



FLYKTNINGHJELPEN
NORWEGIAN REFUGEE COUNCIL

A Guide to Property Law in Afghanistan



UNHCR
The UN Refugee Agency



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First Edition

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Council



Norwegian Refugee Council

Oslo/Pakistan/Afghanistan

September 2005

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Designed By

Shahzad Ahmad

Project Support Office

NRC, Pakistan

Printed in Peshawar

By

Khyber Mail

A C K N O W L E D G E M E N T S

This Guide was drafted by Conor Foley and was overseen by a working group composed of the people mentioned below. The Guide started as an initiative and the work on property issues of Reem al-Salem of UNHCR and John Dempsey of the International Rescue Committee. The writing of this Guide represents a truly collaborative effort. The Norwegian Refugee Council and the United Nations High Commissioner for Refugees would like to record their special appreciation and thanks to the following people who spent many hours in the writing, editing and production of this Guide:

Katharina Lumpp, Simon Russell, Sayed Amanullah Abdali, Surraya Ahmadyar, Sayed Aliunnaqi Amini, Ingunn-Sofie Aursnes, Bakht Muhammad Bakhtyar, Christophe Beau, Mohammad Aziz Rahjo, Andrea de Maio, Kirstie Farmer, Mayra Gomez, John McKissick, Guy Griffin, Rob Hager, Gabriela Iribarne, Gullalay Karimi, Najib Khyber, Basir Ahmad Noori, Lisbeth Pilegaard, Hayatullah Rahmatzai, Sayed Muhayaddin Raai, Mohammad Musa Rahimi, Jacob Reimers, Farida Sadid, Per-Olof Henrik Olofsson, Professor Wadir Safi, Mahmooda Sakhi, Tariq Sediq, Mohammad Ayub Yusufzai, Mohammad Arif Rezai.

The Norwegian Refugee Council and UNHCR would also like to record their thanks to Liz Alden Wiley whose reports on land and property issues for the Afghan Research and Evaluation Unit were particularly informative.

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F O R E W O R D

Emerging from over two decades of conflict, Afghanistan faces opportunities which were denied to its people for many years, as well as challenges. These challenges in the ongoing process of transition to a lasting peace are multi-faceted and range from economic development, security sector reform, judicial reform and responsible action to address the social problems of the communities to the healing of wounds which have divided people and caused conflict. At the core of the transition is the endeavor to re-build a future in which human dignity and human rights are being respected, in which the rule of law is restored and national reconciliation takes place. With the restoration of the rule of law, national protection for those who were displaced and forced to flee will be re-established.

It is in this context that the decree on Dignified Return was promulgated by H.E. President of the Islamic Republic of Afghanistan, Hamid Karzai.¹ It tasks the Ministry of Refugees and Repatriation to work towards ensuring that returning Afghans, who were compelled to leave the country or were displaced within Afghanistan, are welcomed back, that their rights are restored and that they are able to enjoy the same human rights and fundamental freedoms enjoyed by other citizens. The decree specifically states that the recovery of movable and immovable properties such as land, houses, markets, shops, *sarai*, apartments and others will be effected through relevant legal organs. This provision proved to be particularly important because the recovery of property rights presents a major challenge for returnees and concerned actors in Afghanistan, and therefore adequate procedures need to be developed and established.

Addressing questions of recovery of property and of land and housing for returnees, has become a high priority for the Ministry and for me as the Minister of Refugees and Repatriation. This requires the co-operation and combined efforts of different ministries and other institutions. Together with other relevant ministries and partners, solutions have to be found and obstacles to the reintegration of returning refugees and IDPs removed, so that returnees have

¹ Decree of the President of the Afghan Interim Administration on the Dignified Return of Refugees, Reference No.(297) of 13.03.1380.

their land and property restored to them and land, and homeless Afghans have access to housing.

This Guide to Property Law in Afghanistan, which is published by the Norwegian Refugee Council (NRC) in conjunction with the United Nations High Commissioner for Refugees (UNHCR), provides an important contribution to this process and comes at a crucial moment. It is based on the experience of working with returnees and illustrates the importance of land and property rights in the process of return and reintegration. It provides an important resource for judges, lawyers and other officials, including the staff of the Ministry of Refugees and Repatriation and its departments in Afghanistan's 34 provinces.

I hope the Guide will assist returnees and other Afghans to realize their right to own property, thereby contributing to strengthening human rights and the rule of law in Afghanistan.

Dr. M. Azam Dadfar

Minister of Refugees and Repatriation

Islamic Republic of Afghanistan

I N T R O D U C T I O N

Who is this Guide for?

This Guide has been written as an information resource for judges, lawyers and other public officials whose responsibilities include upholding land and property rights in Afghanistan. It is intended to be a short and accessible, but comprehensive, guide to the applicable law on land and property, which can be used as a basic reference point and a training resource.

The Guide outlines the main provisions of Afghanistan's constitutional and legal framework and the protection these provide to property rights. It also briefly describes the formal structure of Afghanistan's judicial system and sets out the hierarchy of Afghan law. The Guide discusses the legal basis of various policies pursued by different governments in Afghanistan, and the laws regulating transfers of land and property between private individuals. It also contains guidance about how property cases are dealt with in Afghanistan's formal legal system as well as under Afghan customary law. Afghanistan is constitutionally required to abide by the international human rights treaties that it has ratified and the Universal Declaration of Human Rights. The Guide outlines what protection is given to land, housing and property rights under international law and contains advice on how to use international human rights monitoring mechanisms.

Who is publishing this Guide?

This Guide has been published by the Norwegian Refugee Council (NRC), in conjunction with the United Nations High Commissioner for Refugees (UNHCR). Both UNHCR and NRC are particularly concerned with the rights of Afghan refugees, returnees (and potential returnees) and internally displaced persons (IDPs).

NRC has established a network of Information and Legal Aid Centres in Pakistan and Afghanistan. These centres provide free information and legal advice to Afghans who have been displaced from their homes or are returning to them. They also work to strengthen the rule of law in Afghanistan in order to help create the conditions for sustainable return. Disputes over land and property are

by far the biggest single type of cases registered by NRC's information and legal aid centres and it is clear that there is considerable confusion about the current applicable laws and how they should be applied.

UNHCR in Afghanistan supported the establishment of NRC's Information and Legal Aid Centres in an effort to assist returnees to overcome obstacles to their return and reintegration and has also worked to strengthen the capacity of Afghanistan's legal system to address such obstacles. Land and property rights have been and remain one of the most pertinent challenges to address.

This initiative should also be seen in the context of UNHCR's mandate. Facilitating and promoting return is a core function of UNHCR. The organisation's statute calls upon governments to cooperate with the High Commissioner through, amongst other things, assisting efforts to promote the repatriation of refugees.¹ Since then successive UN General Assembly Resolutions and Conclusions of UNHCR's Executive Committee have confirmed that UNHCR has a legitimate interest in operating in countries from which refugees have originated in order to monitor the conditions and consequences of their return. From UNHCR's perspective the core of voluntary repatriation is a dignified return, in and to conditions of physical, legal and material safety, so that the returnee is able to enjoy the full protection of his or her own national government. This may involve some reform of a country's legal structure.

In this context, UNHCR has sometimes helped to identify, and work towards removing, physical and legal barriers to return. Experience has shown that voluntary repatriation programs are likely to be less successful if housing and property issues are left unattended too long and, in particular, if returning refugees are not able to recover their houses and property. In the Conclusion adopted by UNHCR's Executive Committee in October 2004 it was recognised that:

in principle, all returning refugees should have the right to have restored to them or be compensated for any housing, land or property of which they were deprived in an illegal, discriminatory or arbitrary manner before or during exile; *notes* therefore, the potential need for fair and

¹ UNGA Resolution 428V, 14 December 1950, Article 2 (d).

effective restitution mechanisms, which also take into account the situation of secondary occupants of refugees' property; and also *notes* that where property cannot be restored, returning refugees should be justly and adequately compensated by the country of origin.²

UNHCR Field Offices in countries of origin and return have been encouraged to develop 'plans of action on housing and property restitution', which include supporting the establishment of legal aid centres 'to provide expert legal assistance to returnees seeking to invoke their rights to housing and property restitution,' and to 'take into account customary (traditional) structures for resolving disputes relating to housing, land and property issues, as and where appropriate.'³

A word about definitions

The terms 'housing,' 'land' and 'property' are used in this Guide as they are easier to understand than the terms 'moveable' and 'immoveable' property, which are often used in Afghan law. Housing and land rights can also have a broader meaning than property because many people who have been forced to flee from their homes or lands do not actually own them but nevertheless have a right to return to their places of habitual residence. Both housing and land rights are also more widely recognised in international law than property rights because they are so vital to people's economic, social and living conditions. This is also recognised in the Constitution adopted by Afghanistan in 2004, which contains separate protection for both property (contained in Article 40) and land and housing rights (contained in Article 14).

How to use this Guide

- The first chapter of this Guide provides an introduction to Afghanistan's constitutional and legal framework. It outlines the main provisions of the Constitution adopted in January 2004 and describes the protection afforded to property rights. It briefly describes the formal structure of Afghanistan's judicial system and the hierarchy of Afghan law. It also contains a description of the structure of the Special Property Disputes Resolution Court

² UNHCR Executive Committee Conclusion No. 101 (LV) 2004, 'On Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, 8 Oct 2004.

³ UNHCR Inter-Office Memorandum No. 104/2001, 28 November 2001.

- The second chapter places the issue of land and property rights in a historical context. The issue of land and property rights and land reform has been extremely controversial in Afghanistan's recent past and some explanation of this is necessary in order to explain some of the key challenges facing the current Government of Afghanistan.
- The third chapter outlines the legal basis of some of the policies of the present Government towards land and property rights. These include: restitution, property taxation, land acquisition and distribution, pastureland, rights of use, water rights, State appropriations, evictions and the role of urban master plans.
- The fourth chapter describes the laws regulating transfers of land and property between private individuals. Property disputes normally arise in the context of transfers of land or property or due to conflicting claims about ownership rights and this chapter outlines the regulations surrounding each of these transfers.
- The fifth chapter provides guidance about how to take a case related to property rights through the Afghan courts. It describes the process that should be followed to register a case and take it to court, the procedures that should be followed at the trial, forms of evidence and the burden of proof, and the appeals process. These procedures are largely regulated by the Afghan Civil Code and Civil Procedure Code.
- The sixth chapter discusses the significance of Afghan customary law and its relationship with State and religious law. The importance that customary law places on restorative justice is explained and some of the contradictions between customary law on one hand and State, religious and human rights law on the other are also discussed.
- The seventh chapter describes the protection given to land, housing and property rights under international law. Although this law is not directly applicable in Afghanistan's courts, it provides an important framework within which the courts should operate. As stated above, Afghanistan is constitutionally required to abide by the international human rights treaties that it has ratified.

- The eighth chapter provides guidance on how to use international human rights monitoring bodies to draw attention to particular violations of land, housing and property rights. It describes the different mechanisms that exist and the procedures that should be followed in each case. It also contains practical advice about submitting reports and complaints and useful points to remember.

Land, housing and property rights are primarily regulated by statutory decrees and by the Afghan Civil Code and Civil Procedure Code. While some criminal law and the Afghan Criminal Code may also be of relevance in some contexts, this area of law has largely been excluded from the scope of the Guide. Assembling and translating all of the applicable law is a huge task, given the current conditions prevailing in Afghanistan, but this Guide attempts to provide an accurate guide to the law relating to land, housing and property rights as of December 2004.

CHAPTER 1

1.0 Afghanistan's legal and judicial framework

This chapter provides an introduction to Afghanistan's constitutional and legal framework. It outlines the main provisions of the Constitution adopted in January 2004. It describes the protection afforded to property rights in this constitution and it briefly describes the formal structure of Afghanistan's judicial system. The Afghan judiciary has an important role to play in protecting land and property rights as they are simultaneously charged both with arbitrating in disputes and acting as officers of land administration. This chapter describes the hierarchy of Afghan law and the role of the State, *Sharia* and customary law in Afghanistan. It also contains a description of the structure of the Special Property Disputes Resolution Court.

1.1 Background to the legal system

The Constitution of the Islamic Republic of Afghanistan (2004 Constitution) was adopted by a *Loya Jirga* (Grand Assembly) in January 2004. This followed a United Nations-sponsored conference held in Bonn, Germany, after the fall of the *Taliban* in 2001. The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement) was signed on 5 December 2001.

The Bonn Agreement created a very general framework for governance in Afghanistan and established an Interim Authority, which would govern the country until an *Emergency Loya Jirga* could convene and select a Transitional Authority. In June 2002, the *Emergency Loya Jirga* met and established the Afghanistan Transitional Administration to govern the country until a new government is sworn in following national elections. Presidential elections took place in October 2004, and President Hamid Karzai was inaugurated on December 7 of that year. His new Cabinet was named shortly thereafter. Parliamentary elections will take place in September 2005.

The Bonn Agreement specified that a Judicial Commission be established to rebuild the domestic justice system in accordance with Islamic principles,

international standards, the rule of law and Afghan legal traditions.¹ It also laid down the framework for the laws and regulations to be used during the transitional period, indicating that the 1964 Constitution should be applied until the adoption of a new Constitution. The Bonn Agreement stated that existing laws and regulations could remain in force provided they were not inconsistent with the Bonn Agreement itself, the 1964 Constitution or the international legal treaties to which Afghanistan is a party.²

This was confirmed by a Presidential decree, dated 5 January 2002, by which the Interim Authority officially ordered the abolition of all ‘decrees, laws, edicts, regulations and mandates, which are inconsistent with the 1964 Constitution and the Bonn Agreement.’³ The Ministry of Justice was assigned responsibility to study all legal documents that were issued before this date and check them for consistency. Proposals for changes to the law should then be brought to the Government for approval.⁴ This did not mean that all laws issued during the *Taliban* or earlier regimes were abolished. Rather, only those laws deemed by the Ministry of Justice to be inconsistent with the 1964 Constitution and the Bonn Agreement were to have been abolished. A subsequent Presidential decree assigned the task of carrying out a ‘comprehensive program for reform of the law’ to the Judicial Reform Commission.⁵

The Bonn Agreement also envisaged the creation of an Afghan Independent Human Rights Commission (AIHRC),⁶ which was established by Presidential decree in June 2002.⁷ The 2004 Constitution solidified AIHRC's role as an independent, human rights institution for the country.⁸ The AIHRC's responsibilities include human rights monitoring, investigation of violations and the development of domestic human rights institutions. The AIHRC can also

¹ *The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, II Legal framework and judicial system, Article 2.*

² *ibid.*, Article 1.

³ Decree No. 66. Decree on the Abolishing of all decrees and legal documents enacted before 22 December 2001.

⁴ *ibid.*, Article 2.

⁵ Decree No. 153 Decree on the formation of a Judicial Reform Commission and its duties, 02 November 2002, Article 3.

⁶ Bonn Agreement, Section III, Interim Administration, Article 6.

⁷ Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, 6 June 2002.

⁸ 2004 Constitution, Article Fifty-eight.

refer persons whose fundamental rights have been violated, to legal authorities and assist in defending their rights.⁹

1.2 The 2004 Constitution of Afghanistan

The 2004 Constitution was adopted by a *Constitutional Loya Jirga* and then officially signed into law by President Hamid Karzai on 26 January 2004. Constitutions represent the most fundamental and basic law of a nation and are an agreement of the people on how they wish to be governed. A constitution is both the law behind the law, setting the basic framework for a country's judicial and legal systems, and the law above the law with which all other legislation and government action must comply. Laws and practices that are incompatible with the 2004 Constitution, as determined by the Supreme Court, are therefore, not valid.

1.2.1 The Government

The 2004 Constitution declares that Afghanistan is an Islamic Republic and a unitary and indivisible State.¹⁰ The President is the head of the State¹¹ and the Government consists of Ministers who are to be appointed by and work under the Chairmanship of the President¹² subject to the approval of the National Assembly.¹³ The National Assembly consists of two Houses: The *Wolesi Jirga* (House of the People) and the *Meshrano Jirga* (House of the Elders).¹⁴ Members of the *Wolesi Jirga* are to be chosen by the people through free, general, secret and direct elections.¹⁵ Two-thirds of the *Meshrano Jirga* members are elected by provincial and district bodies, with the remaining one-third appointed by the President from 'among experts and experienced personalities.'¹⁶ Half of these appointed members must be women.¹⁷ The 2004 Constitution also provides for the creation of a system of provincial, district and municipal government based on direct, democratic elections.

⁹ *ibid.*

¹⁰ 2004 Constitution, Article One.

¹¹ *ibid.*, Article Sixty.

¹² *ibid.*, Article Seventy-one.

¹³ *ibid.*, Article Sixty-four (11).

¹⁴ *ibid.*, Article Eighty-two.

¹⁵ *ibid.*, Article Eighty-three.

¹⁶ *ibid.*, Article Eighty-four.

¹⁷ *ibid.*

1.2.2 Human Rights

The State is constitutionally ‘obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.’¹⁸ The 2004 Constitution lays down the rights and duties of every Afghan citizen, which are broadly in line with international human rights obligations.¹⁹ It also specifies that the State shall abide by the United Nations Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights (UDHR).²⁰

The 2004 Constitution does not specify how the provisions of international treaties shall be enforced in domestic courts or how the courts should deal with situations in which domestic laws, or the Constitution itself, are in conflict with these treaties. It should be noted that the Presidential decrees referred to above did not specify that laws that are inconsistent with Afghanistan's international treaty obligations should be abolished. Judges should nevertheless interpret the law to the extent that it is within their discretion to do so, in ways that do not place Afghanistan in violation of its international treaty obligations. The relationship between national and international law and the particular protection given to land, housing and property rights under international law is discussed further in chapter seven of this Guide.

1.2.3 Islam and the 2004 Constitution

Afghanistan is constitutionally defined as an Islamic State. Unlike prior constitutions of Afghanistan, the 2004 Constitution makes Islam alone, not the *Hanafi* sect, the State religion. Followers of other religions are free to exercise their faith and perform their religious rites within the limits of the provisions of law, but ‘no law can be contrary to the beliefs and provisions of the sacred

¹⁸ 2004 Constitution Article Six.

¹⁹ *ibid*, Articles Twenty-two to Fifty-nine.

²⁰ *ibid*, Article Seven. Afghanistan has ratified the following international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC) including both Optional Protocols.

religion of Islam.²¹ In personal matters concerning the followers of the *Suni* and *Shia* sects of Islam, the courts shall apply religious jurisprudence: *Hanafi* and *Jafari* law. In cases where no provisions of the Constitution other laws apply, *Hanfi* law shall be applied to do justice.²² Where both sides of the case are followers of the *Shia* Sect, courts shall resolve the case according to the laws of this Sect.²³

1.3 The judicial system of Afghanistan

The judicial branch is an independent organ of the State of the Islamic Republic of Afghanistan.²⁴ The 2004 Constitution provides for a three-tiered, independent judiciary, consisting of the Supreme Court (*Stera Mahkama*), High Courts (Appeal Courts), and Primary Courts, whose structure and authority is determined by law. In the past, other specialized courts have also been created including among others, juvenile courts, labour courts, and land courts. Many of these courts were actually specialized *collegia* formed within the existing courts. An independent Special Property Disputes Resolution Court (the Special Property Court) was created by Presidential decree in 2003 to deal with property disputes concerning returnees and its structure is described later in this chapter.²⁵

The Supreme Court is the country's paramount judicial body.²⁶ It is composed of nine members who are appointed by the President with the approval of the *Wolesi Jirga* for a single-term period of ten years. The President names one of the nine members as the Head of the Supreme Court. Members cannot be dismissed from their service until the end of their term, except under exceptional circumstances.²⁷

The Supreme Court, on the request of the Government or the Courts, may review the compatibility of laws, decrees, inter-state treaties, and international covenants with the Constitution and has the authority to interpret the

²¹ 2004 Constitution, Articles Two and Three.

