CHAPTER 5

Leader of the pack: Who will take the lead on post-conflict HLP issues?

Scott Leckie

HLP rights issues are invariably affected by conflict and in the various steps to build post-conflict peace. As ubiquitous as they may be as issues of war, however, HLP rights still do not enjoy the benefits of a lead agency within the UN system that is willing and able to take coordinating responsibilities for securing these rights within broader peace-building objectives. While considerable progress has been made in terms of programming and policy, peace-building exercises on HLP issues tend to be ad hoc, incomplete and all too often ineffectual in achieving their avowed aims. This chapter looks at these issues and proposes both an agency that might be most well-suited within the UN system to be the lead agency for HLP rights and the exploration of the basic HLP policy infrastructure that should be in place within all post-conflict societies.

Introduction

Much has been written in recent years about the central importance of HLP rights issues in conflict and post-conflict peace-building (Fitzpatrick, 2002; USAID, 2004; FAO, 2005; Philipott, 2005; UN-Habitat, 1999, 2008; Williams, 2006; Leckie, 2003, 2005, 2007, 2009). In addition, a series of HLP gatherings have been held since 2004 in Switzerland, the US, Thailand, the UK and elsewhere. Most important of all, HLP issues have been addressed in a steadily growing number of UN and other field operations, including Bosnia, Kosovo, Timor-Leste, Iraq, Sudan, Burundi and DRC. With this expanding coverage has come an ever-deeper grasp of the issues at play, the causes of HLP crises, their consequences and, increasingly, their cure. HLP issues are present to one degree or another in all of the conflicts that have taken place in recent memory. At long last they are starting to get the attention they deserve.

For many of those working on a regular basis within the HLP sector, the types of HLP issues that are likely to arise within conflict or post-conflict (and, indeed, post-disaster) contexts are rarely surprising. At the same time, however, while our understanding of the issues has surely evolved, it is not particularly clear whether the international community is all that much closer to assuring better HLP performance following the conclusion of

today's ongoing conflicts or in countries that will eventually transition from authoritarian regimes to more democratic forms of governance. We would all naturally hope that the HLP rights that are meant to be enjoyed by everyone, in particular those forced to flee their homes and lands because of conflict, will be taken increasingly seriously in coming years, but whether this will happen in practice remains very much an open question. Obviously, national actors are key in determining how seriously HLP rights will be taken. Nonetheless, the role of the international community in influencing these decisions should not be underestimated.

Where, then, do we turn at the international level to improve the HLP prospects of the tens of millions of people affected by conflict, now that many of the conceptual and normative underpinnings of HLP questions are increasingly clear? This chapter argues that the HLP community needs to begin focusing attention on three inter-related themes: a renewed discussion on ideal HLP policy leading to a Humanitarian HLP Platform; further discussion on the institutional arrangements that would best serve countries emerging from conflict; and a clearer view of the lead agency responsible for addressing HLP concerns.

Towards a Humanitarian HLP Platform

Although much has been achieved, and a degree of consensus is clearly apparent, it is important to explore how to further refine the legal and policy frameworks that guide HLP activities in the field. The humanitarian community has come far, but not yet far enough. Many fundamental questions remain open, and a vigorous discussion is still required to come to a broad mutual understanding and eventual agreement among the multitude of actors that make up the international humanitarian community as to what constitutes essential HLP policy in post-conflict countries and countries in transition. Finding this common ground and bringing donor nations on board will assist greatly in creating better conditions for effectively addressing HLP rights.

Remedy and restore, reform and redistribute… or both?

One particularly salient element in any emerging HLP platform concerns the issue of restitution, and where and to which degree restitution measures have a place within the country concerned. Restitution rights are considered increasingly pertinent not only as a means of discouraging territorial conquest, ethnic cleansing and demographic manipulation, but also simply as the legal means of ensuring that people maintaining HLP rights are not subjected to their unlawful or arbitrary removal by others intent on confiscating their homes and lands. Beyond this, restitution rights fortify the very notion of HLP rights and tie them to physical spaces such as the houses, dwellings, apartments and land that people themselves deem to be their original homes, while at the same time formally according HLP rights to individuals, families

and larger communities that may have previously not necessarily been treated as HLP rights-holders.

