit written response (within six months) with information on its activities regarding the matter.[215] Finally, the Committee can ask the State Party to submit another report regarding its policy measures in response to the Committees views or recommendations.[216] In extreme cases, the Committee can request interim measures prior to the following procedure ñto avoid possible irreparable damage to the victim or victims of the alleged violationsò.[217] The Protocol is an encouraging development, however, it is yet to enter force and very few States have ratified the document. Until the Protocol comes into force for those States who become parties, the only way individuals have access to remedy for violations of the ESC Rights in the CESCR is either domestically, if there is domestic provision, or with a regional human rights mechanism. One example of the latter is the European Court of Human Rights, again, only for State parties of the European Convention on Human Rights and Fundamental Freedoms.

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[209] UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117, last accessed on 5.6.11 at: http://www.unhcr.org/refworld/docid/49c226dd0.html
[210] Ibid, Article 18, Paragraph 1
[211] Ibid, Article 3, Paragraph 1
[212] Ibid, Article 2
[213] Ibid, Article 10
[214] Ibid, Article 6, Paragraph 2
[215] Ibid, Article 9, Paragraph 1 & 2
[216] Ibid, Article 9, Paragraph 3
[217] Ibid, Article 5, Paragraph 1

CERD has an inbuilt complaints mechanism for individuals and groups if State Parties declare the Committee on the Elimination of Racial Discrimination competent to receive and consider communications under Article 14.[218] CEDAW has an Optional Protocol to the Covenant of which there are 102 States Parties which has a complaints mechanism for individuals and groups whose procedure is similar[219] to CERD and the Optional Protocol of the CESCR complaints procedure. Therefore, for those State Parties of the Optional Protocol to CEDAW and CERD who recognise the competence of the respective Committee, individuals who believe their property rights have been violated can bring their claims the relevant Committee.

So what laws regarding property and housing is Kosovo now party to? Obviously, since there is a dispute over sovereignty and if Kosovo is a part of Serbia, it would party to the international law that Serbia has adopted. However, since Kosovo has been under international administration and it has now declared independence, I will focus on the laws that apply if Kosovo is considered to be independent. One of the principles on which the Kosovo Constitution is based is the right to property.[220] In addition, Article 46 states that ñthe right to own property is guaranteedò[221] and ñno one shall be arbitrarily deprived of propertyò.[222] However, the Constitution also allows the Republic of Kosovo or a public authority of the Republic to expropriate property if it is lawful, necessary for a public purpose or public interest and there is immediate compensation to the óvictimô of the expropriation.[223] Perhaps this could be a provision of law that is aimed to allow the authorities to decide competing property claims and provide property restitution. Article 54 guarantees the right to an effective legal remedy in the event of a violation of a right set out in the constitution which, obviously, includes Article 46.[224]

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218 CERD, Article 14

219 UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, United Nations, Treaty Series, vol. 2131, last accessed on 22.6.11 at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en

220 *Constitution of the Republic of Kosovo* [Serbia], 9 April 2008, Article 7 (1), last accessed at 17.6.11 at: http://www.unhcr.org/refworld/docid/4ae969d32.html [accessed 8 July 2011]

221 Ibid, Article 46 (1)

222 Ibid, Article 46 (2)

223 Ibid, Article 46 (2)

224 Ibid, Article 54

Regarding international human rights law, Kosovo is not a state party to any of them. However, Article 22 of the Constitution states that several international human rights instruments are ñdirectly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutionsò.[225] Those that include property and housing rights are the UDHR, CERD and CEDAW with the notable exception of CESCR. But since Article 11 of CESCR that regards the right to housing under the right to a standard of living is the same as the UDHR (which the Constitution does deem directly applicable) Article 25, it is not too damaging to the right to adequate housing in Kosovo. So, in summary, the Constitution guarantees the Right to Property and the Right to Adequate Housing and shows that the post-conflict government has made some progress protecting the human rights in these instruments.

The area where most progress has been made regarding property and housing rights is for refugees and IDPôS. Principally, this is through the Guiding Principles on Displacement (2001) issued by the Secretary-Generalôs Representative on IDPôs and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005). The latter are also commonly known as the Pinheiro Principles, after Paulo Sergio Pinheiro, the architect of the principles and the UN Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons.

In Guiding Principles on Internal Displacement, Principle 21 guarantees that none shall be arbitrarily deprived of their property and also incorporates international humanitarian law, including that the property of IDPôs must be protected from pillage, reprisals, destruction, illegal appropriation, direct or indiscriminate attacks, and being used as military shields.[226] Principle 28 charges the relevant authorities with the obligation to establish the conditions and provide the means for IDPôs to voluntarily return to their homes or resettle elsewhere and to facilitate their reintegration into society.[227] Principle 29, prohibits the discrimination against former IDPôs who have settled or resettled. Perhaps the most important provision for IDPôs and their property rights is Principle 29 (2) which states:

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[225] Constitution of the Republic of Kosovo, Article 22

[226] UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement,* 11 February 1998, E/CN.4/1998/53/Add.2, Principle 21, last accessed on 20.6.11 at: http://www.unhcr.org/refworld/docid/3d4f95e11.html

[227] Ibid, Principle 28 (1)

"Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were disposed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.ò[228]

Its importance is due to its influence on the emerging right to restitution of property for those who have been arbitrarily deprived of it, a right which is expanded on and made more explicit in the Pinheiro Principles. The Pinheiro Principles elaborates and perhaps establishes this emerging right in Principle 2 which states ñAll 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.ò[229] Additionally, it stresses that the right to restitution is a distinct right and that States should clearly prioritise restitution over other forms of remedy such as compensation.[230] The right to property restitution will be examined in the following chapters.

There are several other rights in the principles that protect the vulnerable people. The right to non-discrimination on grounds such as race, sex, language, social origin etcé . including the prohibition of discrimination against refugees and IDPs.[231] The Right to equality between men and women ensures the equal right to housing, land and property restitution including practices and policies that establish joint ownership of property rights between men and women and prohibiting restitution programmes that disadvantage women and girls.[232] Principle 5, the Right to be protected from displacement, includes that this right should be part of domestic legislation, it also requires states to prohibit

[228] UN Commission on Human Rights, *Report of the Representative,* Principle 29 (2)
[229] COHRE, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles), 2005, Principle 2.1, last accessed on 1.6.11 at: http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/PinheiroPrinciples.pdf,
[230] Ibid, Principle 2.2
[231] Ibid, Principle 3
[232] Ibid, Principle 4

force eviction and destruction of housing and land and ensure that third parties abide by this.[233] The Principles also include the right to privacy and respect for the home (prohibiting unlawful interference)[234], the right to freedom of movement which protects against people being forced to leave or remain in a given territory[235] and the right to adequate housing for refugees and IDPôs.[236]

[233] COHRE, United Nations Principles, Principle 5
[234] Ibid, Principle 6
[235] Ibid, Principle 9
[236] Ibid, Principle 8

Chapter 3: Housing, Land and Property Rights

A). Right to Property Restitution

This section will examine the main development in HLP protection that is the legal remedy for housing, land and property rights violations - property restitution and the rights upon which it is based. Rhodri C. Williams explains that legally, the Right to Property Restitution rests upon two other rights. The first is the right to return ñwhereby refugees and IDPs are entitled to return voluntarily not to their country but their actual home of originò.[237] The second, is a ñrights-based ï rationaleò[238] otherwise known as the Right to Remedy.

The latter appears to be the stronger of the two rights that support the right to property restitution. This is because the right to return to oneôs home of origin as opposed to the right to return to ones country of origin is a right that, for Williams, is ñonly weakly supported in international lawò.[239] He reveals that the architects of the Guiding Principles on IDPs could not find anything in international law asserting this right; however, they found that ñfailure to allow such return could amount to a violation of the right to freedom of movementò.[240] Although forced displacement is a violation of International Humanitarian Law and the right to freedom of movement[241] there is only the Guiding Principles and Pinheiro Principles that assert the right to remedy in such cases. However, the Guiding Principles only assert a state duty and not an individual right to return to oneôs home of origin. Williams notes that because of this lack of legal support, the Principles ñincluded a state duty to allow return home on the basis of the right to a remedyò[242] and in doing so, made the right to return derivative of the right to remedy.

There has recently been a turn towards the principle of a right to return to ones home of origin via the right to remedy through practice as well as the legal instruments. The UN

[237] Rhodri C. Williams, Post-conflict property restitution in Croatia and Bosnia and Herzegovina: legal rationale and practical implementation, *Forced Migration Review* 21 (Oct. 2004), p.15
[238] Ibid, p.15
[239] Rhodri C. Williams, The Contemporary Right to Property Restitution in the Context of Transitional Justice, *International Center for Transitional Justice Occasional Paper*, May 2007, p.i
[240] Ibid, p.8
[241] Ibid, p.7
[242] Ibid, p.8

Sub-Commission has asserted this right and the UN Security Council have also supported it.[243] However, the right remains derivative of the right to remedy. The UNHCR has upheld this right as a remedy for forced eviction, which, Williams believes, ñin displacement settings amounts to an effective right to return homeò.[244] The peace settlement for Bosnia, the Dayton Peace Agreement (1995) represents another surge forward for the right to restitution because the Agreement included the right of IDPs to return to their homes of origin as well as property restitution.[245] The return of a million people to Bosnia and the restitution of 200,000 homes represent, for Williams, ñthe first real precedent for large-scale post-conflict property restitution as of rightò[246]

Regarding legal instruments, as already noted, the UN General Assemblyôs Resolution (2006), ówBasic 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 Lawô establishes that such violations require remedies including access to justice and reparations[247] including restitution which ñshould, whenever possible, restore the victim to the origin situation before the gross violations of international human rights law or serious violations of international humanitarian law occurredò[248] and return of property is explicitly named as one example. Additionally, as previously explained, Principle 2 of the Pinheiro Principles asserts the distinct right of property restitution for IDPs and Refugees in event of its arbitrary or unlawful deprivation. Williams states that the Pinheiro Principles as well as the Guiding Principles on Displacement ñhave helped fill an important gapò[249] in the consolidation of the right to property restitution as a legal entitlement.