²² *ibid*, Article one hundred and thirty.

²³ *ibid*, Article One hundred and thirty-one.

²⁴ 2004 Constitution Article One hundred and sixteen.

²⁵ Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Disputes Resolution Court, Date: 1382/9/9 (30 November 2003).

²⁶ *ibid*.

²⁷ 2004 Constitution, Article One Hundred and seventeen.

Constitution, laws, and decrees.²⁸ Such opinions are not binding but simply advisory. Binding decisions can only be issued when an actual case is before a court in Afghanistan.

The Supreme Court also has an important function in supervising and administering the affairs of Afghanistan's judiciary. It is responsible for drawing up the budget of the judiciary, in consultation with the Government, and has sole responsibility for implementing this budget.²⁹ The Supreme Court also recommends judges for appointment, subject to Presidential approval, and it is responsible for the transfer, promotion, punishment, and proposal for retirement of judges and the general administration of judicial affairs.³⁰

The Ministry of Justice also contains a law department (the *Hoquq*), which has departments in each province and a number of districts. The *Hoquq* often conducts a preliminary investigation before a case is brought to court and is sometimes involved in mediating settlements. The procedures for bringing a case relating to land or property through Afghanistan's courts is described in greater detail in chapter five of this Guide.

1.3.1 Courtroom Procedures

The Constitution requires that all trials must be open and everyone may attend trials in accordance with the provisions of the law.³¹ Even in circumstances where it is deemed necessary by the applicable court to hold closed trials, the judgment must always be publicly proclaimed.³² The courts are bound to state in their judgment the reasons for their verdict, which should be based on the law. The enforcement of all final judgments of the courts is obligatory, except in the case of capital punishment, which is subject to the approval of the President.³³

1.3.2 Qualifications of Judges

The 2004 Constitution requires that Supreme Court members (a) not be less

²⁸ *ibid.* Article One Hundred and twenty one.

²⁹ *ibid.* Article One Hundred and twenty five.

³⁰ *ibid.* Article One Hundred and thirty two. See also Law of the Jurisdiction and Organization of the Courts of Afghanistan of (MuslimYear) 1346 (1967), Articles 80-118.

³¹ 2004 Constitution, Article One Hundred and twenty eight.

³² *ibid.* Neither the Constitution nor the laws of Afghanistan specify the manner in which such public proclamations should occur.

³³ *ibid.* Article One Hundred and twenty nine.

than forty years old at the time of their appointment, (b) be citizens of Afghanistan, (c) have higher education in law or in Islamic jurisprudence and 'enough' expertise and experience in Afghanistan's judicial system, (d) enjoy high ethics and a good reputation, (e) not have been convicted of crimes against humanity or other crimes nor have been sentenced by a court resulting in a deprivation of his or her civil rights and (f) not be a member of a political party while serving on the bench.³⁴ The 2004 Constitution does not address the qualifications of judges on the country's other courts, but current law requires that they also hold a degree in law or Islamic jurisprudence, be between the ages of 28 and 60 and have completed a one-year legal professional training course.³⁵

1.4 Hierarchy of law

The hierarchy of domestic law in Afghanistan is basically clear. The courts are required first to apply the provisions of the 2004 Constitution, which is paramount, and if no constitutional provision speaks directly to the case or controversy in question, then they shall look to applicable statutory law in rendering their decisions. Where no provisions in either the Constitution or other statutory laws for a case under consideration, the court shall follow *Sharia* using *Hanafi* jurisprudence within the provisions set forth in the Constitution to render a decision that secures justice in the best possible way.³⁶ If the issue is covered by the Constitution or statutory law, this takes precedence over *Sharia*.

State law (or statutory law, or national law) comprises both supreme law national constitutions and statutory law, such as laws pertaining to land, agriculture, environmental management, housing and taxation. The first statutes were issued by King Abdur Rahman who also laid the foundations of the modern court system at the end of the 19th Century. His grandson King Amanullah, who ruled Afghanistan from 1919-1929, produced a Guide Book for Judges and also drafted Afghanistan's first Constitution in 1923, as well as a body of laws. The system of law-making has largely survived intact and since

³⁴ 2004 Constitution, Article One Hundred and eighteen.

³⁵ 1967 Courts Law. Note again that discrepancies between the 2004 Constitution and the 1967 Courts Law will probably result in a new law on the organization of courts soon being issued, which may change the requirements all judges in Afghanistan must meet. One reason for this presumption is that while the 1964 Constitution of Afghanistan provided for a maximum age of Supreme Court members, the 2004 Constitution does not. Similarly, age qualifications for other judges may also change.

³⁶ 2004 Constitution, Article One Hundred and thirty.

1964, all new laws have been published in an official gazette.³⁷ Laws published in the Official Gazette (published monthly) are required to be in both Dari and Pashto, and a lack of qualified translators makes the publication process slower than it otherwise could be.

Afghanistan's Civil and Penal Codes were formalized in 1977 and consist of a series of books and chapters of selected Islamic jurisprudence assembled into two separate volumes. Although the Codes were published during the First Republic in the 1970s, most of the work in compiling them was carried out over the previous decade. The Civil and Penal Codes are considered a basic handbook by judges and most courts have access to copies, despite a severe shortage of other legal texts.³⁸

The Civil Code contains the most detailed provisions with respect to land and property rights.³⁹ It consists of 2,416 Articles and is divided into a series of topics. These include: the legal definition of a person, civil status, residence, citizenship, family, marriage, children's rights and child care, wills and inheritance, endowments, the formation of companies, charitable associations and other institutions, contracts, fraud, compensation, loans, deposits, credit and debt, ownership documents and other forms of proof, transfers of ownership, including sales, rental agreements, leasing and donations, labour law and work regulations, insurance, bail, mortgages, and land and property rights.

The section on property rights is the largest single topic in the Civil Code and ranges from guidance on the handling of contracts and mortgages to rights of possession, severing of joint rights, inheritance and marriage rights and procedures for leasing, purchase, renting and sale of property.⁴⁰ The Code distinguishes between 'moveable property' such as money, livestock and equipment and 'immoveable property' such as land, houses and commercial buildings.

The Civil Code takes precedence to religious jurisprudence and 'in cases where the law has a provision, the practice of religious jurisprudence is not

³⁷ Rob Hager Foreword to Compiled Translations of the Laws of Afghanistan, UNDP, Kabul, 1975.

³⁸ Rob Hager, *Detailed Report - Badakhshan Mission*, for Afghan Research and Evaluation Unit and the World Bank, April 2003.

³⁹ The Civil Law of the Republic of Afghanistan, Kabul, Afghanistan, 1977.

⁴⁰ *ibid.*, Articles 1554-2416.

permitted.’⁴¹ Where there is no provision in the Constitution or statutory law, then ‘the court shall issue a verdict in accordance with the fundamental principles of *Hanafi* jurisprudence of Islamic *Sharia* to secure justice in the best possible way.’⁴² If there is no provision either in State law or in *Sharia* then the courts may rely on customary law, ‘provided the convention does not contradict the provisions of the law or principles of justice.’⁴³ The Code further states that: ‘What is proved by time, until no reason to the contrary exists, shall be valid.’⁴⁴ The role and nature of Afghan customary law is discussed further in chapter six of this Guide.

However, the Afghan Civil Code is largely based on *Sharia* so the issue of which takes precedence is rarely a pressing one. Although Afghan civil law and Islamic law are not completely interchangeable they overlap to a very considerable extent.

The role of *Sharia* law in relation to immovable property rights was explicitly recognized in the 1923⁴⁵ and 1931⁴⁶ Constitutions and again in 1987⁴⁷ and 1990.⁴⁸ Under the *Taliban*, *Sharia* was made the only source of law. In practice, the close links between the Afghan Civil Code and Islamic jurisprudence means that the courts have continued to deal with most land and property issues in a similar way despite frequent and violent changes of governments, land policies and constitutions in Afghanistan's recent history.

As one expert has noted, ‘because the law of Afghanistan is, thus, for the most part, either the traditional Islamic law or an indigenous product, it is a system somewhat unique in the world. Unlike most of the other Islamic and non-Western countries, Afghanistan never came under the political and juridical dominance of any European power. Accordingly, its sources have remained purely Islamic and where foreign models have been used they have, with the

⁴¹ *ibid.*, Article 1.1

⁴² *ibid.*, Article 1.2.

⁴³ *ibid.*, Article 2.

⁴⁴ *ibid.*, Article 3.

⁴⁵ 1923 Constitution, Article 21.

⁴⁶ 1931 Constitution, Article 16.

⁴⁷ 1987 Constitution, Article 29.

⁴⁸ 1990 Constitution, Article 67.

major exception of the Commercial Code, normally been molded to the Afghan context.⁴⁹

1.5 Land and property in Afghanistan's Constitution

Article forty of Afghanistan's 2004 Constitution specifies that:

Property is immune from invasion.

No person shall be forbidden from acquiring and making use of a property except within the limits of law.

No person's property shall be confiscated except within the provisions of law and the order of an authorized court.

Acquisition of personal property is permitted only for securing public interest, in return for prior and just compensation according to law.

Inspection and disclosure of private property shall be carried out only in accordance with the provisions of law.

This provision is in line with Afghanistan's obligations under international law and is supported by a number of other constitutional provisions. These include: a prohibition of any kind of discrimination and guaranteed equality before the law;⁵⁰ a guaranteed right to privacy and the prohibition of 'search-and-entry' without a warrant;⁵¹ the rights to liberty and a fair trial;⁵² and the prohibition on torture and other forms of ill treatment or compulsion.⁵³ Crime is a personal action and no one can be imprisoned or punished for the crimes of someone else.⁵⁴ The ways and means of recovering a debt must be specified in the law and no one can be imprisoned or deprived of his or her liberty simply for being in debt.⁵⁵ Every Afghan is entitled to travel within the territory of his State and settle anywhere except in areas prohibited by the law. Similarly, every Afghan has a right to travel outside of Afghanistan and to return to Afghanistan according to

⁴⁹ *Rob Hager Foreword to Compiled Translations of the Laws of Afghanistan*, UNDP, Kabul, 1975.

⁵⁰ 2004 Constitution, Article Twenty-two.

⁵¹ *ibid.*, Article Thirty-eight.

⁵² *ibid.*, Articles Twenty-Four, Twenty-five, Twenty-six, Twenty-seven and Thirty-one.

⁵³ *ibid.*, Articles Twenty-nine and Thirty.

⁵⁴ *ibid.*, Articles Twenty-six and Twenty-seven.

⁵⁵ *ibid.*, Article Thirty-two.

the provisions of the law.⁵⁶ Foreigners do not have the right to own immovable property in Afghanistan, but may lease it.⁵⁷

Article fourteen of the Constitution also specifies that:

The state shall design and implement within its financial resources effective programs for development of agriculture and animal husbandry, improving the economic, social and living conditions of farmers and herders, and the settlement and living conditions of nomads.

The state shall adopt necessary measures for housing and the distribution of public estates to deserving citizens in accordance within its financial resources and the law.

International treaties to which Afghanistan is a party, particularly the International Covenant on Civil and Political Rights⁵⁸ and the International Covenant on Social Economic and Cultural Rights,⁵⁹ provide considerable formal protection to Afghans against the forceful or wrongful eviction from, or deprivation of, their property and a legal right to obtain its restitution.

In practical terms, these legal provisions mean that all Afghan citizens are permitted to acquire and make use of property within the limits of the law and are protected from arbitrary or unlawful interference with their privacy and home. No one can be arbitrarily or unlawfully deprived of his or her property. The State is also obliged to protect individuals against the arbitrary deprivation of their property, to restore property to its rightful owners where they have suffered a wrongful deprivation, or to compensate them for any loss suffered. While the State can, under certain specified circumstances, deprive individuals of their property, or control its use, the interference must be lawful and a fair balance must be struck between the interest of the general community and the right of the individual property owner. The reason for the interference must be

⁵⁶ *ibid.*, Article Thirty-nine.

⁵⁷ *ibid.*, Articles Forty-one and Forty-two.

⁵⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976. Ratified by Afghanistan April 1983.

⁵⁹ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. Ratified by Afghanistan April 1983.

specified and it must be proportionate to this legitimate aim. Where an interference takes place, the individual concerned has the right to a fair and public hearing and to prior and just compensation. Any commitments or statements relating to property ownership or transactions that were made under duress are null and void.

The courts in Afghanistan are legally obliged to protect property rights and the implementation of the law is one of the basic duties of the State.⁶⁰ Practices that violate these rights must be declared illegal by the courts even if they are based on Afghan customary or religious law.

1.6 The role of the judiciary in upholding land and property rights

Responsibility for the administration of land and property matters in Afghanistan is divided between the Ministry of Agriculture (*Imlak* Department) and the municipal authorities. The judiciary also plays an important role in issuing and validating title documents and maintaining land ownership records. This means that judges in Afghanistan have a dual role with respect to land and property rights. They are charged both with arbitrating disputes, either between private individuals or between individuals and the State, and acting as officers of land administration. This requires an understanding of Afghanistan's *Sharia*-based civil law, the statutory law and the overall strategy of the central Government towards land and property rights.

The basic role of judges is to uphold national law, including international law when it has been incorporated into domestic legislation, and to preside independently and impartially over the administration of justice. In weighing the merits of competing claims in civil cases, judges must refer only to the established facts, the merits of each party's position and the relevant law. They must also ensure that their court proceedings are managed in a way that is fair and is seen to be fair.

Current perceptions, in the international community and among many ordinary Afghans are that the courts sometimes fall short of judicial standards. Afghan law requires all judges to hold a degree from either the Faculty of Law or the Faculty of *Sharia*, to have completed the one-year legal professional training and be aged

⁶⁰ 2004 Constitution, Article Five.

between 28 and 60.⁶¹ However, there is evidence that many sitting judges do not hold the necessary qualifications and have exceeded the specified age limit.⁶² A report compiled by the UN Assistance Mission to Afghanistan (UNAMA) in 2004 stated that only a third of prosecutors and judges are educated at university levels and that over half of the judicial staff working in Kabul have no official legal training.⁶³ Many Afghan judges graduated from religious schools and do not have formal legal training.

A second major impediment to the judiciary carrying out its duties in a just manner is the lack of material resources available in courtrooms throughout the country. Many courts lack even basic legal texts, including the Civil Code of 1977, Civil Procedure Code of 1990, Penal Code of 1977 and the Interim Criminal Procedure Code of 2003. As a result, decisions are often issued with judges unable to cite the correct provisions of the Constitution or statutory law, instead relying on their own memory of what the law says or their own conceptions of justice, which are often based on customary practices.⁶⁴ While such decisions may sometimes be fair to the parties involved, they may also contravene Afghanistan's formal legal system if following the applicable constitutional or statutory provisions would have resulted in a different decision.

A third problem facing the judiciary is that the current status of many of these laws is extremely confused. Frequent forcible regime changes over the last 30 years have led to great legal instability and confusion as new governments have frequently repealed or annulled the laws of their predecessors. This has particularly been the case with respect of land and property rights, as different regimes have pursued markedly different policies in relation to land reform. This issue is discussed further in chapter two of this Guide.

1.7 The Special Property Disputes Resolution Court

The Special Property Disputes Resolution Court (Special Court) was first

⁶¹ Law of the Jurisdiction and Organization of the Courts of Afghanistan of (Muslim Year) 1346 (1967), Article, 75.

⁶² Dr. Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, The International Commission of Jurists, November 2002.

⁶³ *Human Security and Livelihoods of Rural Afghans 2002-2003, A report for the United States Agency for International Development*, Feinstein International Famine Center, TUFTS University, June 2004.

⁶⁴ Dr. Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, The International Commission of Jurists, November 2002.

established in August 2002, as a single-tier court located within the framework of the Supreme Court.⁶⁵ A subsequent decree modified its structure in November 2003, abolishing a Special Dispute Resolution Commission, establishing an appeal court and a second court to deal with cases outside Kabul, increasing the number of judges, and imposing deadlines for the completion of cases.⁶⁶ This decree provided for a larger number of judges than the first special court had, and deadlines for the completion of cases were imposed.⁶⁷ In February 2004, another decree was issued, allowing anyone who was dissatisfied with a judgment of the Special Court to have their cases reopened if they obtain the permission from the Supreme Court and the Office of the President.⁶⁸

The Special Court is tasked with ‘looking after returned refugees in Afghanistan and addressing their complaints, as to hasten the process of resolving property disputes.’⁶⁹ Property or real estate is defined as including: ‘land, residential areas, apartments, shops, *Mendavi* (market) and other immovable properties.’⁷⁰ Property disputes covered under the decree are limited to those which took place in the absence of the owners from the date 7th *Saur* 1357 (27 April 1978).⁷¹ Cases may be brought either directly by the parties to a dispute or through a referral by ‘relevant governmental authorities.’⁷² Cases involving the Government may not be heard before the Special Court and must be ‘reviewed in accordance with relevant laws and with the authority of the relevant court.’⁷³

The Court consists of two levels: a primary court, which is itself divided into two courts, and an appeal court. One of the primary courts focuses on cases located in Kabul Province, while the other deals with the rest of Afghanistan. Both of these courts are located in Kabul, but the court dealing with cases outside Kabul may, with the permission of the Chief Justice of the Supreme

⁶⁵ Decree 136 Presidential Decree on the Establishment of Land & Property Disputes Court, Circular Letter No. 4035 dated 19.6.1381.

⁶⁶ Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Disputes Resolution Court, Date: 1382/9/9 or 30 November 2003.

⁶⁷ *ibid.*

⁶⁸ Decree 112, February 2004.

⁶⁹ Decree 89, Article 1.

⁷⁰ *ibid.*, Article 5.

⁷¹ *ibid.*, Article 6.

⁷² *ibid.*, Article 10.

⁷³ *ibid.*, Article 11.

Court, travel to the provinces to hear certain of these cases. The Court at the appellate level (*Mahkamae Nehayee*) may review cases heard at the primary level by either court.⁷⁴ Subsequent appeals can also be made to a Revision Committee of Afghanistan's Supreme Court.⁷⁵

The decree establishing the Special Court specifies that the appellate court shall consist of three judges from among the members of Afghanistan's Supreme Court.⁷⁶ Three separate judges are appointed to a Revision Committee within the Supreme Court.⁷⁷ The number of judges in the primary court is not specified, but they shall be appointed on the recommendation of the Chief of the Supreme Court with the approval of the President.⁷⁸

The Special Court's primary court (both for cases in Kabul Province and for cases outside Kabul Province) is obliged to decide on all filed cases within two months from the date of being filed. The Court's appellate court (*Makamae Nehayee*) is obliged to decide on all filed cases within one month. The two-month deadline in for the primary court may be extended by up to ten days in special and exceptional situations (i.e. complicated cases). The Revision Committee shall review submitted cases within a one-month period after receiving the President's decision on submitted cases.⁷⁹ It is obliged to report on the implementation of decisions made by the Office of the President.⁸⁰

Judgments and decisions of the appellate court are generally final and enforceable, with both parties and the relevant authorities obliged to ensure their implementation.⁸¹ The Ministry of Interior is specifically obliged to implement the final judgments and decisions of the Court, whether at the primary, appellate or highest level. Other relevant governmental authorities are obliged to implement decree 89 and to cooperate with the Special Court.⁸²

⁷⁴ *ibid.*, Article 2.

⁷⁵ *ibid.*, Article 3.

⁷⁶ *ibid.*, Article 4(2).

⁷⁷ *ibid.*, Article 4(3).

⁷⁸ *ibid.*, Article 4(1).

⁷⁹ *ibid.*, Article 7.

⁸⁰ *ibid.*, Article 13.

⁸¹ *ibid.*, Article 12.

⁸² *ibid.*, Article 14.