However, some within the HLP sector seek to present the view that restitution, and restitution alone, should form not only a central element of any post-conflict HLP policy, but that it should in fact be the *only* issue within such a plan. This position is perhaps based on a mistaken interpretation of the purpose and intent of the UN's Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons. Restitution rights are, of course, of vital importance to millions of refugees and IDPs throughout the world, particularly those who are not able to repossess and reclaim their original homes and lands, and to argue the contrary is clearly without merit. The remarkable, albeit imperfect, strides in the restitution experiment in the past two decades have been a human rights victory of extraordinary significance, and one that cannot be downplayed (Leckie, 2007, 2003. See Pinheiro, 2005). At the same time, of course, restitution is only one issue among dozens of HPL issues that arise in conflict countries, and thus obviously whatever HLP endeavours are undertaken must never be based solely on initiatives to ensure restitution rights. The HLP canvas is far larger than that; what is needed are creative ways to blend restitution elements into the tapestry of an HLP platform, rather than angry retorts that restitution is somehow suspect.

It is surely true that, in a country such as Afghanistan or Sudan, restitution measures alone would be woefully inadequate as a means of securing HLP justice or broader HLP rights to all of those in need, and in many contexts might – in their standard form – not be appropriate. Far larger and more complex issues are often at play than simply the desire to ensure that people are entitled to return to their places of habitual residence. As we all know, a policy of that nature in overcrowded Rwanda, impoverished south Sudan or troubled Afghanistan will achieve little, and in fact detract from issues that affect more people, result in more human suffering and constitute greater threats to long-term peace. When political change finally comes to Burma, for instance, as it surely will, restitution must invariably be part of the broader HLP programme, both in terms of domestic measures and those guided and supported by the international community, but it will only ever be *part* of the broader HLP equation.

At the same time, restitution's critics, particularly those from progressive circles, need to reconsider the fundamental nature of restitution and how, in legal, conceptual and practical terms, such rights strengthen the hand of all those who believe in just peace and sustainable economies. Where restitution critics are very right, however, is in recognizing that restitution can be a process grounded in cynicism, supportive of economic elites at the expense of middle- and lower-income groups, and a distraction from larger, more ubiquitous HLP concerns. Finding a balance between these and other factors remains a central challenge.

In essence, what is needed is an integral approach to HLP rights in which all of the necessary dimensions are fully embraced and fully addressed. There

is a need for a platform that focuses not only on return or shelter. Neither can such measures aim solely to turn back the clock through restorative justice, nor seek to fundamentally reform what may be perceived to be archaic ways of allocating land and homes. The tactics and strategies of the *shock doctrinaires* so graphically outlined in Naomi Klein's recent book *The Shock Doctrine* all too often win the day, and unless the humanitarian community embraces an integral view of HLP issues, which includes redistribution and steps towards the universal enjoyment of the full spectrum of HLP rights, solutions will remain partial, unsatisfactory and at times detrimental (Klein, 2007).

In developing a Humanitarian HLP Platform it is important to take full cognizance of both the victories, failures and many unexpected outcomes of previous HLP efforts and to be aware of how best to obfuscate the efforts of the promoters of neo-liberal property rights who see private property rights as the next giant leap for societies emerging from conflict. It is therefore essential to combine the forces of HLP practitioners *of all persuasions* in a manner hitherto untried. The vast majority of HLP field workers in post-conflict countries, for instance, have never set foot in a slum nor have they necessarily worked on the types of tenure, rights and upgrading issues that are part and parcel of housing rights work. The same applies in reverse: very few of those well versed in the intricacies of security of tenure provision to slum dwellers, community mobilization and measures to prevent forced eviction have ever worked in post-conflict or transitional settings. Far too often, the still rather small cadre of HLP practitioners and consultants jump from country to country, conflict to conflict, sometimes learning, often forgetting, and frequently applying their own personal blend of HLP sauce to the very different challenges that face the humanitarian community. In some cases this works, but in others it can just as easily fail. The weakest among us, especially the agencies, follow ideology, desires for conquest, hegemony and profit in determining the policies they choose to pursue, while the worst among us not only take the path of enrichment without consequence, but happily do the dirty work that no UN agency or government would ever publicly pursue.