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[243] Williams, ówThe Contemporary Right to Property Restitutionô, p.8
[244] Ibid, p.8
[245] Europe - Miscellaneous, *Dayton Peace Agreement, Annex 7: Agreement on Refugees and Displaced Persons*, 14 December 1995, last accessed on 13.6.11 at: http://www.unhcr.org/refworld/docid/3de497992.html
[246] Rhodri C. Williams, ñGuiding Principle 29 and the Right to Restitution,ò *Forced Migration Review* (Dec. 2008), p.23, last accessed on 1.6.11 at: http://www.fmreview.org/FMRpdfs/GP10/23-24.pdf
[247] UN General Assembly, 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 : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, Article 11 (a-b), available at: http://www.unhcr.org/refworld/docid/4721cb942.html [accessed 1 June 2011]
[248] UN General Assembly, Basic Principles, Article 19
[249] Williams, ówGuiding Principle 29ô, P.23

Another important reason for the emergence of right to restitution is that it is an important durable or long term solution for displaced people.[250] There are three durable solutions for IDPs and Refugees, return to their home/county of origin, local integration in the location where they are presently living, or resettlement that somewhere else. Indeed as the Pinheiro Principles state, restitution should be the ñpreferred remedy for displacementò.[251] So property restitution, for displaced people, provides both a remedy and the preferred durable solution for them. For this reason, Williams holds property restitution ñcan contribute to the resolution of larger conflictsò[252] and is considered to be ña central tactic in addressing the wave of renewed sectarian strife and attendant ethnic cleansingò.[253]

[250] Williams, ôThe Contemporary Right to Property Restitutionõ, p.49
[251] COHRE, ôUnited Nations Principles on Housing and Property Restitutionõ, Principle 2.2
[252] Williams, ôThe Contemporary Right to Property Restitutionõ, p.11
[253] Ibid, p.11

Chapter 4: Housing, Land and Property Issues in Post-Conflict Environments

The section will explain the issues that need to be dealt with in post-conflict contexts as a result of these violations of land and property rights and Kosovo specifically. Scott Leckie notes a number of such issues that need to be resolved. The first, the destruction and damage to housing will cause ñsevere shortages of habitable housingò[254] and housing remains will often be overcrowded and/or unsuitable.[255] This affects Kosovo since, as already noted, half of the territories housing stock was either destroyed or uninhabitable. He also notes there is often a ñlegacy of arbitrary applications of law affecting HLP Rightsò[256] which will need to be repealed. He actually offers Kosovoôs own ólLaw on Changes and Supplements on the limitations of Real-Estate Transactionsô (which has already been described) as an example of this.[257] Property rights records, whether incomplete or lost through destruction or confiscation is another legacy that Leckie outlines.[258] These records are sorely needed to work out who has rights over land, property or tenancy especially to resolve a property dispute. For Kosovo, many property records were either destroyed by Serbian forces or taken to Serbia by the authorities[259] and what remains is incomplete, especially records registered since 1994.[260] In fact, Leckie quotes estimates that over half of Kosovoôs property records are no longer in the territory.[261] Understandably, this is a huge issue to be dealt with and adversely impact upon the ease with which property disputes are resolved.

Leckie also states that post-conflict settings often suffer from ñlarge-scale secondary occupation of housing, land and propertyò.[262] In Kosovoôs case, this is a problem for Albanian IDPôs and Refugees whose property rights were dissolved and transferred to others by Serbian authorities though UNMIK has since annulled all documents and laws

[254] Leckie, óHousing, Land and Property Rightsô, p.16
[255] Ibid, p.16
[256] Ibid, p.14
[257] Ibid, p.14
[258] Ibid, p.15
[259] Leopold Von Carlowitz, 'Resolution of property disputes in Bosnia and Kosovo: The contribution to peacebuilding', International Peacekeeping, 12: 4, 2005, p.551
[260] Tawil, óProperty Rights in Kosovoô, p.18
[261] Leckie, óResolving Kosovoôs Housing Crisisô, p.13
[262] Leckie, óHousing, Land and Property Rightsô, p.12

issued by the Serbian government after 24th March 1999.[263] Similarly, it is also a problem for Serbs who have had their vacant houses occupied by returning Albanians.[264]

The destruction of property, forced evictions and the annulment of property rights as well as the general conditions of a conflict means that there will be many IDPs or refugees. I will use the The Guiding Principlesô definition of an IDP as;

ñPersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally-recognized State border.ò[265]

Refugees are those who have crossed the state border. Obviously, given the sovereignty dispute over Kosovo, displaced peoples could be IDPs or refugees depending on whether one considers Kosovo to be independent. Refugees and IDPs have a number of issues that need to be addressed. Leckie writes that first, for those that want to return, the authorities need ñto assist returnees to return to, reclaim and re-possess their original homesò.[266] Second, there will be a number of HLP rights disputes for refugees and IDPs who find that their original home is occupied either by ñpoorer groups [who] seek to find adequate housingé . [or] opportunistsò[267] who, as Wiley states, exploit the lawless situation for their own ends. For Leckie, such disputes include the determination of rights:

1. between the original and current occupier and their competing land deeds
2. in the case of unofficial property transfers
3. for land boundaries
4. for tenancy and cultivation rights[268]

[263] Leckie, óResolving Kosovoôs Housing Crisisô, p.13
[264] Ibid, p.13
[265] UN Commission on Human Rights, *Guiding Principles on Internal Displacement,* paragraph 2
[266] Leckie, óHousing, Land and Property Rightsô, p.12
[267] Ibid, p.12
[268] Ibid, p.12

This is particularly difficult for Kosovo because in response to the discriminatory laws and restrictions on property many such transactions, according to Hans Das, ñcontinued to take place in large numbers through secret, informal or unregistered contractsò[269] to the extent that the ñproperty registration system has gradually become obsolete.ò[270] Another result is that there are significant numbers of competing claims between Albanians and Serbs who have documentation óprovingô their property rights.[271] Related to this is another issue, that Kosovo authorities will have to do deal with is ñInsecure Housing and Land Tenureò[272] to protect people vulnerable to HLP disputes from arbitrary eviction or informal tenancy agreements.[273] Additionally, as many of the property rights records are either in Serbia or destroyed, and Serbian and Kosovo authorities do not recognise each other ñthere is no exchange of records or mutual recognition of issued documentsé [which presents] severe challenges to IDPôsò[274] as well as refugees.

There is also the problem of ñforced housing sales or rental ócontractsô made under duress at the time of flightò[275] which affected both fleeing Albanians and Serbs and Roma during Operation Horseshoe and Albanian retaliatory attacks during and after the NATO intervention respectively. Members of all three communities were forcefully evicted since July 1999 using false documents under duress and often having to sign that they have relinquished their property ñwillingly and without any pressureò.[276]

[269] Hans Das, óRestoring Property Rightsô, p.434
[270] Ibid, p.434
[271] Leckie, óResolving Kosovoôs Property Rightsô, p.13
[272] Leckie, óHousing, Land and Property Rightsô, p.17
[273] Ibid, p.17
[274] Tawil, óProperty Rights in Kosovoô, p.18
[275] Leckie, óHousing, Land and Property Rightsô, p.13
[276] Leckie, óResolving Kosovoôs Housing Crisisô, p.13

Chapter 4: Housing, Land and Property Issues in Post-Conflict Environments

A). Vulnerable Groups

Before discussing haw these problems have been dealt with in Kosovo, I want to further explore which groups are vulnerable and why they are crucial to peacebuilding. I wish now to look at the plight of vulnerable groups who are or might be victims of property rights violations. As explained in the previous chapters without the provision of remedies for such violations, óspoilersô could exploit their socio-economic grievances (including property violations) and encourage them to take up arms. Additionally, if these socio-economic grievances are not resolved, they will not feel inclined to cooperate in rebuilding or reconciliation, which is crucial to the success of peacebuilding.

IDPôs and refugees, by definition, particularly suffer from property violations. They can lose their land in a number of ways as has been shown previously. They might have fled conflict violence or faced forced eviction and subsequently, third parties have illegitimately occupied their property.

The Special Rapporteur on Adequate Housing, Raquel Rolnik notes that ñDisplacement is a notorious driver of human and particularly housing-rights violations.ò[277] Indeed, the United Nations explicitly recognised the this by appointed The Representative of the UN Secretary-General on the Human Rights of IDPs in 2004.[278] Rolnik states that eight risks faced by IDPôs which are ñlandlessness, joblessness, homelessness, marginalization, increased morbidity and mortality, food insecurity, loss of access to common property resources, and social/community disarticulationò[279]

Many of these risk areas are manifested because their displacement has removed, according to the Protection Cluster Working Group, ñtheir main source of physical and socio-economic security, including shelter, water, and food as well as the ability to earn a

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[277] Raquel Rolnik, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,* A/HRC/16/42, Human Rights Council, Sixteenth session, 20 December 2010, p.7, last accessed on 1.6.11 at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-42.pdf

[278] William OôNeill, Internal Displacement and Peacebuilding: Institutional Responses, Refugee Survey Quarterly, 28:1, 2009, p.155

[279] Rolnik, óReport of the Special Rapporteurô, p.7

sustainable livelihood.ò[280] Regarding employment, this would certainly be an issue for subsistence farmers, but it would affect significant others since many countries require a fixed address as a condition for eligibility of employment. This condition could also be the case for services like education and healthcare and consequently ñdisplaced persons may suffer increased poverty, marginalisation and risk of harassment, exploitation and abuse.ò[281] Security and safety can also be an issue for IDPôs and refugees.[282] This could be because of landmines or hostility from the local population, especially if their land or property is situated in an area dominated by other ethnic communities. Rolnik points out the speed with which displacement should be dealt with by quoting the United Nations Inter-Agency Standing Committee (IASC) who believe that the position of IDPôs deteriorates over time and human rights violations, particularly of economic, social and cultural rights become more frequent.[283]

Rolnik states that all those displaced suffer terribly, however, women, minorities and children, who are more vulnerable to discrimination, are most at risk.[284] After an ethnic conflict, discrimination towards certain community groups can still be a real problem for minorities. The Working Group note that in the case of women their vulnerability stems from laws and cultural practice that prohibit them from ñowning, leasing, renting and/or inheriting propertyò[285], and so without a male head of the household they face serious problems. Additionally, for these reasons, the Working Group hold that it will be difficult for women to successfully return to their homes, without which, they face risks ñsuch as rape, forced prostitution or traffickingò[286]

[280] Protection Cluster Working Group, Land and Property, (Part V.11), Handbook for the Protection of Internally Displaced Persons, PCWG, 2007, p.255, last accessed on 1.6.11 at: http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Protection/Protection%20Handbook/land%20and%20property.pdf
[281] Ibid, p.256
[282] FAO, óAccess to Rural Landô, p.18
[283] Rolnik, óReport of the Special Rapporteurô, p.7
[284] Ibid, p.7
[285] Protection Cluster Working Group, óLand and Propertyô, p.256
[286] Ibid, p.256

Chapter 4: Housing, Land and Property Issues in Post-Conflict Environments

B). Kosovo

I will now examine the vulnerable IDPôs in Kosovo. After the conflict in 1999, at their peak in 2000, there were 36, 000 IDPs in Kosovo[287] and that figure has been reduced to 18,300 by late 2010.[288] Ethnic violence (against Kosovo Serbs and Roma) in 2004 caused a further 4,200.[289] By the end of 2010, the ethnic make up of the IDPôs was thus; ñSlightly over half were Kosovo Serbs, around 39 per cent Kosovo Albanians, and six per cent from Roma communities.ò[290] In addition, there are roughly 225,000 IDPs from Kosovo in Serbia (proper).[291] The report concludes that 18,000 IDPs and 22,000 Refugees have returned to Kosovo, and the lowly figures are explained by reluctance to return because of security concerns, ñlimited freedom of movement, the restricted access to services and livelihoods, and the difficulties in repossessing or rebuilding their homes.ò[292]

Who are the particularly vulnerable displaced people in Kosovo? The IDMC report states that the most vulnerable were those IDPs (4,500) living in collective centres that ñwere still living in very harsh conditionsé [with] only minimal and intermittent assistance at bestò.[293] Tawil states there are four; Displaced Kosovo Serbs, the Roma, Ashkali, and Egyptian Communities, women and Kosovo Albanians North of the Ibar River.[294] The Internal Displacement Monitoring Centre report that most of the Kosovo Serb IDPôs were living in Northern Kosovo including Mitrovicë/a and other IDPs were in enclaves where their respective ethnic group represented the majority of the

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[287] Internal Displacement Monitoring Centre (IDMC), *Internal Displacement: Global Overview of Trends and Developments in 2010*, 23 March 2011, p.65, last accessed on 12.6.11 at: http://www.internal-displacement.org/publications/global-overview-2010