Possession of property based on forged documents is illegal and the ownership of such property shall belong to the entitled person as based on the final decision of the Court. The cost of producing any new deeds and other related expenditures may be charged to the forger in accordance with the provisions of law. Compensation from the date of illegal possession or occupation until the date of the Court's order for the actual owner to recover such property shall be payable from the illegal possessor or occupier to the actual owner.⁸³

It should be noted that the Special Court does not have exclusive jurisdiction over land and property cases involving refugees and returnees. Its creation does not prevent other courts at the district and provincial levels from continuing to deal with such cases if the returnees are willing to submit them. It also does not prevent the settlement of such disputes through Afghan customary law.

⁸³ *ibid.*, Article 9.

C H A P T E R 2

2.0 Land and property rights in Afghanistan: key challenges

This chapter places the issue of land and property rights in Afghanistan in a historical context and discusses the various policies that have been pursued by its different governments. The issue of land and property rights and land reform has been extremely controversial in Afghanistan's recent past and some explanation of this is necessary in order to place the policies of the present Government of Afghanistan in context. It is particularly important to understand the various attempts that have been made to create a national land registry and the various types of documents that are currently used to prove ownership of land and property. Both of these issues are vital for the establishment of a nationwide system of land tenure.

This chapter also discusses two other key issues facing the current Government: the development of a land allocation policy and the role of urban master plans. These are extremely difficult challenges given the devastation caused by years of war, the rapid return of so many refugees, grave shortages of land and the lack of capacity of the existing institutions of law and order to manage land rights in a fair and equitable manner. An understanding of this background is important in order to explain some specific laws relating to land and property rights and transfers of land and property between private individuals, which are discussed in more detail in chapters three and four of this Guide.

2.1 Historical context

Historically, private property enjoyed little formal protection and a person could have all of his or her land and possessions confiscated by the King if he or she was subject to banishment from the country. Even today, a court can order the confiscation of private property as a punishment for some offences under the Afghan Penal Code. Nevertheless, the right to property was guaranteed by Afghanistan's first Constitution in 1923 and this was restated in the 1931, 1964 and 1977 Constitutions.

According to the 1923 Constitution:

In Afghanistan everyone's real and personal property in his possession is protected. If real property is required by the government for a public purpose then in accordance with the provisions of a special law, first the price of the property shall be paid and then it may be expropriated.¹

Land disputes will be decided in accordance with both *Sharia* and the general civil and criminal state law codes.²

Expropriation without compensation of property (and forced labour) may be undertaken in times of war.³

Nothing shall be taken from anybody in violation of laws.⁴

The 1931 Constitution re-stated the protections contained in Article 19 and 26 of the first Constitution and also added a prohibition of search and entry without a warrant.⁵ Confiscation of property was forbidden except during a war or state of emergency or 'for those who stay abroad and indulge in movements and propaganda against the government.'⁶

The 1964 Constitution expanded these protections further, although it also permitted the confiscation of property during a state of emergency.⁷ It specified that:

A person's residence is inviolable. No one, including the State can enter or search a residence without the permission of the resident or on the orders of a competent court and in accordance with the conditions and procedures specified by the law.⁸

Property is inviolable. No one's property can be confiscated except in accordance with the provision of the law and the decision of a competent

¹ 1923 Constitution, Article 20.

² *ibid.*, Article 21.

³ *ibid.*, Article 22.

⁴ *ibid.*, Article 26.

⁵ 1931 Constitution, Article 16.

⁶ *ibid.*, Article 17.

⁷ 1964 Constitution, Article 115.

⁸ 1964 Constitution, Article 28.

court. Expropriation is allowed only for securing public interest against an advance equitable compensation in accordance with the provisions of the law. No one shall be prohibited from acquiring property and exercising the right of ownership of the same, within the limitations of the law. The way of utilising property shall be regulated and guided by the law for securing the public interest. Investigations and declarations of a person's property may only be made in accordance with the provisions of the law.⁹

The 1977 Constitution, maintained Article 28 of the 1964 Constitution, but added the following clause: 'The ways of utilising property shall be regulated and guided by the law for the purpose of ensuring the interests of the public.'¹⁰

All four constitutions provided that compensation should be paid when property is appropriated. In practice, however, successive governments continued to appropriate private land to favour ethnic groups and to encourage large-scale development projects.¹¹ The former policy was used by Afghanistan's early rulers as a means of extending their control throughout the country by settling Pashtun colonists in areas where other ethnic groups predominated whose loyalty was considered to be suspect. The latter policy became increasingly important from the 1930s onwards as governments initiated the construction of dams and irrigation canals in an attempt to 'green the desert.' Both policies were only partially successful, but both involved the expropriation of much land from its indigenous inhabitants.¹²

A statutory law was enacted in 1935 concerning the circumstances and conditions in which private land could be appropriated by the Government, which contained the catch-all phrase that this included 'all other projects that benefit the public in general.'¹³ An attempt was also made in the mid-1960s to survey and register land ownership and to issue official title deeds certifying

⁹ *ibid.*, Article 29.

¹⁰ 1977 Constitution, Article 35.

¹¹ *ibid.*

¹² Liz Alden Wiley, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

¹³ Land Appropriation for Public Welfare 1935, Article 2.

ownership.¹⁴ This policy proved extremely costly and achieved only mixed results. It was formally abandoned when the communists seized power in 1978.

Nevertheless a registration system was created and a set of Books of Ownership covering about a third of all landholdings and a fifth of the total arable land in the country were produced.¹⁵ Property has been taxed in Afghanistan since the 1880s, and records for the taxes paid between 1930 and 1958 are still maintained intact in the Ministry of Finance archives.¹⁶ Both the registration books and tax receipts have subsequently been used by people to confirm their ownership of land. The State also continued to grant land to people during this period through Royal or Presidential decrees, and these documents have also subsequently been used by people in order to prove their ownership of a particular piece of land.

The 1970s and 1980s witnessed a land reform policy that was started by President Daoud and then accelerated by the communists. President Daoud's First Republican Constitution of 1977 limited the right to land ownership to the provisions of a Land Reform Law and stated that: 'Private property and enterprises, based on the principle of non-exploitation, shall be regulated by Law.'¹⁷ The Constitution further stated that:

'No person's property shall be confiscated without the provision of the law and the decision of a competent court. The expropriation of private property is permitted only by virtue of the law for the purpose of ensuring the interest of the public and in exchange for just compensation. No person shall be prohibited from acquiring property and exercising the right of ownership therein, except within the limits of the law. The ways of utilising property shall be regulated and guided by the law for the purpose of ensuring the interests of the public.'¹⁸

¹⁴ See Liz Alden Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research & Evaluation Unit, Kabul, February 2004.

¹⁵ Liz Alden Wily, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

¹⁶ Liz Alden Wily, *Putting Rural Land Registration in Perspective: the Afghanistan Case*, Afghan Research and Evaluation Unit, Kabul, April 2004.

¹⁷ 1977 Constitution, Articles 14 and 15.

¹⁸ *ibid.*, Article 35.

Resources such as mines, forests, and large energy industries, communications, important air and surface transport ...are part of the nation's property and their administration shall belong to the State.¹⁹

The Land Reform Law imposed a ceiling on land ownership of 20 hectares of irrigated land, 20 hectares of gardens and 40 hectares of rain-fed land. Any excess land was to be purchased and redistributed. Compensation for excess land was to be paid to the owner over 25 years with two percent interest.²⁰ In addition, improvements to the property such as vines or structures were to be paid for.²¹ Priority groups for distribution included landless farmers in the local area, followed by landless nomads and then by other farmers and graduates from agricultural and husbandry schools.²² The new owners were to pay for the land in installments at three percent interest.²³

The farm could not be transferred, sold, mortgaged or subdivided until the full payment had been made and a final certificate of title was issued.²⁴ If the new owner did not use the land within six months, or if he took a job, the land was to revert to the Government.²⁵ A special Council of Ministers was to be established to devise guidelines and draft regulations. A special High Court on land reform was to be formed as the final arbiter of disputes.²⁶

In practice the reform process was slow and little land was actually purchased. When the Communist Party (PDPA) seized power in 1978 they imposed a sharp reduction in the land holding ceiling. No one was allowed to own more than 30 *Jeribs* of land and any excess was to be expropriated without compensation.²⁷ Failure to register land would result in its confiscation and those who destroyed their land, or other property, faced heavy fines or imprisonment.²⁸ The 1980 Constitution made it clear that private ownership would be limited and subject to government control:

¹⁹ *Ibid.*, Article 13.

²⁰ Land Reform Law 1975, Article 10.

²¹ *Ibid.*, Article 5.

²² *Ibid.*, Articles 12-13.

²³ *Ibid.*, Articles 16 and 22.

²⁴ *Ibid.*

²⁵ *Ibid.*, Articles 18 and 42.

²⁶ *Ibid.*, Article 28.

²⁷ Land Reform Decree No. 8 1980, Article 3 and 9.

²⁸ *Ibid.*, Articles 31, 32 and 33.

Ownership exists in the Democratic Republic of Afghanistan in the form of public property, which is shared by all, cooperative and private ownership. The state preserves and protects all forms of ownership. Underground resources, other national resources, energy resources, banks, insurance organisations, major means of production in heavy industries, communications installations and radio and television stations belong to the state. People's property enjoys special protection.²⁹

The government respects and guarantees ownership of the peasants and other land holders over land according to the provisions of law. The government will adopt measures to implement democratic changes in agriculture in the interest of vast masses of peasants with their active participation.³⁰

The government will guarantee for the nomad tribes and livestock breeders vast opportunities to use pastures free of charge on an equitable basis and guarantees for the nomads the right of unhindered passage over national territories.³¹

The government will preserve and protect private ownership according to law. Using private property contrary to the interests of society and people is not permitted. The government guarantees private property of Afghan nationals obtained through legal means. Inheritance rights in connection with private property will be defined and guaranteed by law. Expropriation of property against payment in accord with social justice and law is permissible.³²

These policies provoked a considerable backlash and were a significant factor in the subsequent revolt against the regime. The attempted land reform policy, which had never really been implemented in much of the country, was abandoned by President Najibullah in 1987 and the right to private property was restored in a new Constitution.³³ Presidential decrees stated that compensation

²⁹ 1980 Constitution, Article 19.

³⁰ *ibid.*, Article 20.

³¹ *ibid.*, Article 22.

³² *ibid.*, Article 17.

³³ 1987 Constitution, Articles 29 and 30.

would be paid for any seized land that could not be returned to its original owners.³⁴

In 1992 the *Mujahedin* seized Kabul and President Rabbani drafted a new Constitution, proclaiming Afghanistan to be an Islamic State. The new Constitution also guaranteed the right to private property,³⁵ but this provided little protection in the anarchy that followed as Afghanistan descended into civil war. Many people were driven from their land or coerced into handing over their property deeds or ownership documents. Popular revulsion against this state of lawlessness helped to pave the way for the rise of the *Taliban* who captured Kabul in 1996.

The *Taliban* dispensed with the Constitution and the civil law and created 'Islamic courts' which were to apply *Sharia* directly. The *Taliban* carried out a number of illegal land seizures and massacres in many parts of the country and hundreds of thousands of people were forced to flee from their homes. However, a series of edicts and decrees also attempted to bring some order to the extremely chaotic state of land relations that existed and to restore ownership to its pre-revolutionary times.³⁶ This broadly remains the policy of the current Government of Afghanistan and some of the more recent decrees are discussed in detail in chapter three of this Guide.

2.2 Land registration

Determining the ownership of land has been seen as a key task for successive governments of Afghanistan and attempts to develop a national land registry have been pursued over several decades, despite the interruptions of revolution, war and foreign invasion. The most ambitious attempt to establish a register of land ownership was carried out by the Land Survey and Statistics Law of 1965, which created a Department for Cadastral Survey to conduct a nationwide land

³⁴ For example, Decree on Selling of Apartments. Gazette Issue 668, 31.3.1367 (21 June 1989) Decree on Exemption of Tax penalty on Farmers and The Owner of the Land, Gazette Issue 679, 15.9.1367 (6 December 1989) Decree on the Return of Properties of the Returnees, Which are Under the Control of Government, Gazette Issue 715, 15.2.1369 (5 May 1991) Decree to Return Houses, Apartments, which are Under the Control of Government to the Owners, Gazette Issue 725, 1.7.1369 (23 October 1991).

³⁵ 1992 Constitution, Articles 48, 65, 67 and 74.

³⁶ For example, Law on Land, Decree No. 837; Law on Land under Decree No. 57, *Taliban* Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000; Expropriation Land Law, Official Gazette 794 - September 2000.

survey.³⁷ The aim of this survey was to ‘acquire land statistics of the country, to maintain a land register and to organize tax affairs.’³⁸ Tax declaration forms were distributed to all landowners who were required to complete them in quadruplicate. They were attested by witnesses and by the chief of the village and returned them to a declaration office, which would issue a receipt.³⁹

The Cadastral Survey Department was established to create a listing of all properties based on surveys and maps. The register included the coordinates of each property and its ownership and legal status. Mobile teams were sent around the country to survey ‘all useable land in Afghanistan whether it is of private or public ownership.’⁴⁰ Owners were to be personally questioned wherever possible, or else information was to be obtained from neighbours and village leaders.⁴¹ Ownership documents were only accepted if 10 villagers or close neighbours testified to their authenticity.⁴² Information about the lots and their claimants was to be made public ‘for at least three days’⁴³ and where no disputes arose, certificates of title would be printed and issued to the registered owner. Disputes would be referred to a land registration court.⁴⁴ The records established by this process would cancel all prior documents relating to the land.⁴⁵

The system was designed to bring together the civil, religious and customary legal framework governing landholding norms into a single State-controlled framework. It was also hoped that by achieving greater certainty about land ownership the system would make it easier for land-owners to use their land as collateral for loans.⁴⁶ Some redistribution was envisaged as the law created a Committee of Assessors whose role was to decide whether any land should be declared ‘excess’ of the amount ‘allowable for private ownership.’⁴⁷

³⁷ Land Survey and Statistics Law 1965, Articles 13 - 17.

³⁸ *ibid.*, Article 1.

³⁹ *ibid.*, Articles 1-4.

⁴⁰ Land Survey and Statistics Law 1965, Article 13.

⁴¹ *ibid.*, Article 14.

⁴² *ibid.*, Articles 32 and 43.

⁴³ *ibid.*, Article 19.

⁴⁴ *ibid.*, Article 20.

⁴⁵ *ibid.*, Article 15.

⁴⁶ Liz Alden Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research & Evaluation Unit, Kabul, February 2004.

⁴⁷ Land Survey and Statistics Law 1965, Article 47.

Landowners would be permitted to determine from which part of their land any excess should be taken.⁴⁸

A subsequent decree, The Law Concerning Land Survey and Registration of Settlement Survey,⁴⁹ was enacted under President Daoud's Government in order to prevent large land owners from selling off land in excess of the new 'land ceilings' that his Government had introduced.⁵⁰ The decree attempted to prevent private sales taking place without official permission and sought again to determine the precise boundaries of all public and private land in Afghanistan. A Law on Progressive Taxation was introduced in 1975, which categorised land holdings according to their size and introduced a progressive taxation scale.⁵¹ After the Communist Party (PDPA) came to power, they also attempted to register all land in the country in order to redistribute larger land holdings. The Land Reform decree of 1980 specified that anyone who failed to register his or her land would have it confiscated by the State.⁵²

The outbreak of war and the Soviet invasion in 1979 brought a halt to the attempts to create a national land registry, and even the collection of nationwide taxes was abandoned.⁵³ Order was restored to some parts of the country under the *Taliban* the Government also adopted a policy aimed at categorising land and classifying its ownership.

The Law on Land, introduced in 2000, created Commissions for Clarification, which consisted of Provincial Governors and regional officials operating under the overall authority of the Department of Land Classification in the Ministry of Agriculture.⁵⁴ They were charged with working with the courts and relevant authorities in order to:

⁴⁸ *ibid.*, Article 51.

⁴⁹ The Law Concerning Land Survey and Registration of Settlement Survey 1976 (1355).

⁵⁰ Land Reform Law 1975.

⁵¹ Law on Progressive Taxation 1975 (1355)

⁵² Land Reform Decree No. 8 1980, Article 31.

⁵³ Liz Alden Wiley, *Putting Rural Land Registration in Perspective: the Afghanistan Case*, Afghan Research and Evaluation Unit, Kabul, April 2004.

⁵⁴ Law on Land under Decree No. 57, *Taliban* Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000, Articles 20 and 21.

- Register land and legal documents
- Categorise farmland areas
- Define boundaries between private lands
- Determine what constituted government-owned land, common lands, religious lands and barren lands
- Restore land that had been confiscated to its original owners
- Refer disputes to the courts
- Distribute ownership documents and land to eligible applicants.⁵⁵

The Cadastral Survey Department was mandated to furnish these Commissions with relevant information⁵⁶ and property owners were legally obliged to cooperate with the Commissions.⁵⁷ This Law also provided for the return of private land that had been confiscated after 1978⁵⁸ and for the distribution of government-owned land to eligible applicants.⁵⁹ A separate law specified the circumstances under which the Government could expropriate land.⁶⁰

It can be seen from the above that the policy of attempting to establish a national land register has been pursued by successive governments of Afghanistan. The original attempt to produce such a register in the 1960s was never completed due to the costs involved. Only about a third of all landholdings and a fifth of the total arable land in the country were surveyed and no title deeds were ever issued.⁶¹ In an effort to cut costs and speed up the process, the authorities abandoned the establishment of a cadastral-based register and instead relied on a 'self-reporting' system in which owners of land, or government-appointed representatives were asked to declare the size of their holdings. While this made it impossible to produce the land maps with detailed coordinates that had

⁵⁵ *ibid.*, Article 16.

⁵⁶ *ibid.*, Article 17.

⁵⁷ *ibid.*, Article 19.

⁵⁸ *ibid.*, Articles 31 - 35.

⁵⁹ *ibid.*, Articles 36 - 100.

⁶⁰ Expropriation Land Law, Official Gazette 794, September 2000.

⁶¹ Liz Alden Wilely, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

originally been envisaged, one expert has questioned the utility of such a process in a country like Afghanistan.

Most farm boundaries are visible, stable and permanently marked, and those that are less well marked, such as rain-fed farms, are known by those to whom it matters - the owner, neighbours and community members who may be called upon to determine whether or not the boundary has been moved . . . Falling back on traditional descriptions of boundaries and using neighbours and local leaders as witnesses seems commonsense. What is lost is accuracy in the measured size of the plot, but this is relevant to taxation only where the bands of tax grades are so close that a difference of one *jerib* makes a difference to the tax amount owed.⁶²

Given that many disputes over land between neighbours and family members take place over the precise borders of very small plots or farms, a detailed national land registry will only ever be of limited use as the margin of error of the map readings may be greater than the disputed land in question. There are currently a variety of official documents that can be used to prove ownership of land and property, including the Books of Ownership and Taxation produced during the first nationwide registration process. However, official documents and records are not likely to be considered a wholly reliable guide in the near future and most Afghan judges and public officials will continue to rely heavily on the oral testimony of witnesses when trying to settle disputes. The procedures used, which are contained in civil and customary law, are described in chapters five and six of this Guide.

