

# Restitution of land and property rights

by Anne Davies

*Property restitution is central to the successful return and reintegration of both refugees and IDPs. Without it, perceptions of injustice are perpetuated and underlying conflicts remain unresolved.*<sup>1</sup>

**P**roperty restitution touches on all aspects related to successful return: protection, law and order, reconciliation and peace building, restoration of livelihoods, strengthening of local institutional capacity and, ultimately, the chance to bury past conflict and working towards a peaceful future.

This paper focuses initially on Bosnia and Herzegovina (BiH) where half the population was internally displaced or exiled during the conflicts of the 1990s. It draws lessons from property restitution efforts undertaken in Bosnia for application to newer post-conflict resolution situations, such as Afghanistan and Iraq, where the continued denial of property and occupancy rights risks prolonging conflict and blocking sustainable development.

Private ownership, enshrined in Article 17 of the Universal Declaration of Human Rights, is a concept understood and jealously upheld by individuals in most societies. Yet defining and proving ownership or right of use is not easy in countries such as Afghanistan and Iraq where 'property grabs' have become the norm, where the nature of property ownership and other rights relating to land and housing may be arbitrary, and where institutions are currently too weak to define the boundaries of property or provide definitive, non-controversial proof of ownership or rights holding.

Refugees and IDPs are particularly affected since the loss of rights, including property, has been either the cause of their flight or the main reason for their inability to return home. In order to end displacement and move towards a durable peace, it is essential to redress loss of property, housing and land rights.

## Property restitution efforts in Bosnia

At the end of the Bosnian war in late 1995 the international community recognised that restitution of property rights (among others) could motivate thousands of displaced people to return home. The challenge to create conditions where people could return in safety and dignity was not underestimated. The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), established in Annex 7 of the Dayton Peace Agreement in late 1995, was an innovative strategy to facilitate return by addressing the issue of property restitution. Annex 7 made an explicit link between the right to return to a former home of origin and to recover property lost as a result of hostilities. Its purpose was specifically to "receive and decide any claims for real property" where the claimant did not enjoy possession of that property or to receive "just compensation" for it. The authors of the Dayton Accords saw the CRPC as pivotal to refugees' and IDPs' decisions to return and recommence their livelihoods.

The CRPC's limitations soon became apparent:

- The proposed Compensation Fund never materialised due to donor unwillingness to provide resources.
- The CRPC had no enforcement mechanism and could not, by itself, assist people to recover their property rights (or deal with the problem of secondary occupants) and to return home.
- A decision made by the CRPC in favour of a particular claimant did not mean instant restitution of rights: it merely represented

the first step of what turned out, for many owners and rights holders, to be a long process to recover their rights.

- The CRPC did not provide for an appeals mechanism against its decisions, which put BiH in contravention of the European Human Rights Convention which it had signed up to.
- It was not supported by a national legal framework to resolve restitution cases, repeal provisions responsible for the loss of property rights, force local authorities to provide alternative accommodation for those in need and lay down enforcement procedures.
- The CRPC faced major teething problems: its low budget, slow access to municipal records, poorly kept pre-war records, illegal construction and bureaucratic and political obstructions hampered its ability to tackle the massive task of compiling a nationwide register of contested property.

However, due to the commitment of the international community to reverse ethnic cleansing by restoring property rights the CRPC was able to lay the groundwork for property rights restitution on a national scale. Despite its imperfections the CRPC was able, as its budget and staff resources steadily grew, to confirm whether in 1991 somebody had held the ownership of a certain property or occupancy right of a house or apartment and to provide owners/occupiers with a certificate, recognised nationwide, that would allow them to proceed to the next stage of having their property rights reinstated. Although many owners/occupiers encountered difficulties in actually repossessing their properties, or otherwise benefiting from the restoration of their rights, what the CRPC did was to restore those rights. People's motivation to stay the course - despite the frustrations

- was bolstered by their holding an internationally recognised legal document that local authorities could not take away.<sup>2</sup>

*property rights restitution should be a nationally-owned and directed process*

The next steps were also important. Because the CRPC was essentially an internationally imposed mechanism to fast track domestic legal procedures, it inevitably came up against the problem of implementing decisions on the ground because of the flawed national legal framework. Crucial to the success of the enterprise was the muscular determination of the international community to persuade the Bosnian authorities to repeal discriminatory laws drawn up during the war and draft a new national legal framework that recognised property rights existing prior to 1991. Then, implementation of CRPC decisions became possible and national enforcement mechanisms grounded in law could be enacted.

Gradually the combined efforts of international determination and the growing cooperation of local authorities led to an increasing number of property restitutions. By April 2004 over 90% of formerly displaced claimants have been able to recover rights on their pre-war homes.

The CPRC experience has highlighted the necessity to ensure that property rights restitution should be a nationally-owned and directed process.

While the international community can assist, it should refrain from imposing its concepts without thinking through how these can be implemented practically.

### **Could CPRC be a model for other countries?**

Lessons learned in BiH appear not to be being heeded in Iraq where it is estimated that up a million people were displaced as a result of expulsion policies that the former regime used to remove opponents and

gain valuable land in the southern marshes and in the north. A worrying start was made when the occupation authorities established an Iraq Property Claims Commission (IPCC) in January 2004 with little Iraqi involvement. Experts working for the Coalition Provisional Authority (CPA) drafted a document and required the Iraqi Governing Council (IGC) to implement its provisions without paying sufficient attention to realistic enforcement mechanisms.