[288] Ibid, p.65

[289] Internal Displacement Monitoring Centre (IDMC), *Kosovo: Need to support minority communities to prevent further displacement and allow durable solutions*, 22 January 2010, p.4, last accessed on 12.6.11 at: http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/C8391DFACE00AEC6C12576B3004C751A/$file/Kosovo_Overview_Jan10.pdf

[290] IDMC, óInternal Displacement: Global Overviewô, p.65

[291] Ibid, p.67

[292] Ibid, p.65

[293] Ibid, p.65

[294] Tawil, óProperty Rights in Kosovoô, pp. 18-23

population.[295] Displaced Kosovo Serbs, according to Tawil, face ñdiscrimination, freedom of movement, and lack of employment opportunities, security and access to basic services.ò[296] Owing to the property deeds problems outlined previously (i.e. many are either destroyed or in Serbia and Kosovo authorities do not recognise Serbian documents/courts or administrative bodies) Kosovo Serbs find in difficult to register their property, and as Tawil notes, without a property certificate they cannot begin the process to attempt to legally reclaim their former homes.[297]

Both Tawil[298] and Internal Displacement Monitoring Centre believe that the Roma, Ashkali and Egyptian (RAE) community are the most marginalised group in Kosovo.[299] There are between 35,000 ï 40,000 RAE living in Kosovo, and many of their settlements have been destroyed.[300] Most notably, Roma Mahala in Mitrovica where 7,000 RAE resided until the settlement was destroyed because of their alleged collaboration with the Serbs during the conflict.[301] Tawil writes that this community ñface discrimination and disempowerment at all levels of Kosovo societyò[302] and many are forced to live in settlements ñwithout electricity, clean water or sewerage.ò[303]

One major reason for their continued displacement is that they cannot register because they do not have the right documents. Tawil labels this ña phenomenon called ñchronic unregistrationò[304] either because generations have not been able to acquire them or that they have been lost when they fled the violence. Without this documentation they cannot ñobtain accommodation, social assistance or health cards.ò[305]

Kosovo is sadly a prime example where laws and cultural practice make women extremely vulnerable to property and wider abuse. Tawil holds that women of all ethnic communities have ñsubordinate statusò[306] but Kosovo and Albanian and RAE women are

[295] IDMC, óInternal Displacement: Global Overviewô, p.65
[296] Tawil, óProperty Rights in Kosovoô, p.18
[297] Ibid, p.18
[298] Ibid, p.19
[299] IDMC, óInternal Displacement: Global Overviewô, p.65
[300] Tawil, óProperty Rights in Kosovo, p.20
[301] Ibid, p.21
[302] Ibid, p.20
[303] IDMC, óInternal Displacement: Global Overviewô, p.65
[304] Tawil, óProperty Rights in Kosovoô, p.20
[305] Ibid, p.20
[306] Tawil, óProperty Rights in Kosovoô, p.21

most vulnerable. Though the Kosovo constitution assures equality between the sexes[307], ñthe weight of culture and traditionò[308] prevents the application of the law and property rights are a prime example this. Tawil states that, especially amongst rural and poor communities, property amongst other things, is governed by traditional Albanian customary law called the Kanun[309], under which, ñwomenôs rights are severely restrictedò.[310] This law forbids women to inherit property; the latter must go to immediate male family[311], or otherwise to the ñclosest male relativeò.[312]

Tawil writes that the final vulnerable group at Kosovo Albanians who were living north of the Ibar River, in the Northern most part of Kosovo nearest Serbia proper where there was a Serbian majority. During the conflict and afterwards Kosovo Serbs IDPôs from elsewhere in Kosovo alongside various vigilante groups drove many Kosovo Albanianôs from this part of the territory and took their property for their own.[313] Indeed, the UN High Commissioner for Refugees (UNHCR) estimated in 1998 that 98 percent of the Kosovo Albanian IDPôs were displaced from Northern Mitrovice/a.[314] Tawil writes that few of these IDPôs have had access to the properties they were forced to abandon nor repossessed them due to the political and security situation there. He states that the failure of property restitution in the area has led some Kosovo Albanians to sell their property to Kosovo Serbs.[315]

[307] Kosovo Constitution, Article 7 (2), Article 24
[308] Ibid, p.21
[309] Ibid, p.22
[310] Ibid, p.22
[311] Ibid, p.22
[312] Ibid, p.22
[313] Tawil, ôProperty Rights in Kosovoô, p.23
[314] IDMC, ôKosovoô, p.4
[315] Tawil, ôProperty Rights in Kosovoô, p.24

Chapter 4: Housing, Land and Property Issues in Post-Conflict Environments

C). Contribution of Housing, Land and Property to Peacebuilding

This section will examine the contribution Housing, Land and Property can make to Peacebuilding and the developments in the way they are dealt with in post-conflict peacebuilding notably the proposals for a consistent way in which to deal HLP issues particularly the establishment of a national Housing, Land and Property Rights Directorate (HLPRD).

IDPôs form a crucial part of peacebuilding. The most obvious reason, as William OôNeill states, is that for some post-conflict countries, displaced people are a significant percentage of the population (for example, half of Bosniaôs population were displaced after its conflict[316]) and it is therefore ñimpossible to design development plans without taking into account the situation of returning refugees and IDPs.ò[317]

OôNeill believes that ñneither sustainable peace nor development are possible as long as there is a population that is rootless, dependent on foreign aid and harbouring resentment and hostility towards those who caused their displacement.ò[318] There refers to the point made earlier that their group of people will be unwilling to cooperate with development and reconciliation initiatives and could be a cause for instability, they are particularly ripe for óspoilersô who could encourage them to violence.

The author states that the plight of refugees has been recognised (e.g. the Convention Relating to the Status of Refugees of 1951) far longer than IDPôs, who have only been seriously considered for the last two decades. OôNeill explains that in 2006 OCHA launched the ñcluster approachéí [where] individual agencies are expected to assume a lead role for IDPs in their areas of expertiseò.[319] The problem with the cluster approach, for OôNeill, is that various UN agencies quarrel over who has the competency and

[316] Williams, ó The contemporary right to property restitutionô, p.33
[317] William OôNeill, Internal Displacement and Peacebuilding: Institutional Responses, Refugee Survey Quarterly, 28:1, 2009, p.151
[318] OôNeill, óInternal Displacementô, p.152
[319] Ibid, p.154

mandate to deal with IDP issues. Additionally, the approach deals ñwith immediate life-saving needs, but fail to address the longer-term ñsolutionsòò.[320]

OôNeill believes that it is the provision of long-term solutions, commonly referred to as óDurable Solutionsô that are ñessential to building sustainable peaceò.[321] He considers the Guiding Principles on Internal Displacement offer three such solutions, ñreturn to the IDPôs place of origin; integration in the area where the IDP has sought refuge; or resettlement to a different part of the countryò.[322]

In summary, there are number of post-conflict challenges to land tenure and security of tenure that need to be dealt with. As explained, they include destruction of property, arbitrary HLP laws, lost property records, and secondary occupation of housing, land and property. For refugees and IDPs there are issues of return to their homes of origin, housing land and property rights disputes, insecure housing and land tenure, and forced housing sale/rental contracts.

The resolution of these issues will clearly aid peace-building. The FAO report warns that failure to resolve such issues can threaten peacebuilding.[323] It has been shown that in some conflicts, land and property issues are one of the root causes of the conflict, and in the Kosovo case HLP abuses was one of many ways in which the Serbian government repressed the Kosovo Albanians. The Report of the Secretary-General on óThe rule of law and transitional justice in conflict and post-conflict societiesô states that ñthe root causes of conflict have often been left unaddressedò[324] but their remedy can be an important conflict prevention tool.[325] The Report goes on to claim that, ñpeace and stability can only prevail if the population perceives that politically charged issuesé [including] denial of the right to propertyé can be addressed in a legitimate and fair manner.ò[326]

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[320] OôNeill, óInternal Displacementô, p.154
[321] Ibid, p.155
[322] Ibid, p.155
[323] FAO, óAccess to Rural Landô, p.33
[324] UN Security Council, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 3 August, 2004, p.4, last accessed on 1.6.11 at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement
[325] Ibid, p.4
[326] Ibid, p.4

The FAO state that resolving land and property issues, particularly securing access to land helps both ñemergency humanitarian needs as well as longer-term social and economic stability.ò[327] Concerning the former, land can deliver food and shelter and facilitate humanitarian aid during the emergency period.[328] Settling land and property disputes and providing security of tenure can facilitate reconciliation, economic development and neutralise grievances that ñcan be politically, socially and economically destabilizingò.[329] Return of land and security of tenure facilitate economic development because it ñprovides a base where people can live, grow food and workò.[330]

Recognising the danger of neglecting post-conflict land and property issues and the benefit of their resolution to peace-building, the United Nations have made a concerted effort to bring them fully into their post-conflict reconstruction apparatus. Scott Leckieôs óProposals for a New United Nations Institutional and Policy Frameworkô for HLP Rights in Post-Conflict Societies aims to develop ña consistent, transparent and effective policyò to address the land and property issues identified which will aid the ñestablishment of the rule of law within post-conflict settings.ò[331]

Leckie starts by lamenting the relative neglect of HLP violations in comparison to other human rights violations.[332] For example, the International Criminal Court and ICTY does not deal with violations of HLP rights. It only deals with the Geneva Conventions which as previously stated includes prohibitions against destruction to private property (unless out of military necessity), pillage and reprisals against private property but unless these are deemed grave breaches the ICTY will not have jurisdiction.[333] The author notes that such violations have not been dealt with in a consistent way and the proposal seeks to establish HLP rights as a ñpriority of all peacekeeping operationsò.[334] Not only will HLP issues be properly addressed, adherence to the proposals will aid peacebuilding by improving social stability, facilitating economic development and supporting the rule of

[327] FAO, óAccess to Rural Landô, p.33
[328] Ibid, p.33
[329] Ibid, p.33
[330] Ibid, p.33
[331] Leckie, óHousing, Land and Property Rightsô, p.8
[332] Ibid, p.iii
[333] United Nations, International Criminal Tribunal for the Former Yugoslavia Website, Mandate and Jurisdiction Section, last accessed on 16.6.11 at: http://www.icty.org/sid/320
[334] Leckie, óHousing, Land and Property Rightsô, p.iv

law.[335] Leckie, like the FAO, also sees the role of addressing HLP issues as a conflict prevention tool.[336]

At the heart of framework is the establishing ñof a national *Housing, Land and Property Rights Directorate* (HLPRD) to ensure that comprehensive and consistent institutional, political and legal attention is paid to all HLP rights concerns within the countryò.[337] The HLPRD can be a new body or consist of already established national institutions[338] and can operate either when there with a substantial UN presence with executive powers (UN Transitional Authority) or when the UN is supporting a newly formed post-conflict government.[339] The Directorate should include a Claims department that will act as a claims mechanism to solve housing disputes and determine claims.[340] Kosovo represents one of the first examples of a Housing, Land and Property Rights Directorate. So, I will focus on Kosovoôs Directorate and particularly its claims mechanism because it represents a legal remedy for HLP rights violations and property restitution which is a durable solution for IDPs as a vulnerable group.

[335] Leckie, óHousing, Land and Property Rightsô, p.9
[336] Ibid, p.iii
[337] Ibid, p.vi
[338] Ibid, p.vi
[339] Ibid, p.11
[340] Ibid, p.29

Chapter 5: Kosovo

A). Description of Housing and Property Directorate and Claims Commission and the Kosovo Claims Agency

This section will examine Kosovoôs Housing and Property Directorate and Claims Commission (HPD/CC) and its successor the Kosovo Property Agency (KPA), explain and analyse what it has done to resolve land and property issues and if it is in line with Leckieôs conception as well as if it has been successful.