2.3 Proof of ownership documents

The multiplicity of ownership documents that exist is partly a consequence of Afghanistan's plural legal system, in which State, civil, religious and customary law often overlap. It is also due to the different land reform policies pursued by different regimes, the unreliability of the official records system and the absence of a rule of law for much of this period. Over the last 25 years, for example, a piece of private land could have been compulsorily purchased, expropriated or re-designated as belonging to the Government, granted to another individual

⁶² *ibid.*

through a statutory decree, privately transacted between different individuals using official or customary documents, abandoned by its owner, illegally occupied by another party, or sold, leased, exchanged, gifted, inherited, or otherwise transferred on to others. Such multiple transfers using both civil and customary law and documents are not uncommon and this makes it very difficult to determine who are the legitimate owners of land and property in Afghanistan.⁶³

The most comprehensive law on what constitutes legally valid land ownership documents is the Law on Land Management Affairs that was revised by the *Taliban* in 2000 and passed by decree Number 35 of the *Taliban* supreme leader.⁶⁴ This specifies that the following documents may be used as proof of ownership:

- Official documents indicating ownership, purchase, gift, exchange surrender, or another form of transfer, issued and validated by the courts⁶⁵
- Officially authorized purchase documents issued by an authorized government department⁶⁶
- Officially registered tax payment documents⁶⁷
- Water rights documents where there is no evidence against their authenticity and the land concerned is shown in the book of ownership and taxation⁶⁸
- Customary documents prepared before 1975, properly witnessed and submitted to an authorized government department before 1978⁶⁹

Formal documents of land ownership will be recognized where the appropriate court, on completion of a legal registration process, has properly prepared them and where the document can be shown as registered in the Books of Ownership and Taxation. The court should retain an original copy of these documents and

⁶³ For example, see Conor Foley, *Land disputes in Eastern Afghanistan*, Norwegian Refugee Council, 2004.

⁶⁴ Law on Land under Decree No. 57, *Taliban* Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000.

⁶⁵ *ibid.*, Chapter two, Article 4(1).

⁶⁶ *ibid.*, Article 4(2).

⁶⁷ *ibid.*, Article 4(3).

⁶⁸ *ibid.*, Article 4(4).

⁶⁹ *ibid.*, Article 4(5).

documents that have not been registered will only be considered legal after the court has approved them. There must also be no contrary legal claim on the land.⁷⁰

Documents that are not registered in the Books of Ownership and Taxation are not necessarily rendered illegitimate unless the only proof of ownership consists of tax payment documents.⁷¹ As noted above, the land registration process that was begun in the 1960s was never completed and so many properties remain unregistered. One set of the books of ownership and taxation remains centrally-held in Kabul. While it is intact, it has not been kept up to date with the property transfers that have taken place since then. Other official records also exist at both the central and provincial level, but they are held in different locations and some of them have also been lost or destroyed over time.⁷²

Conversely, official records and documents have been forged on occasion and some people were also coerced into handing over their properties through threats and intimidation during periods of lawlessness.⁷³ Similarly, land has occasionally been awarded to people by the authorities without following the correct procedures or by means of decrees that have subsequently been repealed.⁷⁴ Such transfers are therefore illegitimate and the documents issued are not valid. Official documents and official records are not, therefore, to be considered a wholly reliable guide to land and property ownership.

Similar problems exist with the customary law system and establishing the authenticity of these documents is even more problematic given the lack of any form of official oversight. Nevertheless, for much of Afghanistan's recent history people have had no alternative but to use customary documents to validate land and property transfers as there has been no functioning official judicial system. Customary documents may be recognized in some circumstances and where there is no dispute concerning the ownership of the land and the occupant is considered to be legitimate by his or her neighbours.⁷⁵

⁷⁰ *ibid.*, Article 4(6).

⁷¹ *ibid.*, Article 5.

⁷² Liz Alden Wiley, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

⁷³ For example, see Conor Foley, *Land disputes in Eastern Afghanistan*, Norwegian Refugee Council, 2004.

⁷⁴ *ibid.*

⁷⁵ Law on Land under Decree No. 57, *Taliban Islamic Emirate of Afghanistan*, Ministry of Justice, Issue No. 795, 2000, Article 4(5).

There are many cases where the occupants have no legal documents, customary or official, to the land or property that they are occupying and no records exist concerning its ownership. In such circumstances, the occupant may be granted ownership if no one else claims the land and there are visible signs that it is being put to productive use.⁷⁶ Alternatively, the State may assume ownership of the land and either sell or lease it back to the occupant.⁷⁷

2.4 Land allocation policy in Afghanistan

As described above, successive governments in Afghanistan have adopted land allocation policies as a means of rewarding and consolidating their own support bases. The establishment of a fair system of land allocation is a major challenge for the current administration. The basic legal system of land distribution put in place by the *Taliban* has remained in force since the Bonn Agreement. However, to counter what was perceived as widespread distribution of public lands to undeserving beneficiaries at the local, provincial and national levels, the Government issued decree 99 in April 2002, which froze distributions of public land countrywide.⁷⁸ All ministries and other government institutions were directed to avoid distribution of state-owned land. The office of the Attorney General and other government security agencies were specifically tasked with enforcing this ban on land distribution.

This ban remains in effect. However, the rapid return of so many refugees and other displaced persons to Afghanistan in recent years has placed it under great strain.⁷⁹ Lack of access to land, either for shelter or livelihood, is reported to be one of the major obstacles to reintegration for a good proportion of the returning Afghan community.⁸⁰ The United Nations High Commissioner for Refugees (UNHCR) has noted that many Afghans are unable to return to their homes or land because they have been occupied by someone else.⁸¹ Conversely, others have been displaced by the return of people claiming to be the original

⁷⁶ *ibid.*, Article 9.

⁷⁷ *ibid.*

⁷⁸ Decree No. 99 dated 04.02.1381 (24 April 2002).

⁷⁹ *Afghanistan, the search for peace*, Minority Rights Group, November 2003.

⁸⁰ *Land Issues within the Repatriation Process of Afghan Refugees*, UNHCR, Office of the Chief of Mission, Protection, Kabul, September 1, 2003.

⁸¹ *ibid.*

owners. Thus land problems continue to generate fresh conflicts and new displacement.

The 2004 Constitution directs the State to adopt ‘necessary measures for housing and distribution of public estates to deserving citizens in accordance with its financial resources and the law.’⁸² However, distributing State-owned land is complicated by a number of factors, including proper identification of what parcels that are indeed owned by the Government, whether the distribution requirement refers only to the central Government or to provincial and local governments as well, and how best to select the beneficiaries of such distributions. Moreover, the terms of the distributions need to be considered carefully, including whether outright ownership will be conferred to the beneficiaries or whether the distributions will be subject to certain restrictions. Given the general freeze on the allocation of State-owned land, it is difficult for landless returnees and others to have public land allocated to them.

Some uncoordinated efforts were undertaken in 2003 and 2004 by some local authorities to distribute State-owned land.⁸³ The distributions took place without central Government authorization or central coordination and there were a number of other problems with the process. Provincial authorities were not able or willing to distinguish governmental land from private land⁸⁴ and funds were not available to pave roads or build infrastructure to make the land useable. Allegations of official corruption also marred the process. Beneficiaries with family, tribal and political links to local authorities were allegedly prioritized and land was sometimes claimed by powerful commanders and then re-sold to ordinary Afghans for exorbitant sums of money.

In January 2004 a High Commission for Urban Development was established and tasked to identify State-owned land for residential and commercial purposes. Decisions on distribution were coordinated between the Ministry of Urban Development and Housing (MUDH) and the provinces. Various attempts were made by UNHCR, to ensure that a system to allocate land to returning refugees and others would be fair and equitable.

⁸² 2004 Constitution, Article Fourteen.

⁸³ Principally in Herat, Jalalabad and Bamyan.

⁸⁴ In Bamyan, for example, private land was distributed.

The Ministry of Refugees and Repatriation (MoRR) has carried out surveys and consultations in refugee camps in Pakistan to select potential beneficiaries. An objective set of criteria has been developed that prioritizes the most vulnerable families, including landless people, female-headed households and families with disabled members. Land committees were established, to identify suitable land in a number of provinces, including Logar, Parwan, Kapisa, Maidan/Wardak, Gardez and Ghazni. The Land Committees consisted of representatives of different government departments⁸⁵ and provincial *Shuras*.

These committees varied in strength and effectiveness in different regions. By March 2005, proposals were prepared for up to 19 provinces⁸⁶ and a number of families were identified for potential return.⁸⁷ The findings were referred to the High Commission for Urban Development and the relevant municipalities were instructed to prepare housing schemes and maps. Civil engineers from the municipalities developed the schemes on the ground. At the time of publication of this Guide, the Commission for Urban Development had approved several plans in several provinces.

2.5 Role of urban master plans

Master Plans are formulated by municipalities in order to regulate the development of towns and cities in Afghanistan. The Law on Municipalities of 1999 empowers the administrative centres of provinces and districts, or any settlements of at least 5,000 inhabitants, to form their own municipality and to draw up their own Master Plan.⁸⁸ This should then be submitted to the central Government for approval.

The first Master Plan for Kabul City was prepared in 1962 by Afghan experts with the support of advisors from the Soviet Union. It envisaged a town of 800,000 inhabitants on 23,780 hectares to be built over 25 years.⁸⁹ A second

⁸⁵ Ministry of Refugees and Repatriation, the Ministry for Urban Development and Housing, the Ministry for Rural Rehabilitation and Development, the Ministry of Agriculture, the Ministry of the Interior, the Ministry of Tribal Affairs, and the Ministry of Justice along with municipal officials.

⁸⁶ Including: Ghazni, Paktia, Maidan/Wardak, Farah, Laghman, Jawzjan, Kunduz, Bashlan, Samangan, Balkh, Kabul, Logar, Kapisa, Parwan, Ningrhar, Khost, Paktika, Kandahar and Nimroz.

⁸⁷ For example, 314 returnee families were selected in Azhgaro Camp, Pakistan for potential return to Gardez, Paktia.

⁸⁸ The Law on Municipalities 1999, Article 7.

⁸⁹ Nouchine Yavari d'Hellencourt, Shuhrat Rajabov, Nasrollah Stanikza, Consultant Abdul Salam, *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan With special reference to Kabul City*, Ministry of Urban Development & Housing and UN-Habitat, Kabul, October - November 2002.

Master Plan was prepared in 1970, which revised these numbers upwards. The third Plan received final approval in 1978 for two million inhabitants spread over 32,340 hectares. The Town Council was given responsibility for implementing the Plan with the support of the relevant Ministries, and around 100,000 plots were demarcated for the construction of 600,000 apartments.⁹⁰ The Master Plan was extremely detailed. It specified where roads and streets, public structures, parks and open space, individual houses, commercial and residential buildings should be constructed and specified how many hectares should be allocated to each.

A number of laws and regulations were passed in accordance with the Master Plan.⁹¹ Some residential apartments and plots of land were distributed in accordance with these laws in Kabul and other cities. Many apartments were distributed to members of the Communist Party (PDPA) and to government employees in Kabul and elsewhere during the communist period. However, the outbreak of war meant that most of the provisions of this Master Plan were never fulfilled. It is estimated that as of 2002, only 20 per cent of the initial Master Plan had been implemented and only 3,000 of the apartments envisaged under the plan were ever built.⁹²

A vast influx of internally displaced persons (IDPs) during the 1980s and then the destruction of much of the city in the 1990s overwhelmed the plans laid down. Many houses were constructed in unauthorised areas, including on hills and 'green belts,' and on government-owned land. The specifications regarding the design of houses was also widely ignored and many that were built are now considered to be unstable or unsafe.⁹³

After the capture of Kabul by the *Mujahidin* in 1992, thousands of people who had been legally allocated houses and apartments under the previous regime were forced to flee from their homes. This pattern was repeated across the

⁹⁰ Liz Alden Wiley, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

⁹¹ For example, Regulations on Urban Settlement Projects July 1979; Regulation for Sale and Distribution of Governmental Residential Apartments and Land in Kabul City, October 1980; Land Acquisition Law, July 1987; Regulation on the implementation of the Master Plan, December 1990.

⁹² Nouchine Yavari d'Hellencourt, Shuhrat Rajabov, Nasrollah Stanikza, UN-Habitat, 2002.

⁹³ *ibid.*

country and many of these homes were illegally occupied by other people.⁹⁴ There was further displacement when the *Taliban* came to power. A number of new laws and regulations were introduced during the period of the *Taliban* Government and some attempts were made to restore property to its rightful owners.⁹⁵ However, this period also saw widespread forgery of property ownership documents.⁹⁶

The Regulations on Urban Settlement Projects under the Master Plan cover the process of acquisition of private land and houses by the State under the City Master Plan. It specifies the rights of the original owners, the compensation to which they are entitled and the use to which the expropriated land can be put. It also lays down the specifications to which buildings should conform and the process for dealing with illegal occupations.

The Regulation for Sale and Distribution of Governmental Residential Apartments and Land in Kabul city defines the criteria for distributing land to homeless people and the rights of others, including government employees, to purchase plots of land. The Regulation on the Implementation of Kabul Master Plan describes the conditions that must be adhered to when constructing new houses and commercial buildings. Individuals must obtain the permission of the regulating agency before undertaking construction and must submit maps and designs to this agency before work can begin. The agency may also monitor all building work to check its compatibility with the Master Plan. All changes to the Master Plan must be proposed by the Head of Municipality, agreed by the Council of Ministers, and signed off by the Head of the State.

These laws remain in force and on many occasions the Master Plan has been used as legal basis to prevent returnees and homeless people from building shelters on their land.⁹⁷ It has also been used to evict ordinary people from their houses.

⁹⁴ *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan 2003.

⁹⁵ For example, the Regulations on Urban Settlement Projects under the Master Plan; the Regulation for Sale and Distribution of Governmental Residential Apartments and Land in Kabul City; the Land Acquisition Law; and the Regulation on the implementation of the Master Plan. All of these laws are contained in Official Gazette number 794 of the Ministry of Justice of Islamic Emirate of Afghanistan October 2000.

⁹⁶ Information from NRC's legal aid counsellors.

⁹⁷ *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program, Afghanistan 2003.

However, it is also alleged that some powerful people have been able to construct houses outside of the Master Plan's provisions through bribery or intimidation.

A number of observers, including UN Habitat, have also questioned the continued utility of the existing Master Plans, which it describes as 'rigid and outdated' that 'have long ceased to accurately reflect the reality on the ground.'⁹⁸ The UN Special Rapporteur on the Right to Adequate Housing stated after a visit to Afghanistan that, 'the current status of the Kabul and other city master plans is unclear even among government officials. Although city master plans are continuously used as arguments for new construction, demolition of houses for development purposes, etc., the implementation of the Master Plan is supposedly suspended.'⁹⁹

The population of Kabul, which was estimated to be nearly three million in the mid 1990s, has reportedly doubled since 2001.¹⁰⁰ According to UN estimates, Afghanistan's national population is expected to increase by 14 million by 2015 to reach a total of about 37 million; and more than half of this growth will be in urban areas.¹⁰¹ This is far more than was ever envisaged by the Master Plans and such growth is incompatible with the existing plans. The UN has called for the development of 'city action plans to phase and guide investments' in response to this challenge. The priorities that the UN identifies for these plans are to: 'facilitate the release of land for development by the people and the private sector; produce new maps to support urban development; and to engage ministries, municipalities and communities in participatory strategic planning.'¹⁰²

⁹⁸ UN Habitat in Afghanistan: program and priorities, *Strategic planning support for six major cities*, no date.

⁹⁹ *Adequate housing as a component of the right to an adequate standard of living Report by the Special Rapporteur, Miloon Kothari, Addendum, Mission to Afghanistan (31 August-13 September 2003)*. E/CN.4/2002/48/Add.2, 4 March 2004.

¹⁰⁰ "Afghanistan: Focus on Kabul housing shortage," UN-OCHA Integrated Regional Information Network, 22 May 2003 (see www.irinnews.org).

¹⁰¹ Nouchine Yavari d'Hellencourt, Shuhrat Rajabov, Nasrollah Stanikza; Consultant Abdul Salam, *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan With special reference to Kabul City*, Ministry of Urban Development & Housing and UN-Habitat, Kabul, October - November 2002.

¹⁰² *ibid.*

C H A P T E R 3

3.0 Government policy towards land and property rights

This chapter outlines some of the policies of the present Government towards land and property rights and the legal context in which they are being implemented. Some of these policies, such as the introduction of a nationwide land and property registry, are a continuation of the policies of successive previous governments over the past few decades. Others, such as the restitution of land and property to those who have been arbitrarily deprived of it, are a response to the political upheaval and conflict of recent years. However, as noted in chapter two of this Guide, there is significant continuity between the policies of the present Government towards land and property rights and those of its immediate predecessor.

This chapter discusses the legal basis for policies towards issues such as property taxation, land distribution, pastureland, rights of use, adverse possession water rights and the role of urban master plans. The means by which the State can acquire land and property is a key issue. This chapter also sets forth the procedures surrounding State appropriation and evictions.

3.1 Current Government policy

The policy of the current Government of Afghanistan has been to attempt to enforce the rule of law with regard to land and property rights, to restore ownership to those who have suffered arbitrary deprivations, to encourage private investment in land and property, and to increase the efficiency with which it is used and to realise its potential equity for investment and tax-raising purposes. This was set out in the National Development Framework, produced by the Afghan Assistance Coordinating Authority (AACA), in conjunction with the Government of Afghanistan in 2002, which stated that:

There is a need for a programme to produce a nationwide land registry and to settle disputes between individuals and groups over land. Such a registry would allow for the use of land as collateral for entrepreneurial activities . . . Uncertainty over land ownership will hinder investment from the private sector as well as the ability of individuals to use land as

collateral . . . A credible system to resolve land disputes and provide certainty is urgent.¹

To achieve this goal, the Government is proposing to establish a nationwide land and property register. The Government has also attempted to implement this policy through a number of decrees.

In April 2002, a decree regarding the non-distribution of intact and uncultivated land ‘firmly directed’ all government ministries and other governmental institutions that ‘They shall not distribute any State-owned land for building houses or for any other purposes.’² In May 2003, the Government ordered its ministries to ‘take necessary measures to return properties of the Ministry of Defence (MOD) that are occupied by others.’³ The MOD was also required to produce a separate report on the necessary operations needed for it to reacquire its property and submit this to the President.⁴ In September 2003 a decree was issued which specified that, ‘The High Commission for Urban Development is the only competent authority for deciding on and executing any evaluations and studies on town plans or on the distribution of plots of lands for houses and high-rise buildings.’⁵ This decree formally stipulated that such decisions are not within the authority of the Vice President.⁶

In April 2003, the Government decreed that ‘Government properties that are being illegally occupied by persons because of their power and influence should be confiscated.’⁷ The decree stipulated that ‘All provincial governors in the country must repossess any government properties occupied illegally as soon as possible and return such properties to the rightful governmental departments in which they belong.’⁸ If there is any dispute ongoing between the government and

¹ *Afghan Assistance Coordinating Authority, the National Development Framework*, Government of Afghanistan, Kabul, April 2002.

² Decree 99 of the regarding the Head of the Transitional Government, Non-distribution of intact and uncultivated State-owned land, *Date: 4/2/1381 HJ* or 24 April 2002.

³ Decree No. 17 of the head of the Transitional Government , Regarding the return of immovable properties to the Ministry of Defence, *Date: 1382/2/30* or 20 May 2003.

⁴ *ibid.*

⁵ Decree 3860 of the Head of the Transitional Government Regarding the High Commission for Urban Development, 16 September 2003.

⁶ *ibid.*, Articles 2-5.

⁷ Decree 362 of the Head of the Transitional Government, Regarding the illegal occupation of Government property, 1382/1/19 or 08 April 2003, Article 1.