It is clearly crucial to move beyond the ad hoc, inconsistent and unprincipled approaches to HLP rights that have characterized most post-conflict operations. So too must we move beyond the traditional shelter approaches to broader HLP concerns as if tarps and tents were a sufficient response to the deep structural HLP challenges that emerge in all post-conflict settings. The humanitarian community needs to acknowledge and act upon the fact that in no two post-conflict peace operations during the past two decades have consistent policies on these complex HLP concerns been put in place. One peace operation consciously chooses to downplay HLP rights issues, while another attempts (or is forced) to tackle some of the challenges head on. As we know, most post-conflict approaches to these issues are at best piecemeal, earnestly embracing some concerns and overlooking others. Arguably, no post-conflict operation implemented by the international community has tackled HLP rights issues in an integral, comprehensive manner.

No single measure alone is going to instantly change the approaches and structures employed by the international community in achieving greater impacts upon the HLP sector. But one broad measure that may assist in generating the basis of consistent, principled and more effectual action is the development of a UN-wide policy – an HLP Platform – to guide all international involvement (UN, other inter-governmental agencies, states, NGOs and others) in future small-, medium- and large-scale operations in conflict, post-conflict and related settings (Leckie, 2005). This would aim to create administrative and institutional structures that ensured that HLP rights were treated equitably in all countries. One concrete proposal is the idea of ensuring that HLP rights and competencies are enshrined within the organizational and administrative structures of future peace operations, and in particular that a Housing, Land and Property Rights Directorate (HLPRD) forms a central element in all future peace and related operations. An HLPRD would effectively constitute the functional implementation arm of the agreed terms of the Humanitarian HLP Platform. Wherever they were eventually established, HLPRDs would rarely if ever have precisely the same shape or size, but would *always* have the competencies required to address a standard list of the primary HLP challenges, and at the same time be pliable enough and sufficiently resourced to carry out or facilitate all major legal, policy, administrative and governance functions associated with a fully equitable rights-based HLP system. The HLPRD would not necessarily be a UN institution, but would aim to win the support of all agencies working within the HLP sector, evolving into an institutional framework governed exclusively by national institutions in the country concerned.

A fully functional HLPRD may not invariably bring residential justice to all countries where it is in place, but at the very least it could assist in providing a measure of political certainty with regard to housing, land and property rights issues and put post-conflict societies in a far better position to secure HLP rights for all. It would assist in providing greater political stability, enhance the prospects for economic development and expedite the re-establishment of national capacities to restore peace, justice, governance and rule of law. Wherever constituted, the HLPRD should be headed by an executive office comprising an executive director and deputy director and legal and support staff. Each of the seven departments within the HLPRD (see below) should be headed by a department coordinator, who in turn would be responsible for determining precise staffing needs in each area of competence. Ideally, staffing should comprise nationals of the country concerned, with technical assistance and advice provided by the UN and international experts. The financial requirements of the HLPRD should be included within the overall budget of the peace or other operation concerned, and listed as a separate budget line item. Specific funding requests should be developed by the HLPRD to supplement ordinary budgetary allocations. Financing HLP activities has proven difficult in the past and new methods need to be found to adequately resource these new bodies. Adequate space for the HLPRD central office should

be identified in the capital city. Once secured, additional office space should be sought in other major population centres. Additional offices may be required in other countries where refugees are resident.

In terms of functional arrangements, the HLPRD could comprise seven departments: Policy, Legal, Housing, Land, Construction, Claims and Records. Each of these would have the functions discussed below.

The *Policy Department* would carry out housing, land and property rights policy initiatives and develop or assist local authorities with the development of HLP policies consistent with international law. Convening all stakeholder *National Housing, Land and Property Rights Consultations* would be a key function of the Policy Department. These consultations should develop into a national discussion on the most effective means of addressing HLP rights issues within the institutional framework being put into place and the contours of a national legal and policy framework on housing, land and property rights matters. Following the national HLP consultations, a mutually agreed *Housing, Land and Property Rights Plan of Action* should be concluded by the Policy Department in partnership with the national authorities and international actors concerned.