First, I will explain the context under which these institutions were established and operating. United Nations Security Council Resolution 1244 of 1999 established the United Nations Interim Administration Mission in Kosovo (UNMIK).[341] Neither the Resolution, nor the Agreement that ended hostilities in Kosovo the ñMilitary Technical Agreementò[342] referred to property rights issues or property restitution specifically.[343] Jose Maria Arraiza and Massimo Moratti note that this is in contrast to the Dayton Accords which included the right to return to ones home of origin and for the remedy of property rights violations.[344] However, the Resolution did stipulate that UNMIK had to allow the ñunimpeded return of all refugees and displaced persons to their homes in Kosovoò.[345]

To this end, the head of UNMIK, the Special Representative of the Secretary-General (SRSG) decided to address with the housing, land and property crisis by asking the UN Centre for Human Settlements (UN Habitat) in 1999 to form a plan of how to proceed. The plan highlighted three priorities, the first was the housing shortage, the second discriminatory legislation and establishing a dispute settlement mechanism and the third,

[341] Hans Das, ôRestoring Property Rightsô, p.434
[342] Jose-Maria Arraiza & Massimo Moratti, Getting the Property Question Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009), *International Journal of Refugee Studies*, Vol.21, 2009, p.425
[343] Hans Das, ôRestoring Property Rightsô, p.434
[344] Moratti, ôLegal Policy Dilemmasô, p.425
[345] UN Security Council, *Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999), Paragraph 11 (k), last accessed on 3.6.11 at: http://www.unhcr.org/refworld/docid/3b00f27216.html

reforming the broken cadastre and property registration system.[346] Regarding the first, UNMIKôs municipality administrators were instructed to ñtemporarily allocate vacant housing to homeless people on humanitarian groundsò[347] until a new body, the Housing and Property Directorate took over this responsibility.[348]

The newly created Housing and Property Task Force dealt with discriminatory property laws. They recognized two Serbian Laws as discriminatory. Both of them have already been discussed. The first is the Law on Changes and Supplements on the Limitation of Real Estate Transactions which severely restricted inter-ethnic property transactions. The Second, the Law on Conditions, ways and Procedures of Granting Farming Land to Citizens Who With to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija which concerned privatising socially owned housing which heavily favoured Serbs.[349] The Regulation on the Repeal of Certain Discriminatory Legislation (UNMIK Regulation No. 1999/10) which repealed these two laws was approved in October of 1999.[350]

The Kosovo Cadastral Agency (KCA) is an UNMIK body created 2000 that dealt with the third priority identified by UN Habitat; the reform of the Cadastral and Property Registration system. Its main purpose was to ñfoster the rule of law in the property sectorò[351] through legal reforms in two areas. The KCA was careful to recognise and maintain existing Yugoslav, Serb and Kosovo legislation whenever it was appropriate to do so and stipulate that reforms had to be compatible with local civil laws.[352]

Another innovation was a regulation that dealt with the problem of Kosovo Serbs being coerced into selling their properties for a depreciated value by ñAlbanian agents who allegedly aimed to change the ethnic balance in Kosovoò.[353] The Serb National Council lobbied for a freeze of Serb property sales to stem this issue. However, as well as being a return to the ethnically driven prohibition of property transactions of the 1990ôs, UNMIK

[346] Leopold Von Carlowitz, ócrossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovoô, *Global Governance* 10, 2004, p.309
[347] Ibid, p.311
[348] Ibid, p.311
[349] Ibid, p.311
[350] Ibid, pp.311-312
[351] Ibid, p.316
[352] Ibid, p.317
[353] Carlowitz, óUNMIK Lawmakingô, p.321

realised that this could amount to a violation of the right to free disposal of property under the European Convention on Human Rights.[354] UNMIK was sympathetic to the problem though and decided on a ñregulation that provided for the designation of specific geographical areas where all property transactions needed to be registered with the municipal administrator before the civil court could validate the transaction.ò[355] A property transaction in a geographical area (a pre-decided area that included minorities) could be refused if there were well founded evidence that the transaction was coerced or had ulterior ethnically driven motives.[356] Despite Kosovo Albanian objections that the legislation was a retrogressive step towards discrimination, the óRegistration of Contracts for the Sale of Real Property in Specific Areas of Kosovo (UNMIK regulation no. 2001/17) was passed in August of 2001.[357]

The dispute settlement mechanism was the main operation of the new Housing and Property Claims Commission (HPCC) which was a ñquasi-judicialò[358] organisation supported by the Housing and Property Directorate (HPD). These two organisations were established by the SRSG through UNMIK regulation 1999/23.[359] As well as the dispute settlement mechanism, the HPD had to catalogue abandoned housing, provide guidance on property rights issues to UNMIK and other organisations, and allocate housing for humanitarian purposes.[360] Leopold Von Carlowitz writes that the HPD was designed to meet many of Resolution 1244ôs objectives because its ñmain purposes were to protect rights as stipulated in international human rights instruments; to create the conditions for the return of refugees; and to re-establish civil law and order in property mattersò.[361]

Arraiza and Moratti note that the HPD represents the ñfirst mass claims mechanismò[362] for property. UNMIK decided against using local courts or municipal authorities for property claims because both were fledgling institutions and it was deemed that they

[354] Carlowitz, óUNMIK Lawmakingô, p.321
[355] Ibid, p.321
[356] Ibid, p.322
[357] Ibid, p.322
[358] Moratti, óLegal Policy Dilemmasô, p.429
[359] Carlowitz, óContribution to Peacebuildingô, p.551
[360] B Vagle and Rosales, de Medina, An evaluation of the housing and property directorate in Kosovo. S. Skåre, *NORDEM*, Vol. 12, 2006, p.22
[361] Carlowitz, óUNMIK Lawmakingô, pp.312-313
[362] Moratti, óLegal Policy Dilemmasô, p. 423

would struggle to handle such a huge caseload and finally, they ñcould not be trusted with restoring property rights in a fair manner.ò[363] An independent mass claims mechanism with full control throughout the claims process was chosen ñfor the sake of efficiency and impartialityò.[364] Arriaza and Moratti note that the advantages of a mass claims mechanism allows for the grouping of types of claims based on their similarity which will aid efficiency and because the mechanism will bear the brunt of investigation costs, claimants will not to pay for example, they will not require lawyer.[365] The HPD referred unsolved property claims to the HPCC which split the property claims into three types:

ña) Claims by natural persons whose ownership, possession or occupancy rights to residential property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or its intent;

b) Claims by natural persons who entered into informal transactions of residential 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 property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferredò[366]

óAô Claims concerned people who lost their property rights because of discriminatory legislation (so predominantly Albanianôs) and a successful claimant will either have their property restored or be compensated.[367] An important aspect of this type of claims was the reversal of the burden of proof to make it easier for claimants who might face difficulties proving wrong-doing beyond a reasonable doubt. The reversal was due to the HPCC, as a mass claims mechanism, recognising that ñônorm/breaking behaviourô was the rule rather than the exceptionò during those repressive years.[368] óBô Claims attempted to resolve the many informal property transactions that were conducted below the radar of officials and against the discriminatory Serbian property legislation of the 1990ôs. A

[363] Moratti, óLegal Policy Dilemmasô, p.427
[364] Ibid, p.427
[365] Ibid, p.429
[366] Rosales, óAn Evaluationô, p.19
[367] Moratti, óLegal Policy Dilemmasô, p.430
[368] Ibid, p.429

successful óBô claimant will have their property transaction legitimised and deemed legal before being placed in the newly created Immovable Property Rights Register.[369]

óCô claims refer to IDPs and refugees (mainly Kosovo Serbs) who owned or legally occupied property up to 24 March 1999 and have been dispossessed of that property. The HPCC, similar to the reversal of the burden of proof for óAô Claims assumed (without requiring proof) that dispossession during this period was caused by the conflict which speeded the process.[370] A successful óCô claimant will have their property restored with the right to return.[371] The HPCCôs decisions were binding and could not be challenged by another organisation in Kosovo.[372]

An interesting point to note is that Arraiza and Moratti believe that ñthe legislator foresaw a similar number of claims for each categoryò[373], however the reality was very different. There were 25,283 (93%) óCô claims in comparison to 1,205 óAô Claims and 365 óBô Claims.[374] Hans Das recognises two principles governing the dispute settlement mechanism of the HPCC concern property restitution. The first, ñAny person who lost residential property after 1989 as a result of discrimination has a right to restitution of propertyò and the second, ñAny refugee or displaced person who has lost possession of residential property has a right to return to the property or to dispose of it in accordance with the lawò.[375]

There are two serious problems for the HPD/CC that concern its mandate. That is the omission of agricultural land and commercial properties and informal housing settlements from the dispute settlement mechanism.[376] Bizarrely, in the case of the former, the studies that informed the mandate of the HPD/CC only considered the dispossession of residential property for facilitating IDP and refugee returns.[377] This omission was in contrast to Bosniaôs programme and the Pinheiro Principles which include the restitution

[369] Moratti, óLegal Policy Dilemmasô, p.430
[370] Ibid, p.431
[371] Hans Das, óRestoring Property Rightsô, p.435
[372] Rosales, óAn Evaluation, p.19
[373] Moratti, óLegal Policy Dilemmasô, p.431
[374] Ibid, p.431
[375] Hans Das, óRestoring Property Rightsô, p.435
[376] Moratti, óLegal Policy Dilemmasô, p.434
[377] Ibid, p.433

of land and property as well as housing.[378] Arraiza and Moratti note that this adversely affected returns, minorities and would-be returnees who upon gaining their home depended on the economic revenue of land and non-residential property that remained in the hands of secondary occupants.[379]

There was also an omission of informal housing settlements from the claims mechanism which particularly affected the RAE Communities who have traditionally lived in such settlements. As previously mentioned, up to 50,000 RAE have been displaced and unregistered since 1999 with many being accused by Kosovo Albanians of collaborating with Kosovo Serbs.[380] Many settlements have been destroyed and their inhabitants displaced, including Roma Mahala which had a population of roughly 7,000. Perhaps, because many of the RAE community do not have registered property titles they have not been included in the claims mechanism. Arraiza and Moratti state that property and land restitution outside of the mechanism has been mixed for the RAE community. Roma Mahala has seen destroyed property rebuilt and property titles given to the original occupiers, whereas other RAE settlements have been permanently expropriated.[381] As previously noted, the General Comment 4 on the Right to Adequate Housing states that informal settlements should have legal security of tenure[382] so the omission is a violation of that standard. It also means that the most vulnerable group in Kosovo do not have access to remedy or protection under the HPD mandate.[383] Arraiza and Moratti cite the ósStandards for Kosovoô document which ñcalled for return and reconstruction and/or compensation for the inhabitants of destroyed informal settlements, including affirmative action to provide legal security of tenure to persons lacking itò[384] however they state that this area has ñmostly remained unfulfilledò.[385]

The HPD/CC was replaced by the Kosovo Property Agency in March 2006, and at that point that former, according to a recent Council of Europe report, had decided 28 828