⁸ *ibid.*, Article 2.

any person over real property, it should be followed up by the *Qazaya Dawlat* (the Office of Government Cases in the Ministry of Justice), and sent to the courts for fair judgment.⁹ ‘All provincial governors must report their operations regarding judicial and legal proceedings to the protection section of Affairs Controlling Department. The courts, prosecutors, police departments and municipality departments must cooperate in the implementation of this decree.’¹⁰ A decree issued in 2004 stated that, ‘State authorities and persons who use their power or personal influence or by use of threat, fear or by use of weapons, possess the lands of others be punished in accordance with the law as the case may be in addition to the appropriation of land and compensation for loss.’¹¹

Alongside these attempts to recover State land and prevent its unauthorised distribution, the Government has been attempting to encourage private investment in land and to develop land in the ‘public interest.’ For example, in September 2002 a decree was issued that allowed foreign investors to lease land and property for short, medium and long-term periods. In 2003, the Government declared, ‘All real property in the possession, custody or use of Ministries or other Government organs is State Land.’¹² Such land could be transferred to and registered by potential private investors at market rates. Foreigners have traditionally been forbidden from acquiring land and property in Afghanistan, but the 2004 Constitution permits them to now lease it.¹³

In relation to refugees returning home, the decree on Dignified Return in 2001 guaranteed the ‘safe and dignified return’ of all returnees and affirms their right ‘to establish residence.’¹⁴ It states that ‘the recovery of movable and immovable properties such as land, houses, markets, shops, apartments etc, will be effected through relevant legal organs’¹⁵ and that, ‘UNHCR and other relevant international agencies will be allowed to monitor the treatment of returnees to

⁹ *ibid.*, Article 3.

¹⁰ *ibid.*, Article 4.

¹¹ Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to properties (*IMLAK*), 18-8-1382, Article 14.

¹² Legal Decree for Transfer of Government Property (8/1382) 2003, Article 1.

¹³ 2004 Constitution, Articles Forty-One and Forty-Two.

¹⁴ Decree on the Dignified Return of Refugees.

¹⁵ Article 5.

ensure these meet recognized humanitarian law and human rights standards, and to ensure that commitments contained in this decree are implemented.¹⁶

In August 2002, a Special Property Disputes Resolution Court (Special Court) was first established¹⁷ and a subsequent decree modified its structure in November 2003.¹⁸ The Special Court is tasked with ‘looking after returned refugees in Afghanistan and addressing their complaints to hasten the process of resolving property disputes.’¹⁹ The structure of this court is described in greater detail in chapter one of this Guide.

3.2 Restitution

The Government has issued three decrees aimed at helping restore land and property to those who have been arbitrarily deprived of it in recent years: the decree on Dignified Return and two decrees related to a Special Court for returnees described above. The legal guidelines for the Government to carry out the task of property restitution are mainly contained in the Law on Land 2000.²⁰ This law is largely based on the Afghan Civil Code and is explicitly aimed at restoring land to those who lost it after 1978. According to this law, ‘Lands which were occupied forcefully from their owners or their children in accordance with the communist regime’ after 1978 should be dealt with in the following ways:

- If the original owner possesses valid documents and the land has not been distributed to a new owner under subsequent land reforms then it will be returned to the claimant or to his or her children.²¹
- If the land was re-distributed to someone else, then the current occupant will compensate the original owner at present day prices or return the land together with the value of all lost harvests.²²

¹⁶ Article 8.

¹⁷ Presidential Decree on the Establishment of Land & Property Disputes Court, Circular Letter No. 4035 dated 19.6.1381.

¹⁸ Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Disputes Resolution Court, Date: 1382/9/9 or 30 November 2003.

¹⁹ *ibid.*, Article 1.

²⁰ Law on Land under Decree No. 57, *Taliban* Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000

²¹ *ibid.*, Article 3.

²² *ibid.*

- If the land has been retained by the State, either for agricultural or urban development purposes and structures have been built on the land then the State must fully compensate the original owner, but is not required to return the land.²³
- If the land was distributed to a person who has subsequently sold the land to another, then the current occupant may claim costs from the person who sold him the land, when returning the land to the original owners.²⁴
- If structures were built on the land, then the original owner should compensate the occupant for the value added, however, if an agreement cannot be reached and the value of the structures is equal to the value of the land the occupant should hand-over the building to the original owner.²⁵
- If the shape of the land was changed in a way that reduced its value, then the occupant must compensate the original owner.²⁶
- If the original owner is absent, an authorised court may appoint a legal representative to secure the property in the owner's name.²⁷
- Property that was occupied illegally during this period will also be restored to its rightful owners whether that be private individuals or the State.²⁸

The right of people who have suffered arbitrary or unlawful deprivations of their land and property to have it restored to them is set out in international law and this issue is discussed further in chapter seven of this Guide.

3.3 Adverse possession

The law restoring all property to its rightful owners is complicated in Afghanistan due to the principle of ‘adverse possession.’ The principle of adverse possession is based on the assumption that it is preferable for land to be used than to remain idle. It is reflected in *Sharia* and Afghan customary law and can also be

²³ *ibid.*

²⁴ *ibid.*, Article 32.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*, Article 34.

²⁸ *ibid.*, Article 35.

found in a number of statutory laws. For example, the Law on Land 2000 specifies that in cases where land is being occupied by someone who has no legal documents – customary or official – and no records exist concerning its ownership, the occupant may be granted ownership if no one else claims the land, there are visible signs that it is being put to productive use, and the neighbours and the local authorities approve.²⁹ If the Government is able to prove that a person’s occupation is illegitimate (that is, against the wishes of the legitimate owner), and his claim has not been challenged, the land becomes the property of the State. If it is below 10 *jeribs* of first grade land or its equivalent, it will remain with the occupant, but if it is more than 10 *jeribs* it will be sold to the occupant at current market prices and this amount must be paid in annual installments over five years.³⁰

According to Afghanistan’s Civil Code, arable land not owned by an individual is considered the property of the State, and possession of this land is prohibited without permission of the State.³¹ However, uncultivated and unusable land, with no owner attached will be deemed to be the property of the person possessing it, subject to the permission of the Government.³² The occupant may also construct on this land, again subject to the permission on the Government.³³ A person who has made an effort to build on and farm such land may be recognized as its owner and required to pay tax, except when legally exempt. If a person occupies and openly uses such a piece of land continuously for 15 years and no one else claims it, then the occupant can become recognised as the official owner of the land, unless the original owner submits a counter-claim.³⁴ The Civil Code extends this to 33 years for cases involving inheritance disputes.³⁵ If a counter-claim is made then the case should be submitted to the courts to decide between the two claims. The procedures for taking a case through the formal legal system are described in chapter five of this Guide.

²⁹ Law on Land under Decree No. 57, Taliban Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000, Article 9.

³⁰ *ibid.*

³¹ The Civil Law of the Republic of Afghanistan, Kabul, Afghanistan, 1977, Article 1991.

³² *ibid.*, Article 1992.

³³ *ibid.*

³⁴ *ibid.*, Article 2279.

³⁵ *ibid.*, Article 2780.

If the dispute relates to land or property that was vacated after 1978, then the case should be brought to the Special Property Disputes Resolution Court, which is further described in chapter one of this Guide. Cases involving the Government may not be heard before the Special Court and must be dealt with by the ordinary courts. The Government has also decreed that where property has been abandoned by its original owners and has been under the control of the State for 37 years or more, then its ownership reverts to the State and cannot be challenged in court.³⁶

The principle of 'adverse possession' is frequently used to confirm the transfer of land ownership between private individuals and between individuals and the State. The Decree With Regard to Properties of 2004, which is discussed further below, contains a similar stipulation about when land controlled by the State becomes State-owned.³⁷

3.4 Property taxation

Property taxes in Afghanistan are levied only on properties above $\frac{1}{2}$ of a *jerib*. Taxes are levied in steps according to both the size and quality of the land holding. Taxes are levied on the owner of the property, whether or not this is the current occupant, and landlords are taxed on property that they are renting out.³⁸

The law distinguishes between two broad categories of land: irrigated land and rain-fed land. The former is considered to be more valuable and the law also takes into consideration the water source or precipitation, the type of agriculture carried out, the cost of the land, the rate of production and its distance from markets.

The head of a family is usually responsible for paying property taxes. If he or she is absent or deceased then his or her representatives or inheritors are responsible for paying the taxes. When a person does not pay tax on time, a monthly penalty

³⁶ Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to properties (*IMLAK*), 18-8-1382.

³⁷ *ibid.*

³⁸ See chapter four of this Guide for more details.

of 1 per cent of the original bill is added³⁹ and the land is forfeited to the State if no tax has been paid after four years.⁴⁰

Payment of taxes can be made in instalments. A dispute over taxable property cannot be used as a reason for not paying taxes. However, when a person's land or property has been destroyed by natural or man-made disaster, he or she can apply for an exemption to the Department of Agriculture. Where someone has turned arid land into cultivable land, then the land is also exempt from taxation for a period of five years. Land which has been turned into use for raising livestock and silk-worms is not subjected to taxation, but the farmer is subject to a tax on his or her income from the livestock or silk worms.

3.5 Rental Property Tax

In March 2004, a new Rental Property Tax Law was enacted in Afghanistan.⁴¹ According to this law, where rental payments exceed 15,000 *Afs* per month for the lease of land or buildings, a tax of 20 per cent of the rental payments is imposed on the landlord. The value of the rent also includes non-cash payments such as improvements to the land or property beyond the ordinary wear and tear. Conversely, the landlords tax burden will be reduced by 10 per cent of the monthly rent to cover wear and tear.

The tenant should withhold the specified amount of tax from the rental payment and pay it on behalf of the landlord to the State. The landlord is permitted to raise the level of rent in order to cover this tax burden. It is the responsibility of the tenant and not the landlord to ensure that this tax is paid. Failure to pay the tax on time each month will result in penalties being incurred by the tenant.

The tenant should present a 'Rental Services Tax Withholding and Deposit Form' to the Central Bank of Afghanistan when making their payment each month. All tenants will be issued with a Taxpayer Identification Number by the Ministry of Finance. The Central Bank will issue a receipt to the tenant for payments and this can be passed on to the landlord. The authorities will also notify landlords if their tenants have not paid the required tax within 30 days. The Minister of Finance may also seek to have the nearest Commercial Court

³⁹ Decree 84 of 19/6/1382 (on the offering of Oshir and Zakat).

⁴⁰ *ibid.*, Articles 21 and 22.

⁴¹ The Rental Tax Law, March 2004.

issue an order to have the amount due paid. This rental property tax is an additional tax to other taxes, such as income tax, which may be levied on landlords.

3.6 State Appropriation

Successive Afghan governments have appropriation private lands to further ‘the public interest’ in order to develop and modernise the country. The Law on Land Appropriation for Public Welfare 1935 first set out the legal basis for such appropriations. Public purposes include ‘roads, bazaars, water development, *mosques*, military installations, factories hospitals, homes for the poor, sanatoriums, orphanages, government offices, water reservoirs for fighting fires, other construction and developments for public needs and all other developments that benefit the public in general.’⁴² This law set out a procedure for such appropriations. It specified that a plan for the land’s use had to be prepared prior to appropriation and approved by the relevant District Councils.⁴³ The value of the land was assessed by four experts, including any value added by the owner, through inputs such as seeds and labour, during that year.⁴⁴ Payment had to be made in the presence of a judge. The owner could appeal against the appropriation or the level of compensation to the relevant government minister.⁴⁵ If the property was not used for the purpose intended, then the owner could buy it back at the same price.⁴⁶

The provisions of this law were reflected in the 1964 Constitution, and the basic principle that land could only be appropriated ‘in the public interest’ and with fair compensation were contained in the 1977, 1987 and 1990 constitutions. As stated above, they are also enshrined in Article 40 of the 2004 Constitution, as well as in Afghanistan’s Civil Code. Neither the 2004 Constitution nor the Civil Code specify what constitutes ‘fair compensation,’ nor how this should be decided, but it can be assumed from previous laws and practice that compensation should be determined by an independent body according to the land’s current market value.

⁴² Land Appropriation for Public Welfare 1935, Article 2.

⁴³ *ibid.*, Articles 3 and 4.

⁴⁴ *ibid.*, Article 4 and 14.

⁴⁵ *ibid.*, Article 9.

⁴⁶ *ibid.*, Article 11.

The detailed provisions concerning the circumstances in which expropriations can be carried out are contained in the Expropriation Land Law introduced under the *Taliban* in September 2000.⁴⁷ This specified, ‘An expropriation of land carried out for the public interest shall be conducted with the approval of the Council of Ministers in exchange for prior and fair compensation determined according to the land's market value.’⁴⁸ Three months prior notice must be given before expropriating the property, and the notice should also specify the proposed level of compensation.⁴⁹

The purposes specified for expropriations were, ‘The construction of industrial complexes, highways, and oil and natural gas pipelines, the extension of telecommunication line, the laying of electricity lines, to build canals and other means of water supply, to build *mosques* and religious *madrassas*, and for the construction of other welfare foundations and to extract from mines and underground resource deposits.’⁵⁰ In addition to this, ‘Certain lands that are determined to have cultural or scientific importance, certain agriculture land, gardens and other areas which are determined to have economic importance, forest lands and other land situated underneath dams may, in exceptional situations, and based upon a decision by the Council of Ministers, be expropriated with legal permission.’⁵¹ This provision reflects a similar provision in Afghanistan's Civil Code, which states that, whenever mines, treasures, or ancient relics are found in privately owned land, the ownership of such land shall go to the State. The original owner of such a property will be given reward in addition to the compensation due from the expropriation.⁵² Note also that Article Nine of the 2004 Constitution declares that mines and underground resources are the property of the State.

When planning an expropriation, the district or municipality is required to establish a committee comprised of:

- The owner of the property, or its user, or his or her agent

⁴⁷ Expropriation Land Law, Official Gazette 794, September 2000.

⁴⁸ *ibid.*, Article 2.

⁴⁹ *ibid.*, Article 20.

⁵⁰ *ibid.*, Article 3 (1) and (2).

⁵¹ *ibid.*, Article 3 (3).

⁵² Civil Law of Afghanistan, Article 1988.

- A competent representative of the organization that determined the expropriation was necessary
- An agent of the district or municipality
- Agents of the Finance Ministry and the Justice Ministry.⁵³

The level of compensation must include the price of the expropriated land and the value of any houses, buildings, trees and plants located on it.⁵⁴ It must also reflect the value of the land according to its level and its location.⁵⁵ Alternative land may be awarded in lieu of monetary compensation and if there is a difference in the value of the land, this can be paid in cash.⁵⁶ The owner should be allowed to take his or her belongings (bricks, timber and etc.) from the expropriated land within three months of the expropriation.⁵⁷ If the claim to ownership is based on ‘special legal documents’ issued between 1978 and 1996 the compensation will only include the value of buildings and plants on the land and not the value of the land itself.⁵⁸

3.7 Evictions from government-owned land

Where someone is legally occupying government-owned land that has been designated by the State for appropriation, he or she may be evicted following the correct legal procedures described above. People occupying property legally must have their due process rights respected before and after being evicted. They are also entitled to compensation for the loss of their homes and land.

Afghanistan's national law is less clear on eviction procedures for those occupying property illegally. According to decree 362, issued by the Government in April 2003, ‘If there is any dispute ongoing between the government and any person over real property, it should be followed up by the judicial department (*Qazaya Dawlat*) and sent to the courts for fair judgment.’⁵⁹

⁵³ Expropriation Land Law, Official Gazette 794, September 2000, Article 5.

⁵⁴ *ibid.*, Article 8.

⁵⁵ *ibid.*, Article 10.

⁵⁶ *ibid.*, Articles 13 and 14.

⁵⁷ *ibid.*, Article 6.

⁵⁸ *ibid.*, Article 9.

⁵⁹ Decree 362 of the Head of the Transitional Government, Regarding the illegal occupation of Government property, 1382/1/19 or 08 April 2003, Article 3.

No evictions should be carried out until the legal status of those occupying the land or property has been clarified.

This issue was considered in detail by a Government-appointed Commission following the destruction of a number of houses in the Shirpour District of Kabul in September 2003.⁶⁰ The Commission found that the people had been occupying these houses illegally as the houses were on government-owned land and had been built outside the framework of the Master Plan. Nevertheless the Commission concluded that the Government had acted illegally as it had violated their constitutional right to private property by evicting them from their homes without a court order.⁶¹

The evictions were also condemned by the UN Special Rapporteur on the Right to Adequate Housing, who stated, ‘the way in which the forced evictions took place, including excessive use of force, amounted to serious human rights violations according to international human rights law.’⁶² Given Afghanistan's obligations under international law even those illegally occupying property have certain rights when faced with eviction. This is discussed in great detail in chapter seven of this Guide.

3.8 Government-owned land

State appropriations and the land registration exercise described in chapter two of this Guide have led to a large expansion of what is legally defined as ‘government-owned land’ in Afghanistan. An estimated 86 per cent of the land area of the entire country now formally belong to the State, although much of the land is still not under State control.⁶³

The first legal definition of what constituted government-owned land was contained in the Land Survey and Statistics Law of 1965, which described these as:

⁶⁰ Draft Report of the Shirpour Commission, unpublished, no date.

⁶¹ *ibid.*

⁶² Statement of Mr. Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Commission on Human Rights, Sixtieth session, 30 March 2004, page 5. Agenda item 10

⁶³ Cited in Liz Alden Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research & Evaluation Unit, Kabul, February 2004.

- Lands developed by the Government and registered as its own;
- Wastelands not registered as private or government land;
- *Moquofa* lands, lands given by the Government or persons for some special charitable purpose.⁶⁴

Failure of register ownership would also automatically render the land of the Government.⁶⁵ Afghanistan's Civil Code subsequently stated, 'Unowned arable lands are the property of the State.'⁶⁶

The Government began to register much of this land but the 1965 law also specified that 'if a person has occupied wasteland continuously for over 20 years, he shall be awarded ownership of it.'⁶⁷ The law also stated that 'reclamation of wastelands is encouraged with permission of the government, and the re-claimer may gain a certificate of title.'⁶⁸

In 2004, a decree with Regard to Properties stipulated, 'Properties which have been under the control of the State for more than 37 years shall be considered as State-related. Claims of people with respect to such property shall not be heard.'⁶⁹ The 37-year period reflects the 15 years laid down for adverse possession in *Sharia* and the Afghan Civil Code plus the 22 years of communist, *Mujahideen* and *Taliban* rule of Afghanistan in which it was considered unrealistic for such claims to have been made. Private property was defined as 'that in which ownership of people is proved by *Sharia* and law. Private property shall be proved by valid *Sharia* and legal documents provided that no superior contradictory document exists.'⁷⁰ However, where it cannot be proved that a particular piece of property belongs to someone, the assumption is that it belongs the State.

The decree stated, 'Non appropriated property that has been registered previously in documents and books as State-related property shall be deemed to

⁶⁴ Land Survey and Statistics Law 1965, Article 54.

⁶⁵ *ibid.*, Article 26.

⁶⁶ Civil Law of Afghanistan, Article 1991.

⁶⁷ Land Survey and Statistics Law 1965, Article 55.

⁶⁸ *ibid.*, Articles 56.

⁶⁹ Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to Properties (*AMLAK*), 18-8-1382.

⁷⁰ *ibid.*, Article 7.

be State-related property and such documents and books shall be deemed as valid documents.’⁷¹ Properties that have been appropriated by previous governments would be considered as belonging to the State in a number of circumstances:

- Where documents exist to prove the appropriation was lawful⁷²
- Where documents do not exist but public welfare projects (‘roads, houses and other establishments’) have been built⁷³
- Where documents do not exist but witnesses testify that compensation has been paid.⁷⁴

It further stated that ‘other properties to which legal ownership by persons cannot be proven shall be regarded as State-related.’⁷⁵

If an individual received land from the State after 1978 he or she may keep it if the land was previously ‘inactive,’ ‘destroyed’ or dead’ and was distributed for the purposes of ‘reviving’ it,⁷⁶ or where it was urban land and the individual has subsequently built a property in accordance with the relevant Master Plan, or promises to do so within a specified time-period.⁷⁷ In other circumstances the land will revert to the State, although individuals may be compensated for structures that they have built on it or inputs they have made that have added to its value.