The *Legal Department* within the HLPRD would be entrusted with developing a democratic, fair and equitable legal framework on HLP rights themes, fully consistent with international human rights and humanitarian laws and other relevant legal standards and norms. It would monitor the implementation of relevant law, identify laws in need of repeal or amendment, draft new legislation and undertake any other measures to develop a consistent legal framework. The Legal Department would encourage the national authorities in the countries concerned to adopt a *National HLP Rights Act* as a means of consolidating all relevant law affecting the enjoyment, in particular, of housing rights. Such an act would enable the development of a consolidated law governing all constituent guarantees comprised under the rights to housing, land and property ensured under international law, and could provide a clear basis for coordinating joint international and local efforts towards protecting HLP rights.

The *Housing Department* would coordinate additional activities in support of HLP rights, beginning initially with a nation-wide Housing, Land and Property Rights Assessment. At a minimum, the type of information that needs to be collected within such an assessment would include: housing stock status, emergency housing needs, land allocation and administration, housing records, availability of building materials and other related measures. The Housing Department would also be entrusted with identifying all abandoned housing and other public and private buildings that could be used for housing purposes, and allocating such premises, (generally on a temporary basis) to displaced and/or homeless persons and families; the provision of other forms of transitional/emergency housing or land for those in need, including secondary occupants of refugee and displaced person's property; protecting all persons against forced evictions and other forms of arbitrary and unlawful

displacement; identifying state land for use in constructing affordable social housing and for allocation to homeless and landless persons and families; administering and managing all public housing resources; monitoring housing affordability and intervening within the housing market to keep residential prices at reasonable levels; and developing housing finance systems accessible to the poor to enable them to construct adequate housing resources and to repair damaged homes.

The *Construction Department* would be responsible for repairing infrastructure and services, repairing damaged or destroyed homes, assisting the housing construction sector to function optimally and developing affordable building materials for lower-income groups. While the actual building of new homes may be opposed by those favouring more minimalist approaches to peace-building, it is vital to remember that the physical reconstruction and expansion of habitable housing stock in a peace conflict environment must necessarily form part of a broader housing rights policy framework. The Construction Department would also maintain responsibility for securing appropriate building materials for the repair and construction of residential dwellings.

The *Land Department* would maintain institutional competence on all matters relating to residential, agricultural and commercial land, focusing in particular on issues of land administration, dispute resolution and broader land policy, including possible measures of land reform and land demarcation. The Land Department would be mandated to address all HLP issues that were not in a structural way addressed by other departments within the HLPRD, in particular the Policy and Housing Departments respectively. Issues relating to customary land allocation and control in areas governed by custom would also be overseen by the Land Department.

The *Claims Department* would be entrusted with collecting and processing HLP restitution claims, resolving HLP disputes linked to restitution claims, the enforcement of successful claims in coordination with other bodies and backstopping traditional forms of mediation and dispute resolution when these proved inequitable or otherwise unable to resolve longstanding disputes. The Claims Department would also be responsible for helping manage the work of any claims tribunal or commission that may require establishment to ensure the existence of an impartial and independent adjudicative body to issue binding decisions on restitution claims that could not be resolved through mediation and other means.

The *Records Department* would be entrusted with re-establishing (or establishing) the housing, land and property registration system, updating the national land cadastre, carrying out GIS (geographic information system) surveys of the country or territory and all other matters concerning the administration of the housing, land and property arrangements. This department should also ensure that all public housing resources are properly administered and managed. Measures should be taken to ensure that any suggested privatization of such resources is made solely by and for the benefit of the local population.

Some will surely argue that a seven-armed monster of an institution with such an expansive and extensive degree of activities will never be accepted by the international community. Likely objections by local political elites and officials may be seen by others as reason enough for not pursuing such an integral approach to HLP rights. Others will simply assert that such an institutional arrangement is utterly naive, given all of the complexities and intricacies of HLP issues in countries the world over. While still others will maintain the view that institutional and policy prescriptions such as these serve little purpose, and that history has shown the value of ad hoc, personality-driven approaches to post-conflict work in the field.