[378] Moratti, óLegal Policy Dilemmasô, p.434
[379] Ibid, p.434
[380] Tawil, óProperty Rights in Kosovoô, p.19
[381] Moratti, óLegal Policy Dilemmasô, p.435
[382] CESCR, General Comment 4, Right to Housing, paragraph 8 (a)
[383] Moratti, óLegal Policy Dilemmasô, p.435
[384] Moratti, óLegal Policy Dilemmasô, p.435
[385] Ibid. p.435

property claims which represented 98.9% of the claims it received.[386] Property Restitution was the result for 5,199 of the claims, and would have been for a further 10,108 claims but in these cases the property had been destroyed so ownership/occupancy was confirmed but restitution was impossible. Finally, other claims were either abandoned before a decision was made or the owner decided to rent the property to the secondary occupier.[387]

The Kosovo Property Agency (KPA) was the result of a study by the European Agency for Reconstruction at the behest of UNMIK who were concerned at the paucity of minority returns owing to the omission of agricultural land and commercial property in the HPD/CC mandate.[388] UNMIKôs rationale was that without the income from their agricultural land and commercial property IDPs and Refugees would be unlikely to return so a resolution mechanism for this land and property had to be in the KPA mandate.[389] Therefore with this in mind, the SRSG drafted Regulation 2006/10 which established the KPA, an independent organisation which comprises some of the HPD/CCôs mandate and responsibilities with the addition of deciding disputes over agricultural land and non residential property.[390] The Council of Europe Report states that the ñKPA is composed of three main bodies, namely an Executive Secretariat (ES), responsible for managing the claims process, the Property Claims Commission (PCC) an autonomous quasi-judicial body adjudicating the claims and a Supervisory Board (SB) providing oversight and policy guidanceò.[391]

In addition to the new dispute mechanism for land and non-residential property, there are further notable differences between the KPA and its predecessor which can be considered improvements on the latter. For óCô Claims the HPCC only decided who had lawful jurisdiction over a property but this did not amount to a title deed. Since a title deed was necessary to be registered in the Property Rights Register and the absence of such a deed would make the legitimate owner/occupier vulnerable to future court challenges, the

[386] Council of Europe: Commissioner for Human Rights, *Report of the Council of Europe Commissioner for Human Rights' Special Mission to Kosovo 23 - 27 March 2009*, 2 July 2009, CommDH(2009)23, p.29, last accessed on 14.6.11 at: http://www.unhcr.org/refworld/docid/4a4c766778.html
[387] Ibid, p.29
[388] Moratti, ôLegal Policy Dilemmasô, p.440
[389] Evaluation, p.101
[390] Ibid, p.102
[391] Council of Europe, ôReport of the Council of Europeô, p.29

newly created Property Claims Commissionôs decisions on cases included a title determination.[392]

Another change was that KPA decisions could be reviewed by the Kosovo Supreme Court if a claimant or defendant decided to appeal the decision. Arraiza and Moratti note that this brought the KPA into the domestic judicial system and would ñhelp to resolve conflicts of jurisdictionò.[393] There was concern that if a significant number of people decided to appeal, the system would grind to a halt and adversely affect property restitution and aid illegal secondary occupiers who would welcome the cessation of the process.[394] Arraiza and Moratti point out that this actually happened to the property restitution process in Bosnia and Herzegovina where thousands of appeals brought the system to its knees. Therefore mindful of this danger, UNMIK stipulated that people could only appeal within 30 days of a Commission decision and the Supreme Court could combine several appeals at once. To guarantee impartiality the appeals panel would consist of two international judges and a domestic judge all of whom were appointed by UNMIK.[395] Finally, the new regulation strove to increase the participation of local government (and harness its support) by appointing a Supervisory Board (including two government appointees) for the Executive Secretariat of the KPA who were entrusted with ñadministrative oversight and policy guidanceò.[396]

Interestingly, whilst the European Agency for Reconstruction study predicted around 11,000[397] new claims under the agricultural land and commercial property mandate, the KPA has accepted over 40,000 (mainly Serb and uncontested) claims of which 18,000 have been resolved.[398]

[392] Moratti, ôLegal Policy Dilemmasô, p.444
[393] Ibid, p.445
[394] Ibid, p.445
[395] Ibid, p.446
[396] Ibid, p.446
[397] Ibid, p.441
[398] Council of Europe, ôReport of the Council of Europeô, p.30

Chapter 5: Kosovo

B). Analysis of Housing and Property Directorate and Claims Commission and the Kosovo Claims Agency

This section will examine whether these agencies have cohered with Leckieøs conception of how they should operate. Scott Leckie states that a Housing, Land and Property Rights Directorate ñshould *maximise* local and national involvementò[399] and its policy must be ñgrounded in human rights principles and international practiceò[400]

HLP policy in Kosovo closely follows human rights principles. For example, one of the three priorities identified by the UN Habitat report is human-rights based. That is, dealing discriminatory legislation and establishing a dispute settlement mechanism. Indeed, Carlowitz notes that the repeal of discriminatory legislation ñhad an unmistakable human rights-based justificationò.[401] Concerning the dispute settlement mechanism, this can clearly be perceived through a human-rights based lens as providing the right to remedy for housing rights violations. Additionally, the three main objectives of the HPD as identified by Carlowitz are inseparable with human rights principles. Firstly, that the HPD should protect the human rights guaranteed in international human rights law, create conditions for the return of refugees which amounts to facilitating the right to return, and to re-establish the rule of law for property, which essentially means promote respect for property rights.[402] One area of Kosovoøs HLP policy that has not followed international human rights standards is the omission of informal housing settlements from the dispute claims mechanism. As previously stated this has particularly affected the Roma, Ashkali, and Egyptian (RAE) Communities who have traditionally lived in such settlements. Since the General Comment 4 on the Right to Adequate Housing states that informal settlements should have legal security of tenure[403] the omission is a violation of that standard. It is sadly the case that the most vulnerable group in Kosovo did not have access to remedy or protection under the HPD mandate.[404]

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[399] Leckie, øHousing, Land and Property Rightsø, p.27
[400] Ibid, p.27
[401] Carlowitz, øUNMIK Lawmakingø, p.312
[402] Carlowitz, øUNMIK Lawmakingø, pp.312-313
[403] CESCR, General Comment 4, Right to Housing, paragraph 8 (a)
[404] Moratti, øLegal Policy Dilemmasø, p.435

Kosovoôs HLP policy does not fare so well concerning its adherence to international practice. I am interpreting international practice as the standard practice of the international community in its HLP policy in post-conflict countries. Obviously, as this is relatively new area, I am mainly comparing Kosovoôs policy to that of Bosnia and Herzegovina which preceded it. To start with the positives, it has been informed by and learnt from the HLP policy of BiH. For example, it noted the problems that the property restitution process there because local officials attempted to obstruct it.[405] Therefore UNMIK recognised the need to establish a completely independent directorate with full control and this was partly the reason why they did not use local courts and municipal authorities. UNMIK also remembered the problem of appeals of Commission decisions seriously impeding the restitution process in BiH because the Courts were overwhelmed. So when they decided that the Supreme Court could hear appeals from KPA decisions, UNMIK chose to limit the appeal time and allowed the Supreme Court to bunch appeals together to save time and prevent a repeat of what happened in BiH. Finally, there are cases of conformity with international practice including the repeal of discriminatory legislation which, for Carlowitz, ñwas in line with the limited regulatory precedents of former peace operationsò.[406]

However, there are glaring examples where Kosovo did not follow international practice to its detriment. As already noted, the omission of agricultural land and commercial property from the mandate of the HPCC was contrary to Bosniaôs dispute settlement mechanism as well as the Pinheiro Principles. This was the major reason for creation of the Kosovo Property Agency which remedied this oversight. Another departure from international is the omission of property rights issues and property restitution in the Kosovo peace agreement, in contract to the Dayton Accords which included the right to return to ones home of origin and for the remedy of property rights violations.[407] However, it must be noted that Resolution 1244 does commit the ñsafe and free return of all refugees and displaced persons to their homesò[408] which obviously coheres with the right to return as well as international practice.

[405] Moratti, ôLegal Policy Dilemmasô, p.426
[406] Carlowitz, ôUNMIK Lawmakingô, p.312
[407] Moratti, ôLegal Policy Dilemmasô, p.425
[408] UN Security Council, Resolution 1244, paragraph 11 (k)

Whilst Leckie recommends that HLP policy should maximise local and national involvement, he also states that ñpolitical decisions will need to be made".[409] It is for this reason that local involvement was not a high priority for the HPD/CC. As explained, UNMIK took a political decision to limit the involvement of local actors particularly courts and municipalities which it deemed did not have the capacity to undertake dispute settlement responsibilities nor could be trusted to be impartial with delicate inter-ethnic disputes. Despite this, the KCA did attempt to recognise and maintain existing Yugoslav, Serb and Kosovo legislation whenever it was appropriate to do so and stipulate that reforms had to be compatible with local civil laws which advanced local ownership.[410] Local involvement further increased under the new Kosovo Property Agency. The Supervisory Board for the Executive Secretariat included two government appointees and the fact that the people could appeal Commission decisions at the Kosovo Supreme Court brought the KPA into the domestic judicial system are both examples of increased domestic involvement and participation in the process.

[409] Leckie, ôHousing, Land and Property Rightsô, p.37
[410] Carlowitz, ôUNMIK Lawmakingô, p.317

Chapter 6: Contribution of HPD/CC and KPA to Peacebuilding in Kosovo

I will now examine the contribution of the HPD/CC and the KPA to peacebuilding. I will examine its contribution to the rule of law, returns of IDPs and Refugees to their homes of origin, protection of vulnerable groups and towards reconciliation.

First, I will address whether these institutions have succeeded in deciding the property dispute claims and providing a legal remedy, i.e. property restitution where this has been required. As stated, by the time the HPD/CC had been replaced by the KPA the latter had had decided 28 828 property claims which represented 98.9% of the claims it received.[411] Property Restitution was the result for 5,199 of the claims, and would have been for a further 10,108 claims but in these cases the property had been destroyed so ownership/occupancy was confirmed but restitution was impossible. Finally, other claims were either abandoned before a decision was made or the owner decided to rent the property to the secondary occupier.[412] The KPA has accepted over 40,000 (mainly Serb and uncontested) claims of which 18,000 have been resolved.[413]

For Anneke Rachel Smit, these figures ñtell a success storyò,[414] particularly given the speed and efficiency of the decisions that ñshouldé not be underemphasized.ò[415] The mass claims mechanism has let the HPD/CC ñchurn through determinations at a rate previously unimaginableò[416] and the author reveals that the HPD/CC has resolved all of the claims in slightly over three years when UNHABITAT had predicted that it would take ten years.[417] Impressively, she reveals that this has been achieved on a pauperôs budget in comparison to UNMIKôs other organisations. Smit notes that this has allowed UNMIK to comply with the European Convention on Human Rightsô article 6 (1) that stipulates the amount of time an arbitrator should take to resolve a claim.[418]

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[411] Council of Europe, ôReport of the Council of Europeô, p.29
[412] Ibid, p.29
[413] Ibid, p.30
[414] Smit, ôProperty Restitution and Ending Displacementô, p.192
[415] Ibid, p.192
[416] Smit, ôHousing and Property Restitutionô, p.70
[417] Ibid, p.70
[418] Smit, ôProperty Restitution and Ending Displacementô, p.192

So regarding the mass-claims mechanism and providing a legal remedy, the HPD/CC have been successful in resolving as many claims as they have and done so in an efficient and timely fashion on a tight budget. For those lucky to have property restitution or gaining the security of tenure that a positive decision provides, this has provided a valued remedy to forced eviction or other housing, land or property violations. Indeed Smit states that the ñHPD... [is] the envy of numerous other post-conflict societies in which individuals only dream of having the right to their property returned to themò.[419] However, the KPA has fared less well. A recent Internal Displacement Monitoring Centre (IDMC) report states that ñthe restitution process has been slow and is far from completeò.[420] By September 2009, 6,700 decisions (of 18,000) ñhave been acted uponò[421] and only 770 of these have ñresulted in physical repossession by legitimate ownersò.[422] Too be fair to the KPA, the rate of progress coheres with the estimate of UNHABIT. Additionally it is the responsibility of the police to carry out the evictions so legitimate owners/occupiers can return. The Kosovo Police Force (KPS) co-operate with the KPA and have an eviction procedure resulting from a memorandum of understanding between the two organisations.[423] Whilst Tawil believes that the KPS have been adequate in their eviction duties, they have ñbeen lax on re-evictionsò.[424] This is when after eviction (ordered by a KPA decision) the illegal secondary occupier trespasses on the property and re-claims it. Tamil states that often the KPS are not acting in these cases by charging the secondary occupier with an offence and/or carrying out a second eviction of the illegal occupier.[425] This reveals an important point, that the HPD/CC and the KPA are not and cannot be responsible for everything, there are other actors such as the Courts and the KPS who have responsibilities that are related to their mandate. The KPA cannot be blamed for the failures of these organisations even though they adversely affect what the KPA is trying to achieve ï the return of refugees and IDPs. Additionally, as well as the police, the IDMC report state that ñthis reflects the reluctance of IDPs to returnò[426] Conveniently, this brings us to the issue of returns.