3.9 Pastureland

Pastureland can be divided in two categories. The first category comprises the best kind of pastures in terms of the quality of grass, usually located close to villages and used by the villagers to graze their animals. Although this land is often not owned by the villagers, the practice of using it has often continued for generations. The second category encompasses lower quality grass and is

⁷¹ *ibid.*, Article 1.

⁷² *ibid.*, Article 5(1).

⁷³ *ibid.*, Article 5 (2).

⁷⁴ *ibid.*, Article 5 (3).

⁷⁵ *ibid.*, Article 3.

⁷⁶ *ibid.*, Article 11 (1).

⁷⁷ *ibid.*, Article 11 (3) and (4).

traditionally used by nomads. Particular groups of nomads lay claim to their own pastureland, which they regard as being exclusively theirs to use. This right has been passed down through generations of nomads and is also widely viewed as an inherited right.

The definition of what constitutes pastureland has historically been ambivalent and it is also unclear as to whether this land is State-owned or held in trust by the State for the public.⁷⁸ The 2004 Constitution requires the State to ‘design and implement within its financial resources effective programs for the development of agriculture and animal husbandry, improving the economic, social and living conditions of farmers, herders, settlement and the living conditions of nomads.’⁷⁹ However, it omits any direct reference to the legal status of pastureland.

The Land Survey and Statistics Law 1965 defined ‘pastureland’ as ‘any land used for grazing in the past and present and called on provincial governors to ensure that pastures were delimited, surveyed and supervised. The conversion of pastureland to agricultural purposes was prohibited and pastureland could only be used for grazing purposes. Pasturelands were declared open to the public and no pastureland could pass into private ownership.’⁸⁰ Government departments were also not authorised to permit the tillage of pastureland for revenue purposes or to convert it into agricultural land.’⁸¹

A subsequent Law of Pasturelands of 1970 stated that pasture consisted of ‘the plains, hills, mountains, the skirts of the mountains, marshlands, the banks of rivers and forest areas which are covered with grass and other places that grow wild and could be used as fodder for cattle.’⁸² Pastureland was defined as ‘public property’⁸³ and the law prohibited its purchase, sale or lease.⁸⁴ Pastureland could be used by those with official documents to use the pasture⁸⁵ and new rights to

⁷⁸ Liz Alden Wily, *Putting Rural Land Registration in Perspective: the Afghanistan Case*, Afghan Research and Evaluation Unit, Kabul, April 2004.

⁷⁹ 2004 Constitution, Article 14.

⁸⁰ *ibid.* Articles 63 - 65.

⁸¹ *ibid.* Article 67.

⁸² Law of Pasture Land 1970, Article 2.

⁸³ *ibid.*, Article 3.

⁸⁴ *ibid.* Articles 6-7.

⁸⁵ *ibid.* Article 15.

use could be acquired through a decision of the administrative council of each province, subject to the approval of the Ministry of Agriculture and Irrigation.⁸⁶

Pastureland was excluded from the definition of what constituted government-owned land in the 1977 Constitution, which stated, ‘Resources such as mines, forests, and energy, large industries, communications, important air and surface transport ...are part of the nation's property and their administration shall belong to the State.’⁸⁷ However, pastureland was added to this list in the 1987 Constitution, which stated that pastureland was the property of the State.⁸⁸ This Constitution also stated, ‘The state guarantees by law the use of pastures by nomads and livestock breeders. The state shall assist in the creation of favorable conditions for the growth of animal husbandry, sale of livestock products and improvement of economic, social and living standards of nomads and livestock breeders.’⁸⁹ These provisions were largely repeated in the 1990 Constitution. However, the 2004 Constitution does not mention pastureland but designates mines and underground resources as ‘properties of the State.’⁹⁰

The Law on Pasture and Public Lands, which was part of the Law on Land introduced by the *Taliban* in 2000, distinguished between public pasture (*Maraa*) and private pasture (*Mawaat*).⁹¹ Pasture is defined as: ‘All types of land . . . that have places where grass grows and supports animals.’⁹² According to this law, ‘public pasture may be used by anyone,’ but private pasture may only be used ‘by residents of the adjacent communities.’⁹³ Private pastureland may not be occupied by either an individual or the Government.⁹⁴ Buying or selling of either private or public pastureland is prohibited⁹⁵ and pastureland may not be ‘sold or leased for expansion of agricultural area or any other purpose.’⁹⁶ State

⁸⁶ *ibid.* Article 16.

⁸⁷ *ibid.* Article 13.

⁸⁸ 1987 Constitution, Article 20.

⁸⁹ *ibid.*, Article 24.

⁹⁰ 2004 Constitution, Article 9.

⁹¹ Law on Land under Decree No. 57, *Taliban* Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000

⁹² *ibid.*, Article 2.

⁹³ *ibid.*, Article 3.

⁹⁴ *ibid.*, Article 4.

⁹⁵ *ibid.*, Article 6.

⁹⁶ *ibid.*, Article 7.

expropriations in the public interest may, however, be exempted from this provision.⁹⁷

3.10 Water Rights

The Afghan Civil Code specifies that the water of rivers and their tributaries are public property and everyone has the right to irrigate their land from this water and to draw an irrigation ditch from it, except where this is contrary to the public interest or special laws.⁹⁸

This is based on the *Sharia* principle that the right to water should be considered comparable with the right to breathe air and see daylight. Everyone has the right to drink water from any source, regardless of whether it is private or public. If the water source is privately owned, then the right to take water from it comes with an obligation not to harm the source or related things. The Civil Code contains numerous other indirect references to water rights relating to the obligation not to harm water sources or irrigation systems and the need for reciprocity when water sources are shared.⁹⁹

⁹⁷ *ibid.*, Articles 7, 8 and 11.

⁹⁸ The Civil Law of Afghanistan, Article 2347.

⁹⁹ *ibid.*, Articles 2348-2354.

C H A P T E R 4

4.0 Transfers of land and property between citizens

This chapter describes the laws regulating transfers of land and property between private individuals. Property disputes normally arise in the context of transfers of land or property due to conflicting claims about ownership rights. They may involve moveable property such as money, furniture or equipment, or livestock; or immovable property such as land, houses or other buildings. The main transfers of land and property in Afghanistan between individuals concern the inheritance, gifting, selling, leasing, renting and mortgaging of land and property and this chapter outlines the regulations surrounding each of these transfers.

4.1 Transfers of property

Establishing who is the legitimate owner of a particular piece of land or property is a key task for any legal system managing land and property relations. It is particularly important for registering land and property transactions and other changes of ownership. It is also necessary for resolving land and property disputes.

State, civil, religious and customary law in Afghanistan deal with this issue in a broadly similar way. The owner of a piece of land or property must provide evidence, either in the form of officially-certified written documents or oral testimony from trustworthy witnesses, that he or she is the legitimate owner. This ownership must be registered or recorded, and records must be stored in a safe place for future reference. Each subsequent transfer of the land, whether through sale, lease, gift, inheritance, exchange, subdivision or any other change in the status of its ownership, must also be recorded. While this is a simple process, the practicalities of establishing and maintaining a reliable system in a country such as Afghanistan are fraught with difficulty.

Afghanistan's Civil Code provides detailed guidance on the legal requirements surrounding the sale or transfer of land.¹ In order to have the transfer recognized the owner must bring an application letter to the Ministry of Agriculture's land

¹The Civil Law of the Republic of Afghanistan, Kabul, Afghanistan, 1977, Articles 1554-2416.

matters department, the Ministry of Justice's law department or a district or provincial judge. The letter should give details of the affected land and be accompanied by a signed statement from the village leader supporting the requested action. If an official record of the land ownership already exists, then this will be used as the basis of sale. If no official record exists, then officials representing the different departments will visit the plot, speak with neighbours and confirm the details in the application. The parties to the transaction will then be summoned and a price finalized, which will be witnessed by the judge or public official. There is a charge for this process and a tax is also payable to the central Government.

The transfer will be noted, official records will be amended and copies should be retained in the judge's office. A transfer deed will also be issued certifying the sale and receipts should be issued for the tax and payment. These official documents and registers can then be used to prove subsequent ownership of a piece of land. Different types of official land ownership and transfer documents (*Qabala*) are issued according to the nature of the land transfer and they can be used as proof of ownership for subsequent transfers, or used if a dispute about ownership arises in the future.

Many Afghans prefer to rely on customary law to register property transactions. The customary legal system is cheaper and more accessible for most Afghans. Many use customary rather than formal procedures as a means of avoiding paying tax or due to the general distrust of the official court system. It is estimated that only a small minority of land and property transactions are currently officially recognized.²

The basic principles of property transfers conducted under customary law are similar to those used in civil law, but more emphasis is placed on the oral testimony of witnesses than written documents, due to the high rates of illiteracy in Afghan society. In these cases the holder of the land will usually call neighbours and elders of the community to testify that they are the legitimate owners and have the right to sell or otherwise transfer the land to another party. The nature of the transfer, including the amount of land and any payment can also be recorded. Customary documents, *Qabala Urfee*, are often issued. *Qabala*

² See, for example, *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan 2003.

Urfee can be used as subsequent proof of ownership documents, but they have less status than official *Qabala* and a court or public official will tend to accept the latter over the former.

4.2 Transfers through sale

The transfer of land and property through sale and purchase is formally regulated by the Law on Property Dealers 1995, as amended by Decree 76 of September 2004.³ It specifies that such transfers should be conducted through officially registered dealers, who are required to be Afghan citizens of good character with at least a high school diploma or equivalent document and a basic knowledge of the civil law.⁴ The Ministry of Justice is responsible for preparing licenses for all property dealers, and the license must carry the State logo and a serial number that is issued from the Ministry of Finance. Sales should be officially registered and all documents should be handled by the property dealer, who will also help the two sides negotiate a fair price for the property. The register in which deals are recorded should be provided by the Ministry of Justice to the property dealers for a fee. Any other registration book should not be considered official.

Any pending sale must be publicized in order to provide prior notice to anyone who might have an existing claim to ownership or a *lien* on the property. A special form is used to record the transfer and it should be signed or thumb printed by the two sides and their witnesses. The transfer is also registered with the district court, which issues an official title deed (*Qabala*) that is given to the buyer together with the tax book and the electricity book of the property. The cost of implementing the *Qabala*, changing the name on the tax book and electricity books is shared on equal basis by both the parties, and the buyer pays a two per cent tax. The change of ownership is noted in the official records. Property dealers should take one per cent of the property purchase price as payment for their services, with the buyer and seller each responsible for half of this cost, payable only upon closing of the transaction. If the deal is later nullified

³ Decree 76 of the Islamic Transitional State of Afghanistan on Amending and Deleting Certain Articles of the 1995 Law on Property Dealers, dated 6/7/1383 (September 2004).

⁴ *ibid.*, Article 6.

due to property defects or imperfections, the property dealer is required to return this sum.⁵

Many people purchase land and property on credit by taking a loan from a bank or other lender in return for a promise to repay the loan over time. According to the Afghan Civil Code, charging interest in order to obtain a profit from such loans is impermissible ‘unless the law orders otherwise’.⁶ However, many courts find that charging interest on and profiting from loans is acceptable so long as the rates being charged are not usurious.

Sometimes the property being purchased with the proceeds is put up as collateral so that the lender has security. If the loan is not repaid, there is still the option of foreclosure on the loan. If a creditor wishes to foreclose on a debtor, he or she must first issue warnings and then obtain a court order in order to have the debtor evicted from the land or property in question.

4.3 Contract Law

Afghanistan's Civil Law contains hundreds of provisions related to contract law.⁷ A contract may be viewed as an exchange of enforceable promises in which each party makes a promise in exchange for the promise of the other.

Some of these provisions relate to contract formation. To form a valid contract, there must be an offer made by one party to exchange a thing of value in return for a promise and an acceptance by another. ‘A contract is concluded with the offer and acceptance of the two parties.’⁸ There must be a clear expression, ‘through words, writing or signs customarily used’ that this agreement entails a contract.⁹ The terms of a contract must also be sufficiently decipherable for a court to enforce them.

The original agreement is sometimes called ‘consideration’ and without consideration, generally the courts will not recognise any contract. However, if one party agrees to provide consideration and the other party does not, sometimes the promise will be enforced if the party not providing consideration

⁵ Article 14(1), The Civil Law of Afghanistan, *ibid.* This also applies to rental contracts that property dealers arrange.

⁶ Article 1295.

⁷ *ibid.*, Articles 497-757.

⁸ *ibid.*, Article 506.

⁹ *ibid.*, Article 509.

subsequently relied upon the original agreement. Contracts will only be considered valid if both parties entered the agreement willingly and on the basis of consent.¹⁰ The Civil Law states that any type of ‘aversion’ will be held to invalidate consent.¹¹ ‘Complete aversion’ is defined as ‘threats of grave physical or financial danger,’ while ‘threats of unsubstantial danger’ are defined as ‘incomplete aversion.’¹²

Both parties must also have legal capacity to enter a contract.¹³ Minors do not have legal capacity to enter certain types of contracts, including contracts for the purchase or lease of land or property. Most contracts entered into by insane or mentally retarded persons are also deemed void or voidable.¹⁴

A contract may be cancelled because both parties accept that it contained a mistake or was based on mistaken information or assumptions.¹⁵ For example, if both parties relied on an assessment saying a piece of land that was being exchanged was 10 *jeribs* in size and a subsequent assessment shows it only total 8 *jeribs*, the contract may be voidable. However, the failure of one party to read and understand all or part of a contract is not sufficient grounds for it to be cancelled.

Finally, the existence of fraud may be a valid defence to the formation of a contract.¹⁶ This defence focuses on dishonesty in bargaining. The fraudulent act may be an intentional misstatement statement of material fact, deliberately withholding information which a party has a duty to disclose to the other party, or intentionally concealing a fact (for example, in the case of the sale or lease of a home, if the seller or landlord paints over water damage before the prospective purchaser or tenant arrives to inspect the home). To prove misrepresentation, one party to the contract must show that the other party knowingly made a false statement intending to induce him to enter into the contract, that he relied on the false statement in entering into the contract, and that he suffered some damage as a result. This reliance must be reasonable, however. If the party could

¹⁰ *ibid.*, Articles 551-561.

¹¹ *ibid.*, Article 558.

¹² *ibid.*, Article 553.

¹³ *ibid.*, Article 542-550.

¹⁴ *ibid.*, Article 545.

¹⁵ *ibid.*, Articles 562-569.

have easily checked if a statement was true, the contract should not be invalidated based on this misrepresentation.

4.4 Transfers through inheritance

One of the most frequently practised forms of property transfer is through inheritance, which is also strictly regulated under the Afghan Civil Code.¹⁷ Inheritance law is based on four principles: spouses, parents and children have an inalienable rights to inherit, the inheritance will be divided according to the proximity of the family relationship, women family members must receive their precise part of the inheritance, and male family members will receive a bigger share of the inheritance than female members.¹⁸ This last stipulation is officially justified on the basis that men are deemed responsible for meeting future family expenses, while women are free of this obligation.

The inheritance is divided between the family members only after deducting the cost of the funeral and having paid the debts of the deceased.¹⁹ If the deceased husband did not pay it before his death, the *mahr* (marriage gift given or promised by the husband to the wife when contracting for marriage) will be given to her before the division, as the payment of the *mahr* is a priority among other debts of the deceased.²⁰ The remaining property is called *matruka* and will be divided amongst the heirs. The Civil Code contains extremely detailed guidance as to how this should be done.²¹

Direct family members (father, mother, son, daughter, wife and husband) have a priority right to receive inheritance. Other family members (brothers, sisters and their children, cousins, aunts, uncles and other relations) will only receive any inheritance rights after the direct members of the family have received their share. Half of the *matruka* goes to any sons and a quarter to any daughters. The husband will receive half the *matruka* if there are no male children and a quarter if there are. The wife will receive a quarter if there are no male children and an eighth if there are. The parents will receive one eighth of *matruka*. The remainder can be divided between the wider family.

¹⁶ *ibid.*, Articles 570-578.

¹⁷ *ibid.*, Articles 1993 - 2102.

¹⁸ *ibid.*, Article 2001 - 2023.

¹⁹ *ibid.*, Articles 1997 and 1998.

²⁰ *ibid.*, Article 110.

²¹ *ibid.*, Article 2001 2023.

Afghan customary practices rarely recognise the right of women to inherit any property when there is a male heir.²² Generally the total property is either divided between the sons or goes to the senior son. If there are no sons, then the brother or father of the deceased usually claims the property. The widow is often allowed to remain on the property, but required to marry the brother of the deceased.²³ It should be noted that these practices conflict with *Sharia*, the Afghan Civil Code, Afghanistan's Constitution and many of the international treaties that Afghanistan has ratified. Judges and other public officials have an important role to play in combating these illegal practices.

If the deceased had a will, it has to be implemented as a priority from the *matruka*, but it cannot be more than a third of the *matruka*. The transfer of property by will is also regulated by the Afghan Civil Code.²⁴ Both men and women have a right to transfer their property through wills. The author of the will also has far greater discretion over how to transfer property by will as it may be bestowed to anybody irrespective of family ties, gender, religion or nationality. The only limitation is that, since it is forbidden for non-Moslems to inherit property from Moslems and for foreigners to own immovable property in Afghanistan, any foreigner who receives such property will be offered payment corresponding to its value instead.²⁵

4.5 Transfers through marriage

When a couple gets married the future husband is required under Islamic law to make a gift or dowry to the future wife. This donation is called *mahr* and its value will be negotiated between the two families. Marriage is regulated under the Afghan Civil Code, which specifies that *mahr* must be included in the marriage contract. It is personal property registered in the name of wife without any condition and gives her all rights of ownership. If the contract takes place

²² Nouchine Yavari d'Hellencourt, Shuhrat Rajabov, Nasrollah Stanikza, Consultant Abdul Salam, *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan With special reference to Kabul City*, Ministry of Urban Development & Housing and UN-Habitat, Kabul, October - November 2002.

²³ See *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan 2003 and Conor Foley, *Land disputes in Eastern Afghanistan*, Norwegian Refugee Council, 2004.

²⁴ The Civil Law of Afghanistan, Articles 2103- 2195.

²⁵ *ibid.*, Article 2000. See also 2004 Constitution, Article 41.

without *mahr*, the wife can ask for it any time she wants and a court should direct the husband to comply.²⁶

According to the Afghan civil law, *mahr* may be given in two steps. The first part is given immediately (*mahr-e mo'ajjal*) when they enter into the marriage contract. The remaining part is given later (*mahr-e mowjal*) as and when she requests it.²⁷ *Mahr-e mowjal* is usually mentioned in the marriage contract as a debt to be paid later.

If the husband dies before giving *mahr* to his wife, it will not be considered by the law as a part of the *matruka*.²⁸ The money or the property will be given to the wife immediately before deducting the expenses of the deceased. If the marriage has not been consummated and the wife asked to break the marriage (*tafriq*), she receives only half of her *mahr*. If sexual relations had taken place and the wife herself had asked to break the marriage contract, she loses her *mahr*. If the husband decides to divorce (*talaq*) his wife without her request, he has to pay her the *mahr*. In practice Afghan customary law rarely respects the right of the woman to own and receive property and the dowry is instead given by the husband to the head of the bride's family (usually a father or brother). As noted above, Judges and other public officials, should respect the law, rather than customary practice, and ensure that women's legally guaranteed rights are upheld.

4.6 Transfers through donation

The donation or *Habba* of property is also recognised in the Afghan Civil Code, which establishes official procedures to be followed through the courts.²⁹ Such donations must be based on the free will of the donor to give and that of the receiver to receive the donation. *Habba* can be made on a conditional basis and the donor may demand the return of their property if the conditions are not fulfilled. For example, if someone donated a piece of land for the construction of a *mosque*, a *madrass* or for some other charitable purpose and it was subsequently

²⁶ *ibid.*, Articles 98-114.

²⁷ *ibid.*, Article 101.