BiH experience shows that national institutions have to be instrumental in reallocating housing to those displaced by a returning owner or rights holder, since they are the ones in control of the municipality housing stock and able to mobilise the police to enforce evictions if necessary. Yet in Iraq national institutions will be hard-pressed to resettle the new 'displacees', as they are bound to under the terms of the IPCC. Those likely to be first in line for eviction by returning owners or legal rights

*Capt Dan Stigall joins Iraqis in celebrating the opening of the Iraq Property Claims Centre, Tikrit, 25 May 2004.*

HOME FOR GOOD?



holders – mostly Arabs allocated housing by the Baathist regime in areas populated by Kurds and Turkomen – will probably wish to be resettled in areas where they constitute a majority.<sup>3</sup> It is not clear either whether the newly-trained Iraqi police force will have the requisite will or ability to carry out contentious evictions. Had more attention been paid to the Bosnian experience it would have been readily apparent to the architects of the IPCC that national involvement from the start is vital to successful implementation of the scheme. Nevertheless, imperfect though it may be, a start has been made.

The primary task of a Property Commission based on the BiH model is to collect property claims and sort them into cases that can be easily verified (and therefore on which decisions can be made immediately) and those where property is contested. In the latter cases, a formula needs to be agreed as to how ownership should be determined (unless such provisions are already in existing legislation). It is important to determine which family has historical rights to the contested property and which subsequent owners have a justifiable claim to compensation.

*fundamental redesign of property legislation is necessary*

Degrees of compensation must be formulated in a uniform and transparent manner so that, with an effective information campaign to prepare the ground, people do not feel they are being victimised by bureaucratic cronyism but rather recognise that the issue is being dealt in a uniform manner all over the country. Even in simple cases where claimants cannot prove ownership or occupancy rights due to absence of documentation, it is important to find a formula whereby proof can be established. Where property is contested, other legal mechanisms are necessary to arbitrate between contestants.

Restoring property in cases of contested rights, or in cases where the occupants refuse to vacate the

property because they have nowhere else to go, will take time. What is important is that the established mechanism uses national legislation and implementation procedures to address these issues.

In Afghanistan property restitution is even more complicated and contentious. According to a report published by the Afghanistan Research and Evaluation Unit (AREU)<sup>4</sup> land tenure laws are complex, uncertain, incomplete and currently unenforceable. AREU warns that the approach taken by the Afghanistan Transitional Administration – to restore order in land ownership by seeking to return land to pre-1978 owners – is flawed. Many aspects of that pattern of ownership remain contested and played an unacknowledged role in generating conflicts. High rates of sharecropping by both landowners and the landless and the ambivalent status of mortgaged plots make a precise definition of ‘owners’ difficult. The little land policy planning undertaken by the ATA has been driven by the objective of helping foreign investors to secure land.

Although the Transitional Authority has created a court to hear land claims, it has not developed laws upon which the court can base its judgments. The inability of the ATA to extend its power beyond Kabul and the lack of a comprehensive legal framework will complicate property restitution for years to come. Until comprehensive mechanisms that are perceived as impartial and uniform can be put in place to address both issues, the roots of internal conflict in Afghanistan will remain.

The ATA has made a tentative start to sort out property claims by establishing ‘land tribunals’ in areas where circumstances permit them to operate and where local warlords are amenable to negotiation, reconciliation and the return of former inhabitants. While operating circumstances for property restitution are horrendously difficult it is encouraging that the approach to setting up the land tribunals has focused on the involvement and endorsement of local and national authorities.

However, AREU charges the international community with giving poor advice to the ATA. By its ‘light footprint’ approach the international community reinforces the perception that land ownership problems are too complex, bewildering or sensitive to be addressed.

Clearly the magnitude of the problem in Afghanistan, as well as in Iraq, will not be addressed by a CRPC mechanism alone. Most actors involved recognise that a fundamental redesign of property legislation is necessary for a long-term, durable solution of the problem that will combine reconciliation with restitution and re-allocation, including fair compensation for those who lose out. In both countries this will be an enormous undertaking and will take years to implement. The question is whether the international community will assist with the same level of determination and resources as it did in Bosnia.

***Anne Davies worked for UNHCR for 18 years in a number of field postings including Cambodia, Bangladesh and Bosnia. She has been an independent consultant for ECHO-funded projects in Afghanistan and for OCHA in Tajikistan and Iran. She is currently Acting Head of OCHA in Monrovia, Liberia. Email: annedavies99@yahoo.co.uk***

<sup>1</sup> For earlier FMR analysis, see FMR7 *Going home: land and property issues*: [www.fmreview.org/mags1.htm](http://www.fmreview.org/mags1.htm)

<sup>2</sup> Madeline Garlick ‘Protection for Property Rights: A partial solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina’, *Refugee Survey Quarterly*, Vol. 19, No 3, 2000.

<sup>3</sup> See the report of Human Rights Watch, at [www.hrw.org/english/docs/2004/08/03/iraq9174.htm](http://www.hrw.org/english/docs/2004/08/03/iraq9174.htm)

<sup>4</sup> Liz Alden Wily *Land Rights in Crisis: Restoring Tenure Security in Afghanistan*, for the Afghanistan Research and Evaluation Unit, March 2003, [www.areu.org.pk/publications/land/land.pdf](http://www.areu.org.pk/publications/land/land.pdf)