[419] Smit, ôHousing and Property Restitutionö, p.71
[420] IDMC, ôKosovoö, p.6-7
[421] Ibid, p.7
[422] Ibid, p.7
[423] Tawil, ôProperty Rights in Kosovoö, p.35
[424] Ibid, p.36
[425] Ibid, p.36
[426] IDMC, ôKosovoö, p.7

As Carlowitz states, since ñthe right to return was the primary justification for the institutionsô establishment, the first gauge for assessing their performance are the actual refugee return figuresò.[427] The right to return is indeed an element of the HPD/CC and KPA set out in UNMIK regulation 2000/60.[428] Additionally, since property restitution is the preferred durable solution for refugees and IDPs and hence an important aspect of peacebuilding one must now examine the amount of returns.

The success of returns depends very much on the ethnicity of the people concerned. The estimated 860,000 Kosovo Albanianôs driven from the territory have returned.[429] However for the minority groups of Kosovo particularly the Kosovo Serbôs and RAE community the rate of returns is much lower. Given the success of the Kosovo Albanian returns, we must focus on these other communities. Over 230,000 minority refugees and IDPs were displaced during and after the conflict[430] and of this number only 19,700 have returned. Before Kosovoôs declaration of independence more than half of this number were Serbs and 32 percent from the RAE communities, there was a reversal post-declaration where the latter formed 48 percent and the former 32 percent.[431]

So what are the reasons for the poor return figures for these groups? I am going to split the reasons into three board groupings, the first reason can be a failure of the HPD/CC, the second, on the political and security situation and finally, on the failure of other organisations or bodies whose mandate includes refugee and IDP returns. The ICMC document states that the main problem for IDPs from minority communities is ñthe lack of integrationé into Kosovo societyò[432] which prevents them from having a durable solution including return. I believe this lack of integration is partly due a failure in reconciliation between the community groups and partly political and security issues.

I will start with political and security issues that have affected the returns of minority refugees and IDPs. Principally, there is a major dispute over who has sovereignty over Kosovo, whether it is now independent or remains a territory within Serbia. The UN

[427] Carlowitz, óContribution to Peacebuildingô, p.553
[428] Smit, óHousing and Property Restitution, p71
[429] Carlowitz, óContribution to Peacebuilding, p.553
[430] Ibid, p.553
[431] IDMC, óKosovoô, p.8
[432] Ibid, p.4

Security Council 1244 upheld the ñterritorial integrity and sovereignty of the Federal Republic of Yugoslaviaò.[433]

Regarding the sovereignty issue, UNMIK was tasked with the responsibility of ñOrganizing and overseeing the development of provisional institutions for democratic and autonomous self-governmenté [and] Transferring, as these institutions are established, its administrative responsibilitiesò[434] before finally, ñoverseeing the transfer of authority from Kosovoôs provisional institutions to institutions established under a political settlementò.[435] So clearly, UNMIK is establishing and supporting the institutions for democratic and autonomous self-government but the resolution remains neutral on who will the recipient of the transfer of authority of these provisional institutions after a political settlement. However, there have been some interesting developments that perhaps indicate that the self-government institutions will gain the upper hand in the final political settlement. This stems from the Ahtisaari Plan named after the Martti Ahtisaari who led the political settlement negotiations between Kosovo and Serbia on behalf of UNMIK.[436] As the IDMC makes clear the Plan published in 2007 ñproposed Kosovoôs independence under international supervisionò[437] which for the Serbian government was sacrilege and the Security Council impeded by the veto-wielding Permanent Security Council members Russia (who particularly support the Serbian claims[438]) and probably China (a stringent upholder of the sovereignty and territorial integrity) did not accept the plan. However, a year later in February 2008, the Kosovo provisional authorities took the initiative and boldly declared independence.[439] They have closely followed the Ahtisaari Plan by creating a Constitution, requesting that the International Civilian Representative (ICR), European Union Rule of Law Mission (EULEX) and NATO embrace the tasks outlined in the Ahtisaari Plan; and these organisations have done so. Additionally, UNMIK operations and staff numbers have been hugely scaled back. Although UNMIK, NATO and EULEX are very careful to remain neutral, they have allowed the Kosovo self-government to dictate the pace of change and have abided by their decisions and the Ahtisaari Plan, making the neutral

[433] UN Security Council, Resolution 1244, p.2
[434] Ibid, paragraph 11 (c & d)
[435] Ibid, paragraph 11 (f)
[436] IDMC, ôKosovoô, p.3
[437] Ibid, p.3
[438] Ibid, p.3
[439] Ibid, p.3

position a minor paradox. However, the IDMC also note that for the UN Security Council resolution 1244 still applies, the Serbian government reject the independence claim and will only cooperate with UNMIK.[440] The Kosovo independence decision has been handed to the International Court of Justice (ICJ) by the UN General Assembly and the former ruled that claiming independence was not a violation of international law but refrained from endorsing the Kosovo provisional authorities.[441] Additionally, out of a total of 192 United Nations members, 76 of them recognise Kosovoôs independence[442] and if the total reaches 100 Kosovo and become a member of the UN[443]. These are significant outcomes, and now it is clear that the international authorities do not view the declaration as a violation of international law, with significant international support, the way is paved for a favourable political settlement for the Kosovo government.

One consequence of this dispute is the Serbian government running parallel institutions as a way of maintaining it sovereignty claims. These parallel institutions, completely independent and separate to UNMIK, run in Serbian enclaves, particularly in Northern Mitrovica and include areas of health, education and courts.[444] For example, schools in majority Kosovo Albanian areas are administered by the Ministry of Education, Science and Technology (MEST) and in Kosovo Serb areas schools are run and follow the curriculum of the Serbian Ministry of Education and Sport (SMES).[445]

No where is this parallel system more dramatically evident than Northern Mitrovica. A recent report by the International Crisis Group states that ñin practice, Serbia and Kosovo both exercise partial sovereignty of the Northò[446] of Kosovo. It reveals that both currencies (Euro and Dinar) are used, in addition to health, education and courts there are parallel public services, energy companies and civil authorities.[447] The Serbian government continues to pump a staggering 200 million Euros a year into Mitrovica to

[440] IDMC, ôKosovoô, p.3
[441] Peter Beaumont, Kosovo's independence is legal, UN court rules, The Guardian, Thursday 22 July 2010, last accessed on 1.6.11 at: http://www.guardian.co.uk/world/2010/jul/22/kosovo-independence-un-ruling
[442] See: http://www.kosovothanksyou.com/statistics/
[443] Beaumont, Kosovoôs independence
[444] OSCE Mission in Kosovo, ôParallel Structures in Kosovoô, 2006-2007, accessed at: http://goo.gl/uEJub, p.5
[445] Ibid, p.32-33
[446] International Crisis Group (ICG), *North Kosovo: Dual Sovereignty in Practice* , 14 March 2011, Europe Report N°211, available at: http://www.unhcr.org/refworld/docid/4d7f25e82.html, p.2
[447] Ibid, p.3

maintain this parallel system.[448] Perhaps the most accurate position is the Crisis Groupôs assertion that ñsovereignty is determined by individual identity and [the] choiceò[449] of the resident living in the territory. So what does this situation mean for IDPôs and refugees and returnees in Kosovo?

As previously mentioned, some of the property rights records for Kosovo have been removed to Belgrade and since the Serbian and Kosovo authorities do not recognise each other ñthere is no exchange of records or mutual recognition of issued documentsé [which presents] severe challenges to IDPôsò[450] and refugees whatever their ethnicity. The IDMC report notes that without the property rights documentation the KPAôs mass-claims mechanism (including restitution of property) has been hampered.[451] Additionally, the report states that in 2008 the Serbian government has closed KPA centres in Serbia (presumably in protest at the Kosovo government independence declaration) that has effectively frozen 3,500 property claim disputes because the KPA canôt proceed without the property register.[452] However, there has recently been a memorandum of understanding between the UNHCR and the KPA which the report believes ñcould improve the situation by allowing the opening of UNHCR property offices in Serbia.ò[453] The situation not only affects the work of the KPA but also the access to legal remedy of potential claimants for Kosovo Serbs, the RAE community and Albanians. Owing to the property deeds problems outlined previously (i.e. many are either destroyed or in Serbia and Kosovo and authorities do not recognise Serbian documents/courts or administrative bodies) Kosovo Serbs find in difficult to register their property, and as Tawil notes, without a property certificate they cannot begin the process to attempt to legally reclaim their former homes.[454] Another vulnerable group who suffer are the over 7,000 Albanians North of the Ibar river (i.e. Mitrovica). They represent 98 percent of the total number Kosovo Albanian IDPôs[455] so this is a huge issue. There have been violent affrays when this group have attempted to occupy and reconstruct their housing[456] and tellingly, the rental collected by the KPA from secondary occupiers (as the Kosovo

[448] ICJ, ôDual Sovereigntyô, p.4
[449] Ibid, p.3
[450] Tawil, ôProperty Rights in Kosovoô, p.18
[451] IDMC, ôKosovoô, p.7
[452] Ibid, p.7
[453] IDMC, ôKosovoô, p.7
[454] Tawil, ôProperty Rights in Kosovoô, p.18
[455] IDMC, ôKosovoô, p.4
[456] Ibid, p.4

Albanian owners do not feel comfortable returning yet) in this area has been pitifully small ï only eight occupants have paid rent out of the 360 that the KPA is supposed to be administering.[457] The main reason for this situation is that the KPS (Kosovo Police Force) are either unwilling or unable to evict secondary occupiers who have lost a claims decision or who will not pay rent.[458] Given the hostile atmosphere and perceived insecurity for Kosovo Albanianôs in Northern Mitrovica and the ñthreats, harassment and violenceò[459] for the RAE communities and Kosovo Serbs elsewhere it is understandable that many are willing to return to their homes of origin.