²⁸ *ibid.*, Article 110.

²⁹ *ibid.*, Articles 1176-1215.

used for another purpose instead, the original owner would have a legal right to demand its return.³⁰

4.7 Landlord-Tenant Law

Lease contracts generally follow the same requirements for formation as do other types of contracts, and the defences to such contracts are the same as well.³¹ Rent may be paid in the form of cash, property or profit and rent shall be payable upon obtaining access to the property or being able to obtain access.³² Where the property leased is in such condition as to endanger the health of the tenants (for example, if a home is not constructed in accordance with the generally accepted minimum standards in Afghanistan), the tenants may cancel the contract. Tenants may install appliances or obtain basic utilities for the property so long as such actions do not do any harm to the property.³³ The tenants are required to make minor repairs where it would be customary to do so, unless the lease agreement states otherwise.³⁴ Tenants are also required to inform landlords when action by the landlord may be necessary (for example, to make a major repair to the property). The tenants must return the property to the landlord at the end of the tenancy in the same condition in which it was originally delivered to them, aside from any damage that may have occurred for reasons beyond the control of the tenants.³⁵

Where the property being leased is agricultural land, the tenant must specify the type of crops that will be grown and obtain permission to use the land in this way.³⁶ If the tenant fails to obtain such permission he or she can be evicted from the land.³⁷

4.8 Tenancy and the sharing of crops

Tenancy is defined in the Afghan Civil Code as a contract between the tenant and landlord that provides for the terms of dividing the harvest between them.³⁸ The

³⁰ See Conor Foley, *Land Disputes in Eastern Afghanistan*, Norwegian Refugee Council, 2004.

³¹ *ibid.*, Articles 1322-1455.

³² *ibid.*, Article 1338.

³³ *ibid.*, Article 1368.

³⁴ *ibid.*, Article 1369.

³⁵ *ibid.*, Article 1376.

³⁶ *ibid.*, Article 1398.

³⁷ *ibid.*, Article 1400.

³⁸ *ibid.*, Article 1411.

contractual relationship between landowners and those hired to work the and is also spelled out in considerable detail.³⁹ Crops should be divided between the tenant or labourer and the land owner in accordance with the contractual terms, and if the contract is silent on the division, then according to local customs. Where there is no set custom, the division shall be equal between the farmer and the landlord.⁴⁰

In such agricultural contracts, the tenants must guarantee to be as conscientious in farming and preserving the crops as they would be on their own land.⁴¹ Tenants are also required to compensate for any unnecessary damage they may cause to the land.⁴² The tenant may not sub-lease the land without permission of the owner, and the tenant must use reasonable care to protect any buildings and irrigation canals on the land.⁴³ Payment of property taxes is the responsibility of the owner of the land.⁴⁴ When crops are destroyed by natural disasters or other unforeseen events, both the farmer and the landlord should suffer equally and no compensation may be demanded of the other party to the contract.⁴⁵ If the contract period ends before the crops have ripened, the crops shall not be harvested until ripe and the necessary costs to irrigate, harvest and reap the crops shall be borne equally by both parties.⁴⁶

4.9 Other land and property transfers

The Afghan Civil Code also recognises a variety of other forms of temporary or partial property transfers known as *Malekiyat-e Naqes*. These take three main forms:

4.9.1 *Bay'-e ja'ez (Temporary Purchase):* A piece of land or property is given to a person to use for a fixed period of time in return for cash payment, which must be returned along with the land or property. The property can be rented out by the occupant during the period of occupation with the agreement

³⁹ *ibid.*, Articles 1411-1431.

⁴⁰ *ibid.*, Article 1426.

⁴¹ *ibid.*, Article 1416.

⁴² *ibid.*

⁴³ *ibid.*, Article 1419.

⁴⁴ *ibid.* Article 1421. See also the discussion of the rental property tax in chapter three.

⁴⁵ *ibid.*, Article 1427.

⁴⁶ *ibid.*, Article 1428.

of the owner, but it cannot be sold. The two parties the original agreement can extend the contract through mutual consent, but either party can end it unilaterally.⁴⁷ The person who has lent the money is, therefore, in a strong position to foreclose on the loan, even when it has been partially repaid, and may gain a property of higher value as a result.

4.9.2 Ajara (Lease): Land and property can be leased for up to three years, and extended as often as necessary, during which time the occupant enjoys exclusive rights to use it as he or she sees fit.⁴⁸ Foreigners were given the right to lease land and property in the 2004 Constitution.⁴⁹

4.9.3 Keraya (Rent) Land and property can be rented for up to a year, and extended as often necessary. The rent can be changed annually or by mutual agreement of the landlord and tenant.⁵⁰ According to Afghan civil law, *keraye* cannot be sublet although this is not observed in practice.

4.10 Conditional Ownership

Property can also be taken into the temporary administration of the State, either because an individual has used the property as collateral for a loan from a State bank or in cases where the individual has left the country. In both circumstances the State can use the property, lease it or rent it out (often to a State employee) but is required to return it once the loan has been repaid or when the individual returns to the country.

4.11 Purchase of State land and properties

A homeless person may purchase a plot of land from the municipality if he or she can prove that he or she does not already own one.⁵¹ This can only be done once and the authorities may repossess the land if it is not used to construct a house according to official specifications within a set time period. The buyer is required to obtain official permission from a number of municipal departments

⁴⁷ *ibid.*, Articles 1770-1899.

⁴⁸ *ibid.*, Articles 1402-1444.

⁴⁹ 2004 Constitution, Articles Forty-one and Forty-two.

⁵⁰ The Civil Law of Afghanistan, Articles 1322-1455.

⁵¹ Nouchine Yavari d'Hellencourt, Shuhrat Rajabov, Nasrollah Stanikza, Consultant Abdul Salam, *Preliminary Study of Land Tenure Related Issues in Urban Afghanistan With special reference to Kabul City*, Ministry of Urban Development & Housing and UN-Habitat, Kabul, October - November 2002.

and to submit a plan detailing the house that will be built. The full purchase price must be paid within six months and at least 40 per cent of the house must have been constructed within three years or ownership of the land reverts to the State.

During the 1960s the Government decreed that State-owned apartments could be bought by State employees at favourable prices and with payments spread over 30 years. This time period was extended to 40 years during the 1980s, although the Government was entitled to repossess the apartment if the required payments were not maintained.⁵² Many of these apartments were forcibly occupied after the overthrow of President Najibullah as State employees were often identified with the previous regime and forced to flee their homes. Some have still not been able to return to their homes as they have been occupied by others.⁵³ A Decree on the Distribution and Sale of State Apartments was issued under the *Taliban* in 2000, which extended the right to buy apartments to all homeless residents. The procedures for buying a State-owned apartment are similar to those for buying State-owned land.

⁵² *ibid.*

⁵³ *Defending Rights at Risk*, Annual Report of the Norwegian Refugee Council Information and Legal Aid Program Afghanistan 2003.

C H A P T E R 5

5.0 Solving disputes in the formal system

This chapter provides guidance about how to take a case related to property rights through the Afghan courts. It describes the process that should be followed to register a case the procedures that should be followed at the trial, forms of evidence, the burden of proof and the appeals process.

The procedures for bringing a case relating to land or property through Afghanistan's courts are largely regulated by the Afghan Civil Code and Civil Procedures Code. In civil cases, the person bringing the claim is referred to as the plaintiff, while the person against whom the case is filed is referred to as the defendant.¹ Both parties to a claim must possess legal capacity.² Where one party does not possess legal capacity, a legal guardian or an executor can be appointed according to the provisions of the laws relating to executors and guardians.³

5.1 Registering a case with the court

A claim must be filed by submitting an official request letter⁴ to the *Hoquq* (Law Department) of the Ministry of Justice. This letter is a one-page form, with blue lettering, which can be obtained from the Ministry of Justice and a variety of other outlets. The form must be stamped by the Ministry of Justice. When it is handed in, the bottom part of the form is cut off and kept by the plaintiff as a receipt.

The form summarises the plaintiff's case and must contain the following information:⁵

- The name, father's name, permanent and current addresses, occupation and national identification number of both the plaintiff and the defendant.

¹ The Civil Procedure Code, Afghanistan Democratic Republic, The Republic of Afghanistan Ministry of Justice Official Gazette, Issue: No. 10, Serial No.: 722, August 22, 1990, Article 6.

² *ibid.*, Article 7.

³ *ibid.*

⁴ *ibid.*, Article 12.

⁵ *ibid.*, Article 13.

- A summary of the plaintiff's claim.
- If the claim concerns an object of moveable property, then its nature and value should be described.
- If the claim concerns a piece of land, then its location and size should also be described.
- Signature or fingerprint of the plaintiff.
- Date of presentation of the claim and date on which it is asserted that the plaintiff first made his or her claim (if these two dates are different).

The claim should usually be filed by the plaintiff but if the claim is filed by an agent, executor or guardian, then this person must be fully identified and the claim must also state the date on which the power of attorney was granted and provide the registration number of this decision.⁶

Multiple plaintiffs can submit a single claim where the case concerns a common piece of moveable or immovable property.⁷ The claim will usually be submitted in the place where the defendant lives or where the property is located.⁸ If the defendant is a married woman, the hearing of the case shall be within the jurisdiction of the court located in the place of residence of the husband.⁹ If she is a girl below the age of capacity it will be in the place of residence of her father or close relatives.¹⁰ Special procedures are also applied if the defendant lacks legal capacity, is absent or missing, is a nomad, a trader, a member of the armed forces or other government employee, or is a foreigner, but the general rule is that the court to which the claim must be submitted should cover the place of residence of the defendant.¹¹ However, where the defendant has left Afghanistan without legal reason the case may, in certain circumstances, be heard in the place of residence of the plaintiff. After a hearing has commenced in a court, and after it has been recorded in a special form, the case cannot be transferred to another

⁶ *ibid.*

⁷ *ibid.*, Article 14.

⁸ *ibid.*, Article 81.

⁹ *ibid.*, Article 82.

¹⁰ *ibid.*, Article 83.

¹¹ *ibid.*, Articles 84–99.

court.¹² If it is ruled that a particular judge should not hear the case, a new judge will be assigned to the case within the same court.¹³

The *Hoquq* issues a letter to the Police Department who will contact the defendant in the case and require him or her to respond to the plaintiff or appear before the *Hoquq*. A maximum of three notifications will be delivered: the first of these will be by letter or a personal visit by the police. If the defendant cannot be located, broadcasts will be made on radio and television. If the defendant does not respond, then the *Hoquq* can make a decision in his or her absence. The *Hoquq* may also gather additional evidence during this period by taking statements, asking questions and collecting documents relating to the dispute.

The *Hoquq* will often first try to settle the case through mediation, by bringing the two sides together and encouraging them to agree to a settlement amongst themselves. The Police Department may also encourage the two sides to settle their dispute through mediation. This is often referred to as a *Jirqa* and the procedures followed may be similar to those used to settle disputes under Afghan customary law which are described in chapter six of this Guide.

Neither the police nor the *Hoquq* are permitted to apply customary law if it contradicts State or *Sharia* law, or Afghanistan's obligations under international law.¹⁴ Nor can they take onto themselves powers that are the preserve of the courts.¹⁵ For example, it is illegal for the police, or a public official, to take possession of a disputed piece of property, or to award it to a third party, pending the resolution of the dispute.¹⁶ It is also illegal for the police to arbitrarily deprive someone of his or her liberty in order to pressurise him or her (or a member of his or her family) to repay an alleged debt.¹⁷

If the two sides agree to settle the dispute through mediation, the *Hoquq* will not usually communicate the result of the settlement to the courts. Either side can ask for it to be done but in practice it rarely happens. Even if the settlement

¹² *ibid.*, Article 93.

¹³ *ibid.*

¹⁴ 2004 Constitution, Articles Two, Three, Eighteen and One Hundred and thirty. The Civil Law of the Republic of Afghanistan, Kabul, Afghanistan, Articles 1 and 2.

¹⁵ 2004 Constitution, Article One Hundred and twenty two. The Civil Procedures Code, Article 3.

¹⁶ *ibid.*, Articles Twenty-five, Twenty-seven, Thirty-eight, Forty and Fifty-one.

¹⁷ *ibid.*, Articles Twenty-four, Twenty-five, Twenty-six, Twenty-seven, Thirty-one and Thirty-two.

involves a transfer of property this will not necessarily be recorded and it will be up to the two sides to register the transfer separately. The procedures surrounding the transfer of property are described in chapter four of this Guide.

Other objections not included in the Code of Civil Procedure but which courts in Afghanistan should consider include whether there is an actual case or controversy before the court. The 2004 Constitution states that ‘the authority of the judicial organ is to attend to all lawsuits in which real individuals or entities including the State stand before it as plaintiff or defendant and in its presence is expressed in accord with provisions of the law.’¹⁸ The Supreme Court has jurisdiction to issue advisory opinions in certain limited instances.¹⁹ Without an actual case or controversy before it, the court may dismiss the case. A defendant may file a preliminary objection if he or she thinks that the plaintiff lacks ‘standing’ before the court. To show that one has standing, a plaintiff must show that he or she has suffered an injury, that such injury was caused by the defendant and that the injury itself could be redressed by a favourable decision of the court. If a plaintiff lacks standing before the court, the court should not entertain the case. Moreover, if a case is not yet ‘ripe’ (that is no adversarial situation and no harm yet exists), or if it is now ‘moot’ (that is has no legal significance, for instance because there is no longer an interest in need of being resolved), a party to the case may lodge a preliminary objection.

If the dispute cannot be solved through mediation the *Hoquq* will usually transfer the case to the relevant court. In most cases involving property this will be the city, municipal, district or sub-district court.²⁰ If the case involves refugees or returnees it will often be referred to the Special Court. Land and property issues are also sometimes dealt with by family courts, labour courts, or other specialist courts, although few such courts exist outside of Kabul.

When a case is sent to court the case file is first reviewed by the president of the court before being officially recorded by the court secretariat.²¹ The president of the court checks that the case file is complete and may refer it back to the *Hoquq* if there are omissions or errors. Once the file has been received by the court

¹⁸ 2004 Constitution, Article One Hundred and twenty.

¹⁹ *ibid.*, Article One Hundred and twenty-one.

²⁰ *ibid.*, Article 79.

²¹ Civil Procedure Code, Article 18.

secretariat each page is numbered and stamped and the date on which the case was officially received is noted. The president of the court then selects three judges and these agree among themselves on a date for a first hearing and inform the plaintiff and defendant.

A judge who is directly involved in a dispute, for example because it concerns a member of his or her immediate family, or because he or she has already acted for one of the parties, must remove him or herself from the judicial panel.²² The parties to the claim may also object to the participation of a particular judge on the same grounds.²³ The hearing of the actual claim will be postponed until after this issue has been resolved.²⁴

The judges review the file and may also refer the case back to the *Hoquq* if they are not satisfied with it. They can strike out points that are not relevant and may also seek to gather additional information about the case. The judges may ask the *Imlak*, the municipality or any other government department to supply them with information and may also ask the legal representatives of the parties to the dispute for additional evidence.

If an objection is lodged against the court hearing the case, this shall be heard before any other proceedings.²⁵ An objection may be lodged on the grounds that the court lacks jurisdiction to hear the case.²⁶ Other preliminary objections include:²⁷

- A lack of legal capacity on the part of the plaintiff or the defendant.
- That the claim does not relate to the person named as the defendant.
- That the issue in dispute has already been decided by the courts.
- That the claim is currently being pursued in another legal proceeding.

That the claim is invalid due to a statute of limitations.

²² *ibid.*, Articles 65-69.

²³ *ibid.*, Articles 70-75.

²⁴ *ibid.*, Article 76.

²⁵ *ibid.*, Article 20.

²⁶ *ibid.*, Article 19 and 21.

²⁷ *ibid.*, Article 21.

In cases where the court decides on objections, it must do so in the presence of both parties and announce its decisions publicly.²⁸ Such decisions can be appealed to a superior court within 20 days.²⁹

Once the case has been accepted, the judges ask the plaintiff to submit a claim concerning his or her case within 15 days.³⁰ The plaintiff is required to bring a form stamped by the Ministry of Justice with a statement of his or her case. This will usually be prepared with the help of a lawyer certified by the Ministry of Justice. It is the responsibility of the plaintiff to ensure that the claim is correctly presented. The court can reject the claim if it is incorrect without giving reasons.³¹ This can cause considerable delays and so it is advisable for a plaintiff to obtain the help of a lawyer. If the plaintiff cannot afford a lawyer, he or she may be allocated one free of charge from either Ministry of Justice or the Supreme Court.

If the plaintiff does not submit the claim within the specified time period it can be dismissed unless there is a reasonable excuse.³² A dismissal can be appealed to a higher court.³³ Once the plaintiff's claim has been accepted, two copies are made of it. The plaintiff keeps one of these, while the other is given to the defendant. A date-stamped receipt is also issued to the plaintiff.³⁴ The defendant is required to respond to the plaintiff's claim within 15 days unless he or she has a reasonable excuse.³⁵

The defendant is required to respond to all of the points in the plaintiff's claim. This can be done either orally or in writing. The clerk of the court will transcribe an oral statement and legal aid is also available if the defendant cannot afford to pay for a lawyer. In simple cases or where the claim requires speedy action, the court has the discretion to make a decision on the case.³⁶

²⁸ *ibid.*, Article 22.

²⁹ *ibid.*, Article 23.

³⁰ *ibid.*, Article 24.

³¹ *ibid.*, Article 26.

³² *ibid.*, Articles 29, 31 and 32.

³³ *ibid.*, Articles 33-35.

³⁴ *ibid.*, Article 25.

³⁵ *ibid.*, Article 24.

³⁶ *ibid.*, Article 28.

Once statements have been accepted from both sides, the judges will set a date for a hearing. If the defendant has not responded within 15 days and has no reasonable excuse for this failure then the judges will set a date for a formal hearing.³⁷ The hearing should be held within two months but this deadline may be extended and often is.

5.2 The conduct of the trial

As noted above, civil claims are usually decided in city, municipal, district or sub-district courts, unless the law provides otherwise.³⁸ Most land and property cases will be dealt with by general courts or the Special Property Disputes Resolution Court. However, some cases may be heard by family courts, labour courts or other special courts. The proceedings of these bodies all follow similar procedures.

The Constitution of 2004 states, 'In the courts of Afghanistan, trials are open and everyone is entitled to attend trials in accordance with the law. The court in situations which are stated in the law or in situations in which the secrecy of the trial is deemed necessary, can conduct the trial behind closed doors, but the announcement of the court decision should be open in all instances.'³⁹ Afghanistan's Civil Procedure Code contains similar provisions, which state that all civil cases shall be heard in public unless a public hearing would adversely affect public order or represent an unwarranted intrusion into a person's right to privacy.⁴⁰ Even in these circumstances all those directly involved in the case, witnesses, experts and interpreters (if needed) shall be allowed to attend and judgments shall always be given publicly.⁴¹

Trials must be conducted in accordance with Afghanistan's Constitution and other laws.⁴² 'When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the *Hanafi* jurisprudence and in a way to serve

³⁷ *ibid.*, Article 30.

³⁸ *ibid.*, Article 79.

³⁹ 2004 Constitution, Article One Hundred and twenty eight.

⁴⁰ Civil Procedure Code, Article 40.

⁴¹ *ibid.*, Articles 41-43.