And yet whilst doubts and outright opposition to such an endeavour can be expected and in part understood, can we really afford not to at least attempt to improve international involvement concerning HLP matters? It may appear to some that the proposed HLPRD institutional framework resembles a sort of gargantuan super-structure that few post-conflict peace operations could realistically establish. In actual fact, however, what is proposed here in not an unwieldy, prohibitively expensive bureaucracy, but rather a basic framework – which will take different forms wherever it is established – that is designed to ensure that all relevant HLP rights issues are for once taken seriously and applied with the same degree of consistency and common commitment as other measures that have come to be central functions in all peace operations. Some – such as the HPG of ODI (the sponsors of this volume) have spoken of the 'uncharted territory' of the links between land, conflict and humanitarian action, while I have addressed what I see as the 'delicate embrace' of HLP rights by the peace community. In a way, both of these descriptions are correct; indeed, we still have a long distance to travel before we fully grasp all the implications of effective HLP programming. At the same time, significant strides have been made and many agencies that had traditionally ignored HLP concerns are beginning to accept their central importance in peacekeeping and peace-building. Where we need to turn next, then, is to have an in-depth, realistic and concrete discussion about how to expand knowledge of HLP issues, how to consistently incorporate these issues within peace-building structures and, above all, consider how best in institutional terms to arrange an enhanced approach to HLP questions in post-conflict settings.

Who will lead the way?

Opponents of international involvement within the HLP sector are becoming less vocal, and the centrality and complexity of HLP issues is clearly being recognized. But the question of precisely what form such sustained involvement should take, and ultimately which institution or institutions should play the lead agency role in this regard, remain unanswered.

Fire-fighters, architects or engineers?

Any determination of the agency best qualified to lead on HLP matters depends firstly on the degree to which the international community wishes to engage on these issues. Are humanitarians expected to be fire-fighters, dousing the flames of HLP disputes and crises; architects responsible for designing the framework of an acceptable HLP system; or are we, in fact, best suited to be engineers entrusted with facilitating the creation of systems and institutions that will bring stability, security and residential justice to all with HLP worries? Coming to terms with questions such as these and discerning where majority support lies in this regard within the international humanitarian community will, of course, influence decisions on who the lead agency should be.

Although humanitarian involvement in HLP matters is relatively recent, the number of agencies that have been involved in one way or another in post-conflict HLP efforts is far larger than many realize. While this is not the place to examine the details or relative merits of this involvement, its scale is impressive. In terms of UN agencies, UN-Habitat, UNHCR, FAO, OCHA (Displacement and Protection Support Service – DPSS), UNDP (Bureau for Crisis Prevention and Recovery – BCPR), the Office of the High Commissioner for Human Rights (OHCHR), United Nations Office for Project Services (UNOPS), DPKO, WFP and others have all had direct involvement in the HLP sector in recent years. UN Transitional Authorities including the United Nations Mission in Kosovo (UNMIK) in Kosovo and the United Nations Transitional Administration in East Timor (UNTAET) in Timor-Leste were extensively involved with HLP themes, as was the Office of the High Representative in Bosnia. Specialized international bodies such as the Kosovo Property Agency, the Housing and Property Directorate and the Commission on Real Property Claims have been formed to adjudicate HLP disputes and claims. As a sign of its potential interest in these questions, the recently constituted UN Peacebuilding Commission has initiated HLP activities in Burundi. Non-UN inter-governmental agencies such as the International Federation of Red Cross and Red Crescent Societies (IFRC), International Committee of the Red Cross (ICRC), International Organization for Migration (IOM), the World Bank and others have also become increasingly engaged in HLP efforts. NGOs such as the NRC, Displacement Solutions, the International Rescue Committee and others have also increasingly worked on HLP issues in the field. Consulting firms such as Development Alternatives, Inc. (DAI), Associates in Rural Development, Inc. (ARD), Terra Institute and others have also been active on certain dimensions of the HLP equation.

Each of these and other agencies maintain permanent or ad hoc HLP competencies, combined with permanent or ad hoc involvement in post-conflict transitional programming. It is difficult at this juncture to determine which of these or perhaps other agencies might be best placed to take the lead role in this regard, but given their lead agency status with the Humanitarian Cluster System on HLP issues under both the Protection and Recovery

Sub-Clusters, UN-Habitat could be seen as a leading candidate to carry out these functions. The recent inclusion of UN-Habitat on the Inter-Agency Standing Committee (IASC) strengthens the case for such a proposal. Although a comparatively small UN agency, lacking the clout or stature of some of the larger and more influential actors, UN-Habitat has led the way in advancing HLP concerns within a growing number of UN peace operations (Iraq, Kosovo, Timor-Leste, Sudan, Crimea, DRC, etc.), and its mandate as the UN housing agency and UN city agency places it in perhaps a better position than many other agencies in this respect.