For those that do decide to return, there is a ñlack of sustainabilityò[460] which some believe distorts returns figures. For example, the Serbian government and Serb IDP groups old that only 5,000 of their IDPs have returned sustainably. With the security situation the way it is, it is not surprising that the most successful returns have been to ñmono-ethnic villagesò[461] for example Serbian enclaves. This might not be just because of the security situation, as the IDMC report notes that the return programmes have generally only dealt with such areas and avoided the more difficult multi-ethnic urban centres.[462] One could argue that sustainable returns in mono-ethnic villages are the product of the return programmes, in which case, programmes should deal with the more sensitive population areas. The plausibility of this argument is strengthened by the evidence that the RAE community has also successfully returned alongside significant support from the Kosovo government including its 2008 ôStrategy for the Integration of Roma, Ashkali, and Egyptian Communitiesô.

In the end, the decision to return is one that only the refugee/IDP can take. Evidence shows that many prefer to take local integration as a durable solution as opposed to return and the choice of durable solution ñvaries depending on the place of displacement andé ethnicityò.[463] The political and security issues are clearly going to be a huge factor for RAE and Kosovo Serbs decision on whether to return. A political settlement would clearly help and there is existing evidence to suggest this. First, that the Kosovoôs

[457] IDMC, ôKosovoô, p.7
[458] Ibid, p.7
[459] Ibid, p.4
[460] Ibid, p.8
[461] Ibid, p.8
[462] Ibid, p.8
[463] Ibid, p.8

declaration of independence did not result in further displacement and second, the RAE community returns figures have improved since this.[464]

Another reason for lack of sustainability as well as political and physical insecurity, is ñdifficulties repossessing property or rebuilding housesò[465] which brings one back to the performance of the organisations who are responsible for this. As has been made clear the Kosovo Police Force have had problems in re-evictions, not charging people for offences and reposing property re-occupied illegitimately. But the local courts also cause significant problems for IDPs and refugees returning.

As Tawil points out though the mass-claims mechanism has limited the role of the local courts in restitution ñthey still have important jurisdiction over the determination and protection of property rightsò.[466] The Courts failings cause problems for the displaced in several ways. First, they do not follow the procedures that govern property transactions which affects displaced minority groups, where others have attempted to use fraudulent documentation to legitimise coerced property sales of such groups. The fault of the courts is that sometimes they ñaccept the validityò[467] of these fraudulent documents or do not show due diligence in investigating suspect documentation. Additionally, they sometimes judge in favour of suspect claimants without any written documentation and on the testimony of óeyewitnessesô.[468] Another way the displaced who represent minorities in Kosovo can be robbed of their legitimate property is when they (unknowingly) faced claims for that property. Tawil notes that Courts do not show due diligence in attempting to find such displaced people in order for them to defend themselves against a claim for their property. Additionally, in the event of a failure of notifying the displaced the Court will often appoint ña temporary representative to defend his/her interestsò[469] but this representative is usually a Kosovo Albanian, who is sometimes in the pay of the claimant and in such a situation will ñact passively during hearings or even support the claimantò.[470] As a result, Tawil believes that the courts are

[464] IDMC, ôKosovoô, p.4
[465] Ibid, p.8
[466] Tawil, ôProperty Rights in Kosovoô, p.37
[467] Ibid, p.38
[468] Ibid, p.38-9
[469] Ibid, p.39
[470] Ibid, p.39

therefore sometimes complicit in the wrongful dispossession of the displacedôs homes and violate the law and procedures that is supported to govern them.[471]

The actions of UNMIK regarding the court system have also prevented Kosovo Serbs and Albanians from a fair trial and potentially from a legal remedy. Tawil writes that there are over 18,000 existing compensation or property claims by aggrieved Kosovo Serbs because the dispossession and damage to their property against the Kosovo authorities and international organisations operating in Kosovo. In response, UNMIK concerned at the possible paralysis of the court system has directed the courts to suspend judgement of these cases. Kosovo Albanians have also submitted roughly 3,000 claims again Kosovo Serbs and the Serbian government which have also been suspended.[472] Tawil reveals that the Kosovo Ministry of Justice, the Organization for Security and Co-operation in Europe (OSCE) and European Union Planning Team for Kosovo (EUPT) are jointly acting to resolve the suspension ñlittle has been done and equally little progress has veen noted in reducing the backlogò.[473] Whereas the failures of the courts detailed above were a mixture of discrimination and corruption this problem is through the lack of capacity of the local courts to deal with such claims. Also it is the political situation because the Kosovo court authorities do not have jurisdiction to decide cases against the government of Serbia and as the ICTY (who would have jurisdiction) do not deal with property cases these claims cannot be decided. As Tawil recognises, the mass suspension of claims not only violates the right to a fair trial under the European Convention on Human Rights, it also violates the right to legal remedy (either compensation of property restitution).[474]

Another reason for the lack of returns is the failure of the HPD/CC and its successor the KPA to facilitate returns. As previously noted, Carlowitz recognises that facilitating the right to return is the main purpose of these agencies and the protection of the right to return is part of the regulation governing the HPD/CC and KPA in UNMIK regulation 2000/60.[475] Additionally, Smit quotes the Senior Legal Advisor of the HPD who claimed that ñthe Directorate is potentially a very useful institutional tool for managing the return

[471] Tawil, ôProperty Rights in Kosovoô, p.39
[472] Ibid, p.40
[473] Ibid, p.41
[474] Ibid, p.41
[475] Smit, ôHousing and Property Restitutionô, p.71

processò.[476] However despite this, Smit believes that the HPD/CC neglected this and that it became ñsingularly focused on legal determinations to the exclusion of other concerns such as returnò.[477] This change is documented in the how the HPD defined its own mandate as to ñsettle legal disputesé [but the] HPD is not responsible for actively promoting returns.ò[478] Smit recognises that the interpretation of responsibility is not the ñpositive obligation to ensure the right to returné [but the negative obligation] to ensure that no one is actively deprived of the right due to a lack of a housing and property restitution processò.[479] This has impacted on the lack of returns and the sustainability of those displaced persons who do return because of a lack of co-ordination between the HPD/CC and its successor the KPA with other organisations that are dealing with returns.[480]

The result of this lack of coordination is that even with legal entitlements to their property, IDPs and Refugees are reluctant to return as ñother conditions necessary for successful return are not provided at the same time.ò[481] Conditions include financial, access to services and security.[482] I believe that the condition the HPC/KPA can alleviate is security, particularly for a displaced person who would be a minority in their village/town/city of origin. Smit states the HPD did not cooperate enough with the UN Office for Returns and Communities (ORC) who coordinate returns in Kosovo. Smit states that the HPD should have aided returns by prioritising and bunching claims together so ñby considering all the claims for a property in a particular village [or street] at once, HPD could help facilitate a group of families returning at the same time, ensuring safety in numbersò. This would be a simple but effective way of helping to facilitate returns beyond a legal determination of ownership.

Smit writes that the HPD and ORC did not cooperate in this way, the former claim that they offered and the ORC did not accept whereas the latter claim ignorance of such an offer. However she notes UNMIKôs 2004 Strategy for Sustainable Returns which explicitly mentions that the HPD should do can do this and this will allow ñreturns

[476] Smit, óHousing and Property Restitutionô, p.71
[477] Ibid, p.72
[478] Ibid, p.72
[479] Ibid, p.72
[480] Ibid, p.73
[481] Ibid, p.73
[482] Ibid, p.73

projects to be built around repossession of homesò[483] which obviously returns the HPD and KPA to the centre of returns again though Smit remains sceptical that this is happening in practice.

Smit notes an effective HPD defence against the charge that they are not coordinating enough with other returns agency and that is that speed of the claim decisions far outstrips the ability of the other agencies to facilitate returns owing to their own inefficiency.[484] She quotes an HPD official who states that the ORC and police cannot respectively facilitate the return of the displaced nor protect their property to keep up with HPCC claims decisions.[485] Essentially, in this sense the HPD/CC and KPA are a victim of their own efficiency when it comes to facilitating returns.

Whether the HPC/CC was going too fast for the other agencies, that it is not co-ordinating with them enough, or that the other conditions are not in place for sustainable return effects the displaced by undermining making the option to return more difficult or closing it entirely. Smit explains that though they might have their legal determination and property deeds, years of uncertainty will create a yearning for a durable solution, and many cannot afford to wait until the conditions are right to return and will simply sell their home of origin property in order to fund another durable solution either local integration or relocation elsewhere.[486]

Previously, one noted that Leckie believes a consistent policy to HLP issues and a framework that includes a Housing Land and Property Rights Directorate (including a claims mechanism) will support the rule of law.[487] So, has the HPD/CC and KPA supported the rule of law in Kosovo? Carlowitz believes that they have ñcontributed significantly to international efforts to re-establish the rule of law and to protect human rights for all ethnic groupsò.[488] He believes that the mass-claims mechanism and its remedies have been an important, dispute resolution and settlement mechanism for the

[483] Smit, ôHousing and Property Restitutionô, p.74
[484] Ibid, p.75
[485] Ibid, p.76
[486] Ibid, p.75
[487] Leckie, ôHousing, Land and Property Rightsô, p.9
[488] Carlowitz, ôContribution to Peacebuildingô, p.554

various ethnic groups of Kosovo in an impartial and legal way encouraging aggrieved persons to pursue legal channels for remedy rather than resort to force.[489]

Carlowitz adds that they have also ñensured that the human right to propertyé could be adequately protected for all ethnic groupsò[490] which is an important point. Crucially, the mechanisms have generally protected the right to legal remedy for HLP violations especially property restitution. However whilst Carlowitz is right generally, there are notable exceptions including the Kosovo Serb and Albanian claims that have been suspended by the local courts at the behest of UNMIK. Additionally the RAE community property rights have not been sufficiently protected which have been explained previously. As informal housing settlements were omitted from the claims mechanism the RAE community have particularly suffered and that along with having no access to remedy is a violation of General Comment 4 on the Right to Adequate Housing which states that informal settlements should have legal security of tenure.[491] Additionally, Roma housing has been destroyed, its inhabitants displaced (up to 50,000) and housing has only been rebuilt in some cases. Whilst the Standards for Kosovo plan has remedied this situation with words, practically, progress has been slow. The other problem for this community has been a systematic lack of documentation that has prevent their attempts to regain their property. Since estimations state that one in four of the community do not have basic civil documents[492] and most have lived ñlived for generations in informal settlements without title deedsò[493] However, the authorities have attempted to improve this situation by the housing section of the Strategy for the Integration of Roma, Ashkali and Egyptian Communities, not charging such communities for late registrations of births and provided legal help and successful registration programmes.[494]

Finally Carlowitz believes that the mass claims mechanisms have ñprovided title security and allowed computerized information to be included in the newly established property registration systemsò.[495] The Immovable Property Rights Register is indeed a great

[489] Carlowitz, óContribution to Peacebuildingô, p.554
[490] Ibid, p.554
[491] CESCR, General Comment 4, Right to Housing, paragraph 8 (a)
[492] IDMC, óKosovoô, p.5
[493] Ibid, p.5
[494] Ibid, p.6
[495] Carlowitz, óContribution to Peacebuildingô, p.554

innovation that helps the rule of law and title security has been provided in the legal sense though this was not until was only the creation of the KPA. As mentioned before, this is because for óCô Claims the HPCC only decided who had lawful jurisdiction over a property but this did not amount to a title deed. Since a title deed was necessary to be registered in the Property Rights Register and the absence of such a deed would make the legitimate owner/occupier vulnerable to future court challenges, the newly created Property Claims Commissionôs decisions on cases included a title determination.

The Kosovo Cadastral Agency has helped the rule of law with the reform of the Cadastral and Property Registration system and at the same time has been sensitive to local laws and used them whenever they could. Additionally, the Regulation on the Repeal of Certain Discriminatory Legislation has helped to make the current laws legitimate, and the Registration of Contracts for the Sale of Real Property in Specific Areas of Kosovo) has protected Serbs from things like being forced to sell their properties.

On the whole, I agree with Carlowitz with only a few exceptions, however there is an important distinction between the rule of law and what Smit calls a ñproperty rights-respecting cultureò.[496] This is because legal improvements and protections can only offer limited protections. If the police and local courts cannot or will not enforce these laws and protections, which as we have seen is sometimes the case, they will not be fully effective. The fact that once secondary occupants have been evicted from properties they have been ñlooted and vandalisedò[497] without the culprits being prosecuted is a good example to show that both civilians and law enforcement agencies are not respecting property rights. Smit states that in focusing mainly on the dispute mechanism, the HPD/CC and KPA have neglected fostering a property rights-respecting culture, the consequence being that their claims decisions are sometimes not being respected (by civilians or law enforcement agencies).[498] Aside from the evidence already shown, the March 2004 riots where ñsome ethnic Albanians reportedly took advantage of the chaosé to make ñgrabsò of residential propertiesò[499] is a sobering reminder of how much more work needs to be done on this front. Smit states that the authorities having realised

[496] Smit, ôHousing and Property Restitutionô, p.77
[497] IDMC, ôKosovoô, p.7
[498] Smit, ôHousing and Property Restitutionô, p.77
[499] Ibid, p.77

the problem have belatedly launched campaigns[500] to improve the rights-respecting culture and HPD decisions but all the examples of the problems faced by the displaced show that this is an area that remains stunted.

I will now examine the HPD/CC and KPAôs contribution to reconciliation between the ethnic groups of Kosovo. I will use Carlowitzôs definition of reconciliation as ña process through which a society moves from a divided past to a shared futureò.[501] One way that these organisations can aid reconciliation is by facilitating direct contact between the various groups to resolve property disputes. As Smit states ñthe restitution process has the potential to bring individuals of differing ethnic groups face to faceò[502] which is the first step towards reconciliation because the groups have to engage with each other to resolve their property disputes where otherwise they would have little contact especially considering the extensive parallel structures. Smit notes that in the beginning claims were intended to reach the Claims Commission when mediation between the two individuals had failed or was ñnot appropriateò[503] and so originally direct contact was the first choice. But she explains that due to HPD not employing mediators to enable this and because of the ñnew push towards efficient procedures, the mediation option has been dropped altogetherò.[504] Presently Smit explains, beyond making the claim, claimants have very little to do with the process and though this helps efficiency it represents an opportunity lost.[505] Though agreeing to a solution between themselves on housing sounds slightly trivial in its contribution to reconciliation it would be one of the few situations where the groups would have to meet and engage with each other[506] and would represent progress on this front. In of judgement of simplicity and efficiency over a more long-winded process that would offer crucial reconciliation opportunities the HPD/CC and KPA have not contributed to peacebuilding as much as they could have done. This judgement is justified because had they chosen this option, it would undoubtedly have slowed the speed of claims mechanism depriving people of a legal remedy and returns to their homes of origin.

[500] Smit, óHousing and Property Restitutionô, p.77
[501] Carlowitz, óContribution to Peacebuilding, p.554
[502] Smit, óProperty Restitution and Ending Displacementô, p.203
[503] Ibid, p.199
[504] Ibid, p.199
[505] Ibid, p.198-199
[506] Ibids, p.201

Another contribution of the HPD/CC and KPA has been their role as a transitional justice mechanism and their rights-based approach. It has been demonstrated that they have followed the rights-based approach by perceiving housing, land and property abuses causing and resulting from the conflict as human rights violations and have provided legal remedies for them through property restitution or compensation as well as repealing discriminatory laws. Indeed Smit notes that considering the housing, land and property rights abuses and discrimination a rights-based approach is appropriate.[507] The great benefit of the rights-based approach too has been to provide legal remedies and too legally resolve peoples HLP grievances through the mass claims mechanism which despite being hampered by the political and security situation, other returns agencies and some of their own problems the HPD/CC has generally achieved. In this way, Carlowitz believes that they have provided ñpost-conflict justiceò[508]

Another classic transitional justice characteristic of the mass claims mechanism that has contributed to peacebuilding is what Carlowitz calls ñacknowledging past wrongsò.[509] He explains that the work of the HDP/CC and KPA alongside repealing discriminatory legislation represents a public condemnation of past abuses and a recognition that they require remedy. Carlowitz writes that ñit provided a necessary outlet for ethnic Albanian angeré and was indispensable to the coming to terms with the legacy of violent ethnic conflictò[510] that has facilitated reconciliation at the individual and national level. It has also contributed to sustainable peace because as it has been an outlet it is has stopped the group from taking matters into their own hands in the search for remedy. Admittedly, there is a lack of respect for property and discrimination, but it could have been much worse and it has stopped widespread violence. Whilst the riots of 2004 might spring to mind as a challenge to this statement Carlowitz points out that despite property issues being the most sensitive issues during and after the conflict the riots were not caused by property grievances.[511]

[507] Smit, ôProperty Restitution and Ending Displacementô, p.203
[508] Carlowitz, ôContribution to Peacebuildingô, p.555
[509] Ibid, p.554
[510] Ibid, p.555
[511] Ibid, p.555

Chapter 7: Conclusion

In conclusion, housing and property restitution emerging from the right to return to ones home of origin and the right to remedy represents an important development in post-conflict peacebuilding. It is one of the few examples where ESC right abuses have been perceived as human rights violations *and* have provided legal remedies for them. This has offered an important durable solution for vulnerable groups such as Kosovo Serbs and after the amendment of the KPA, to the RAE Community. Whilst the impartiality and non-discriminatory aspect of the organisations have protected vulnerable groups like minorities, in other areas, as has been demonstrated they have not been adequately protected.

The claims mechanisms of the agencies have succeeded in deciding property claims in an efficient and timely manner providing a legal remedy and property restitution in particular to thousands. They have done so on a tight budget and in a time period under what was estimated and have shown what an effective mass-mechanism can achieve. Property restitution or the security of tenure that a positive decision gives has provided a crucial remedy to forced eviction and other housing, land or property violations. Although the HPD/CC have been quicker with claims than the KPA the latter has a bigger and more difficult mandate considering the addition of commercial property and agricultural land, of which claims were four times higher than predicted.

Regarding returns, ethnicity dictates the numbers, accordingly the vast majority of Kosovo Albanian displaced have returned to their homes whereas minority groups of Kosovo particularly the Kosovo Serbôs and RAE community the rate of returns is much lower despite many having their home returned to them. The poor return figures for these groups can be explained by the failure of the HPD/CC and KPA, the political and security situation and finally, the failure of other organisations or bodies whose mandate includes refugee and IDP returns. The dispute over sovereignty and existence of the parallel systems has not been conducive to integration and reconciliation between the ethnic groups which has deterred them from choosing to return to their homes of origin. The situation not only affects the work of the KPA and the access to legal remedy of potential claimants for Kosovo Serbs, the RAE community as well as Kosovo Albanians North of the Ibar river. The hostile atmosphere and insecurity of these groups whose homes of

origin lie in an area where they are minority makes them reluctant to return. This will only ease when there is a political solution.

The performance of the organisations who are responsible for returns is another reason for poor return numbers. As has been made clear the Kosovo Police Force have had problems in re-evictions, not charging people for offences and reposing property re-occupied illegitimately. But the local courts also cause significant problems for IDPs and refugees returning. The good work of the HPD/CC and KPA is being undermined because without judicial and law enforcement protection a successful claimant cannot or will not return to their home. UNMIK act of freezing tens of thousands of Kosovo Serb and Kosovo property dispossession and damage claims against the international organisations and Serbian government respectively has violated the claimants right to a trial and right to a legal remedy.

Another reason for the lack of returns is the failure of the HPD/CC and its successor the KPA to facilitate returns. It has been shown that facilitating and protecting the right to return is the main purpose of these agencies. However, they have neglected this by only dealing with legal determinations of housing, land and property and not co-ordinating with other organisations dealing with returns. I believe this is a problem of their mandate, faciliting the right to return is a very ambigious term and the complaints against the HPD/CC and KPA are only valid if their mandate includes a positive obligation to facilitate returns and not just to ensure that the right to return is not deprived.

Regarding the contribution to the rule of law, the HPD/CC and KPA have supporting the this through the mass-claims mechanism resolving claims disputes in an impartial and legal way as well as offering a legal remedy in the form of property restitution. Additionally, they have protected the human right to housing and property. The exception to these have been the RAE community though improvements have been made and the suspended claims. They have additionally provided security of tenure and though the police and courts have perhaps undermined this in practice. The Kosovo Cadastral Agency has helped the rule of law with the reform of the Cadastral and Property Registration system and at the same time has been sensitive to local laws and used them whenever they could. Additionally, the Regulation on the Repeal of Certain Discriminatory Legislation has helped to make the current laws legitimate, and the

Registration of Contracts for the Sale of Real Property in Specific Areas of Kosovo) has protected Serbs from things like being forced to sell their properties.

But a property-rights respecting culture has been more difficult to achieve. Whilst this is mainly down to the other organisations who have a responsibility to enforce property rights once legal tenure has been established, the HPD/CC and KPA in focusing purely on legal determinations have neglecting promoting a rights-respecting culture but perhaps this is beyond their mandate. The 2004 riots and regular damage to property after secondary occupiers have been evicted shows that a property-rights respecting culture has not been cultivated yet. However, again, it is debatable whether fostering a property-rights respecting culture is within the mandate of these organisations, they cannot do everything. The wider their mandate the more ineffective they will be at performing their various responsibilities.

As for the contribution to reconciliation, the HPD/CC and KPA have by excluding those involved in property disputes from contributing to the process by mediation with each other have missed an opportunity for people of different ethnicities to take a step towards reconciliation. However, whilst this is well worthwhile to peacebuilding and is one potential for such organisations, it would slow down the claims mechanism and adversely affect the speed of legal remedy. There has to be a decision between speed and efficiency of legal determinations and the other aspects of peacebuilding that could be harnessed.

The HPD/CC and KPA have been successful as a transitional justice mechanism by following the rights-based approach by perceiving housing, land and property abuses causing and resulting from the conflict as human rights violations and providing legal remedies for them through property restitution or compensation as well as repealing discriminatory laws. Their contribution to peacebuilding has been to provide justice through legal remedies and to legally resolve peoples HLP grievances through the mass claims mechanism which despite being hampered by the political and security situation, other returns agencies and arguments over their own mandate the HPD/CC has generally achieved. The existence and work of the agencies has represents a public condemnation of past abuses and a recognition that they require remedy. It has removed an issue (HLP

grievances for all the ethnic groups) that could manifest itself in violence and adversely affect peacebuilding.

What is clear from the Kosovo example is that, housing, land and property directorates and claims commissions harnessing the right to return to ones home of origin and the right to legal remedy can contribute to peacebuilding in many ways. They are limited by the political and security situation and the performance of other agencies both of which they are not responsible. However, I believe their own failings result from an unclear mandate or at least the perception that the mandate is ambiguous. There is needs to be careful consideration of what the exact mandate should be and implications of this for peacebuilding because the mandate will determination their contribution to peacebuilding. They cannot be a cure-all medicine. There are difficult decisions that have to made that will negatively impact on their effectiveness in some areas of peacebuilding but improve others. The Kosovo example has shown what such organisations can (and have the potential to) achieve, the ways in which their effectiveness is impeded and the challenging decisions that face them.

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