This does not mean that UN-Habitat should be the only agency involved; far from it. As the lead agency, it would be UN-Habitat's crucial role to coordinate the multi-armed efforts of all the agencies that are, and in most senses *should be*, engaged in the HLP sector in post-conflict settings. There is a place for all types of expertise and assistance, but what remains missing is the agency to design, establish, implement and coordinate a full HLP spectrum approach that ensures that all HLP rights issues are addressed, that a HLPRD is established in all relevant settings and that everyone dealing with HLP rights within a post-conflict society has somewhere to turn in the hopes of finding support and relief. In this way, HLP rights will finally get the attention they clearly deserve. UN-Habitat may well fail in such a role, but at least a structural effort will have been made to consciously fill the lacunae existing within the international community on HLP issues. Alternatively, UN-Habitat may succeed and bring global attention and support to HLP concerns to another level. Until an agency finally takes the lead, we will never know.

Making a real difference, leaving a light footprint or simply leaving no footprint at all?

Sustained, comprehensive and effective involvement by humanitarian agencies in the HLP sphere will come down to improving overall UN competence, capacity and political will to deal constructively with the severe problems that face millions of victims of war. When the UN has decided to engage in these matters, notable successes are occasionally identifiable, and these contributions by the UN are widely seen as at least partially responsible for the emergence of stronger and more effective peace operations that actually address day-to-day concerns affecting very often large numbers of people. When considering the areas of the world in 2009 where peace processes, peace agreements, peace implementation and humanitarian actions will be needed – Darfur, Iraq, Palestine, Burma, Zimbabwe, DRC and beyond – all of these conflicts have at their core severe disputes, conflicts and inequities within the broader housing, land and property rights domains. Failing to address these issues within the context of peace-building or political transition, as will eventually take place in repressive countries such as Burma or Zimbabwe, is truly no longer an option. Such failures will themselves only lead to plans and missions that bring results in some sectors, but that will be virtually assured

of neglecting HLP concerns, in turn bringing highly undesirable results, including even a return to violence.

Ultimately, involvement by the international humanitarian community must be designed such that it has a marked impact upon the HLP sector, which makes a real difference in the lives of the broadest cross-section of people. Leaving a 'light footprint' as the UN Mission in Afghanistan has sought, or leaving no footprint at all, as far too many UN and related missions have done when their impact is viewed through an HLP lens, is no longer good enough. Every conflict involves stresses within the HLP sector. These countries will also, without exception, have often severe imperfections within the HLP sector which are not necessarily caused by conflict, but that nevertheless deserve serious attention and assistance. If HLP issues are also *rights*, which indeed they are, there are no reasonable grounds on which to justify inaction or non-involvement in their improvement.

We need an approach by the international humanitarian community to HLP issues that once and for all views these rights in their entirety, as one holistic, inter-related and mutually inter-dependent system of rights that are meant to drive policies and laws that positively affect the residential life of dwellers everywhere. To date, HLP interventions have been far more haphazard than this and have *never* embraced the totality of these concerns in anything close to a comprehensive manner. Building an Humanitarian HLP Platform, agreeing on the institutional HLP steps that are required within countries emerging from conflict, and determining the agency best placed to lead these processes will put us in a far better position to build the necessary foundations within the global humanitarian community for a sustained, embracing and effective approach to the HLP challenges that are ubiquitous, but which have been sidelined for too long.

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Scott Leckie is an international human rights lawyer and researcher with some 20 years of experience in more than 65 countries. He is also the Director of Displacement Solutions (www.displacementsolutions.org). He has advised a range of UN and other agencies on post-conflict housing, land and property rights issues, including UNHCR, IFRC, OHCHR, UN-Habitat, UNDP, OCHA, UNMIK, UNTAET and others. His most recent book *Housing, Land and Property Rights in Post-Conflict United Nations and Other Peace Operations* was published by Cambridge University Press in 2009.