⁴² 2004 Constitution, Article One Hundred and thirty.

justice in the best possible manner.’⁴³ Where the issue concerns personal matters between two parties who are both *Shias*, and where there is no provision within the constitution or other laws, the courts shall apply the *Shia* school of law.⁴⁴

If parties to a case do not understand the language in which the trial is to be conducted, they are entitled to have an interpreter help them understand any materials, documents and transcript of the proceedings and they are also allowed to speak in their mother tongue in the court.⁴⁵

The judicial panel consists of three judges. Before the court proceedings begin, the plaintiff and defendant, their legal representatives, witnesses, experts and interpreters are allotted specific places within the courtroom and the judges will only enter the chamber once these are in place.⁴⁶ All present must rise when the judges enter and may only sit down once the judges are seated.⁴⁷ The presiding judge then opens the official hearing ‘in the name of God, the Almighty and Just’ and informs the attendees of the composition of the judicial panel, the prosecutor, experts, interpreter and court secretary.⁴⁸ The presiding judge also explains to those present the duties and responsibilities of those involved in the hearing and the case. The court secretary reads out the agenda and the plaintiff and defendant, and their legal representatives, introduce themselves before the formal proceedings commence.⁴⁹

The proceedings begin with a statement from the plaintiff (or from his or her legal representative), followed by a statement from the defendant (or his or her legal representative).⁵⁰ The parties shall freely read out their respective statements and give explanations. One side cannot interrupt the other during this process.⁵¹ It shall be within the authority of the presiding judge to demand explanations from the plaintiff, the defendant and other witnesses. If during the trial there are issues which the members of the judicial panel require

⁴³ *ibid.*

⁴⁴ *ibid.*, Article One Hundred and thirty-one.

⁴⁵ *ibid.*, Article One Hundred and thirty five.

⁴⁶ Civil Procedure Code, Articles 45 and 46.

⁴⁷ *ibid.*, Article 47.

⁴⁸ *ibid.*, Article 48.

⁴⁹ *ibid.*, Article 48.

⁵⁰ *ibid.*, Article 50.

⁵¹ *ibid.*, Article 51.

explanation, the parties shall accordingly be questioned with the permission of the presiding judge.⁵² The court secretary must record all the proceedings of the trial, without any addition or omission, in the book of the records of the session and obtain the signature of the president of the court and any other relevant persons at the end of the trial.⁵³

The leadership and management of the judicial hearing shall be within the authority of the presiding judge. All participants in the trial must obey his or her orders and persons who disturb the order of the court may be expelled.⁵⁴ If those disturbing the orderly conduct of the hearing are the plaintiff, the defendant or their legal representative they can be fined or imprisoned.⁵⁵ Parties, witnesses and experts that fail to appear in court can be officially summoned.⁵⁶ Trials can often be conducted in the absence of the defendant,⁵⁷ but the claim will usually be dismissed if the plaintiff fails to appear.⁵⁸

5.3 Forms of evidence and the burden of proof

The onus is on the plaintiff in a civil case to prove the merits of his or her claim.⁵⁹ There are a variety of means of proving such a claim and these have a hierarchy of value. In the first place the courts will consider a confession by the defendant, next they will examine the documents submitted by both sides, after this they will consider the testimony of witnesses, finally they will consider an oath by the defendant.

If the defendant confesses to the court that the plaintiff's claim is justified this will be taken as conclusive evidence.⁶⁰ Once such a confession has been made it cannot be retracted.⁶¹ If the defendant denies the plaintiff's claim then the onus is on the plaintiff to produce either documents or witnesses to prove his or her

⁵² *ibid.*, Article 52.

⁵³ *ibid.*, Article 53.

⁵⁴ *ibid.*, Article 54-57.

⁵⁵ *ibid.*, Article 58. See also Articles 59-64.

⁵⁶ *ibid.*, Articles 101-152.

⁵⁷ *ibid.*, Articles 154-170.

⁵⁸ *ibid.*, Article 153.

⁵⁹ *ibid.*, Article 280.

⁶⁰ *ibid.*, Article 273.

⁶¹ *ibid.*, Article 277.

claim.⁶² Failing this, the plaintiff can require the defendant to swear an oath on the *Holy Quran* that the property in question belongs to him or her.⁶³ Failure to swear such an oath will be taken by the court as a confession that the plaintiff's claim is justified. However, if the defendant swears the required oath then the plaintiff's claim will be rejected.⁶⁴

Two types of documents may be presented to the court: customary and official.⁶⁵ An official document is defined in the Afghan Civil Code as 'the paper in which the general assignee, or staff of public services, register in accordance with the provision of the law, and with the limits of authority ascribed to them, what is reported to them or what they get from interested persons.'⁶⁶ A customary, or conventional, document is described as being, 'where the said paper lacks the attribution of official document but interested persons have signed or put their seal or finger print upon it'.⁶⁷ Customary documents are often agreements drawn up between two parties and witnessed by neighbours, village elders or community leaders. Letters and other forms of correspondence also have the status of customary documents.⁶⁸

An official document, or a copy of it, can be considered as a deed of ownership unless it can be proved that it is a forgery.⁶⁹ A document that does not conform to all of the requirements of the law will be considered a customary document and so have lesser status.⁷⁰ If the parties to a dispute have drawn up a customary document between them and both confirm its authenticity then it shall have the same status as an official document.⁷¹

Suspicious documents may be examined by the court in a number of ways. The court can examine the document itself to see if the writing, signature, seal, finger-print or attached photographs have been altered in any way⁷² or if

⁶² *ibid.*, Article 280.

⁶³ *ibid.*, Article 340.

⁶⁴ *ibid.*, Article 341.

⁶⁵ *ibid.*, Article 282.

⁶⁶ The Civil Code of Afghanistan, Article 991, para 1.

⁶⁷ *ibid.*, para 2.

⁶⁸ Civil Procedure Code, Article 293.

⁶⁹ Civil Code of Afghanistan, Article 992.

⁷⁰ Civil Procedure Code, Article 288.

⁷¹ *ibid.*, Article 289.

⁷² *ibid.*, Article 314.

additional material has been added to the original document.⁷³ The court can demand a copy of the original document from the official registry.⁷⁴ Signatures can also be examined by handwriting experts⁷⁵ and the witnesses who have signed the documents can be summoned to appear. If a witness fails to confirm that his or her signature is genuine, it will be taken as a denial.⁷⁶

The court will go to considerable lengths to determine the authenticity of documents submitted to it.⁷⁷ If the court accepts an official document from the defendant as genuine it will dismiss the plaintiff's claim (subject to a confession by the defendant or a refusal to swear an oath).⁷⁸ If there is doubt about the authenticity of the documents, or if the documents themselves are not crucial to the essence of the case, the court will consider other evidence.⁷⁹

The testimony of witnesses is considered to be of secondary value as a form of proof.⁸⁰ Witnesses are required to swear to tell the truth,⁸¹ but this oath is not made on the *Holy Quran*, which is reserved for the procedure described above. The testimony of witnesses must be made individually during the hearing and in the presence of both parties.⁸² The statement of a witness made outside the court (for example, a written statement) is of no value.⁸³

The number and full identity of all witnesses must be disclosed in advance and it is forbidden to substitute one witness for another.⁸⁴ Witnesses must be over the age of 18 years and of good character.⁸⁵ The weight attached to the testimony of a witness is subject to the rules of Islamic law, so a woman's evidence is worth half that of a man's.⁸⁶ The court will attach greater weight to the testimony of an eye

⁷³ *ibid.*, Article 304.

⁷⁴ *ibid.*, Articles 303 and 313.

⁷⁵ *ibid.*, Article 290.

⁷⁶ *ibid.*, Article 291.

⁷⁷ *ibid.*, Articles 298-320.

⁷⁸ *ibid.*, Article 300.

⁷⁹ *ibid.*, Article 310.

⁸⁰ *ibid.*, Article 321.

⁸¹ *ibid.*

⁸² *ibid.*, Article 322.

⁸³ *ibid.*, Article 334.

⁸⁴ *ibid.*, Articles 323-324.

⁸⁵ *ibid.*, Article 335-336.

⁸⁶ *ibid.*, Article 321.

witness or someone who has direct knowledge of the case. However, the age, religion, nationality or social standing of the witness should otherwise not affect the value that is placed on the testimony of a witness. If a witness called by the plaintiff refuses to appear in court then the court can issue a summons requiring him or her to appear.⁸⁷ Once the plaintiff has informed the court that he or she does not have witnesses, it is recorded and the plaintiff cannot subsequently produce a witness.⁸⁸

If the plaintiff has been unable to produce either documentary evidence or testimony from witnesses to support his or her claim, he or she has the right to demand that the defendant swear an oath on the *Holy Quran*.⁸⁹ Failure to swear such an oath will be taken by the court as a confession by the defendant that the plaintiff's claim is justified. However, if the defendant swears the required oath then the plaintiff's claim will be rejected.⁹⁰ The administration of the oath and the conditions under which it must be made are subject to detailed provisions in the Afghan Civil Procedure Code.⁹¹

5.4 Judicial decisions and appeals

The judicial panel can reach a decision either unanimously or through a majority vote. The decision should be based on the applicable law and how it applies to the facts of the case. The judges are required to attach their opinions to the judgment. If the decision is through majority vote then the minority opinion should also be attached. Three copies of this judgment are issued: one for the plaintiff, one for the defendant and one for the police department. The case file itself is sent back to the *Hoquq*.

If one party disagrees with the decision, he or she may appeal to a higher court to overturn in whole, or in part, the lower court judgment.⁹² The appeal must be made within one month.⁹³ Appeals after the expiry of this time period will only

⁸⁷ *ibid.*, Article 332.

⁸⁸ *ibid.*, Article 331.

⁸⁹ *ibid.*, Article 340.

⁹⁰ *ibid.*, Article 341.

⁹¹ *ibid.*, Articles 342-357.

⁹² *ibid.*, Article 358-360.

⁹³ *ibid.*, Article 365.

be admitted if the appellant has a justifiable reason for the delay.⁹⁴ The appellant should specify the reasons why he or she does not accept the original judgment and can also appeal if a lower court has not implemented its own judgment to his or her satisfaction.⁹⁵

An appeal should be made in the form of a request letter signed by the appellant or his or her legal representative, which should be presented directly to the higher court.⁹⁶ Appeals against decisions of the city, municipal, district and sub-district courts fall within the jurisdiction of branches of the Supreme Court and will usually be made to the Provincial Court of Appeals.⁹⁷ The decision about which court should hear the appeal is usually based on its seriousness and the value of the claim.⁹⁸ The lower court's judgment should be attached to the request letter and the appellant should specify the aspects of the judgment that he or she does not accept.⁹⁹ The court must acknowledge the acceptance of this letter and issue a dated receipt.¹⁰⁰

On receipt of this letter the higher court must officially request all the papers relating to the case from the lower court.¹⁰¹ The higher court will also appoint a judicial panel, consisting of three judges, who will begin to examine the case. The procedure here is similar to that in the lower court. The judicial panel can send the papers back to the lower court if it believes that they contain administrative mistakes. Once the panel is satisfied with the papers it will order them to be officially recorded.¹⁰²

The court will then request the appellant to submit a more detailed brief, outlining his or her objections to the original judgment.¹⁰³ This must be received within 20 days of the official registration of the case.¹⁰⁴ The brief must contain the

⁹⁴ *ibid.*, Article 371.

⁹⁵ *ibid.*, Articles 361-362.

⁹⁶ *ibid.*, Articles 366, 367 and 372.

⁹⁷ *ibid.*, Articles 363-364.

⁹⁸ *ibid.*, Article 423.

⁹⁹ *ibid.*, Articles 368-369.

¹⁰⁰ *ibid.*, Article 370.

¹⁰¹ *ibid.*, Article 375.

¹⁰² *ibid.*, Article 376.

¹⁰³ *ibid.*, Article 377.

¹⁰⁴ *ibid.*

following information:

- The name of the court to which the objection has been made.
- The identity of the person/ party making the appeal.
- A summary of the decision that is the subject of the appeal.
- The name of the court issuing the decision that is the subject of the appeal.
- The reasons why the decision is inaccurate.
- The precise request of the person or party making the appeal.

Two copies of the appeal brief should be sent to the court.¹⁰⁵ The court will review the document and submit one copy to the appellee for comment.¹⁰⁶ If the appellant is unable or unwilling to submit a detailed brief then the court shall rely on his or her signed (or finger-printed) oral statement.¹⁰⁷ Comments on the brief from the appellee will be accepted on the same basis.¹⁰⁸ If the appellant has not submitted all of the required material in the correct form, he or she will be given additional time and the proceedings will be suspended until this process has been completed.¹⁰⁹

Once all the papers have been officially received and studied, the judicial panel will agree on a date for a formal judicial hearing and announce the time and place of this to the parties to the dispute.¹¹⁰ The appellant can abandon his or her appeal, or the two sides can agree to settle their differences through mediation before formal proceedings begin, in which case the appeal will be formally dismissed.¹¹¹

The conduct of an appeal hearing resembles those of other court proceedings in Afghanistan. The presiding judge will introduce the various participants and

¹⁰⁵ *ibid.*, Article 379.

¹⁰⁶ *ibid.*, Article 380.

¹⁰⁷ *ibid.*, Article 381

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*, Article 382.

¹¹⁰ *ibid.*, Article 385.

¹¹¹ *ibid.*, Article 383 and 384.

explain the type of case to be heard.¹¹² The court will proceed with the case in the absence of either party and will only agree to a postponement if there are justifiable reasons for this absence.¹¹³ The judge will also read a report based on the papers that the appeal panel have considered, including the original lower court judgment, the grounds for complaint and other matters that may have been newly presented to the court.¹¹⁴ The court will then hear statements, first from the appellant, and then from other parties concerning the decision of the lower court.¹¹⁵ After hearing these statements, the appeal panel will withdraw from the chamber and deliberate before issuing a decision.¹¹⁶

The higher court may approve the decision of the lower court and dismiss the appeal, or it may send the case back to the lower court for a new judgment.¹¹⁷ The higher court may uphold the substantive judgment of the lower court, but identify mistakes in aspects of the judgment that should be corrected, or it may invalidate the decision of the lower court and require the court to make a new judgment.¹¹⁸ In cases where the higher court overrules the decision of the lower court, this decision is final and cannot be appealed.¹¹⁹

Where the higher court reverses the decision of the lower court, it should issue a ruling that contains the following information:

- The date and place of the higher court's ruling.
- The name of the court issuing the ruling.
- The composition of the judicial panel.
- The identity of all those involved in the case.
- A brief text of the lower court's decision.
- A brief summary of the appeal brief.

¹¹² *ibid.*, Article 389.

¹¹³ *ibid.*, Articles 389-391.

¹¹⁴ *ibid.*, Article 392.

¹¹⁵ *ibid.*, Articles 393-395.

¹¹⁶ *ibid.*, Article 39

¹¹⁷ *ibid.*, Article 398.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, Article 404.

- Any further information given during the proceedings in the higher court.
- The reasoning of the higher court.
- The law on which the higher court has relied.
- The decision of the judicial panel in the higher court reversing the original decision.

Where the appeal court has overturned the decision of the primary court, the case must be heard again. In such cases, the lower court must follow the ruling of the higher court.¹²⁰ Where the higher court rejects an appeal, it must issue a ruling stating the reasons for this rejection.¹²¹ This ruling can also be appealed to the Supreme Court, whose decision is final. The Supreme Court may overrule the decision of a lower court in whole or in part, and send the case for trial either back to the same judges or to different judges in the same court.¹²²

Once the Supreme Court has dismissed a case, it can only be reopened if the Chief Justice of the Supreme Court makes a request authorised of the High Council of the Supreme Court.¹²³ Cases can be reopened if new evidence comes to light that casts doubt on the final verdict. This could be for one of the following reasons:¹²⁴

- Proof of the falsehood of the testimony of a witness.
- Proof of the falsehood of the testimony of an expert.
- Proof of forgery and deceit in documents and other sources of written proof.
- Proof that an inaccurate translation had adversely affected the trial.
- Presentation of new documentary evidence that did not exist at the time of the trial.
- Presentation of other forms of new evidence.

¹²⁰ *ibid.*, Article 410.

¹²¹ *ibid.*, Article 406.

¹²² *ibid.*, Article 449.

¹²³ *ibid.*, Articles 480 and 483.

¹²⁴ *ibid.*, Article 482.

5.5 Public interest cases

If the case directly involves the Government or government officials acting in their official capacity, it will usually be deemed to be a ‘public interest case’ and will be referred to the Kabul city court, State courts or the main District court.¹²⁵ The *Qazaya Dawlat* (Office of Government Cases), which is a special department within the Ministry of Justice, must also be notified of such claims and will attempt to mediate a settlement. After listening to the statements of the two parties and evaluating the other evidence, the courts may strike out such claims as non-justiciable at the preliminary stage.¹²⁶ If the court decides that a further hearing is necessary, it must produce a written ruling to this effect. The *Qazaya Dawlat* can object to such a ruling in which the case will be referred to the Supreme Court.¹²⁷ If the *Qazaya Dawlat* is not able to mediate a settlement to the dispute that is acceptable to both parties, it is also obliged to refer the case to the courts.¹²⁸

¹²⁵ *ibid.*, Article 121-127.

¹²⁶ *ibid.*, Article 123.

¹²⁷ *ibid.*, Article 124.

¹²⁸ *ibid.*, Article 125.

C H A P T E R 6

6.0 Solving disputes through Afghan customary law

This chapter provides an overview of the significance of Afghan customary law. It describes the relationship between State, religious and customary law and the mechanisms that exist to enforce customary law. The importance that customary law places on restorative justice is explained and some of the contradictions between customary law on the one hand and State, religious and human rights law, on the other are also discussed. This chapter also describes two actual cases that were mediated through Afghan customary law and discusses the strengths and weaknesses of the settlements reached.

6.1 The significance of customary law

The role of customary practice has long been officially recognised as the third source of law in the Afghan legal system. Article 2 of the Afghan Civil Code states, ‘Where there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic *Sharia*, the court issues a verdict in accordance with the public convention, provided the convention does not contradict the provisions of the law or principles of justice.’¹ This is particularly the case in relation to land and property as the Civil Code specifies, ‘In regard to rights of possession and ownership and other objective rights, the law of the locality shall be applicable where the property is located.’² The Code further states, ‘What is proved by time, until no reason to the contrary exists, shall be valid.’³

The role and importance of customary law increased in Afghanistan due to the almost complete break-down of the official institutions of law and order during the conflict over the last 25 years. With the official court system barely functioning in many areas, people increasingly used customary law and traditional mechanisms to resolve disputes. According to a report by Amnesty International, ‘The emphasis on informal, non-judicial dispute resolution mechanisms is partly a reaction to the imposition of foreign models of justice

¹ Civil Law of Afghanistan, Article 2.

² *ibid.*, Article 26.

³ *ibid.*, Article 3.

that were perceived by Afghans as being unable to properly serve the interests of justice. The pre-existing lack of confidence in formal justice mechanisms, compounded with recent delays in rebuilding the formal judicial system, means that there is currently a strong reliance on informal justice systems in many areas.⁴

Afghans continue to rely on customary law because it is cheaper, faster and more accessible to them than the official court system particularly given the high levels of illiteracy in many areas.⁵ Customary law is well-established in the country and its rules are well-known and perceived to be legitimate. Customary law places a great emphasis on restorative justice and the need for compromise so it is an effective mechanism for conflict resolution. The institutions created by customary law are also less susceptible to bribery and corruption and their decisions are widely perceived as fair.

This last point is important due to the widespread distrust of the official system in Afghanistan today.⁶ According to a World Bank report published in 2004, 'bribery to police, judicial services, municipal and other sector Ministry staff is almost a daily affair,' particularly in relation to land issues.⁷ Similarly, the United Nations High Commissioner for Refugees (UNHCR) has noted that returning refugees often complain that they are required to pay bribes to the authorities in order to get their land back.⁸ UNHCR concluded that 'there is a strong and evident lack of faith in the effectiveness of the existing judicial system. As such, returnees, similar to other Afghans, hardly resort to the local courts when exploring solutions to land disputes.'⁹

While many judges undoubtedly perform their professional functions honestly and diligently, it is clear that the official courts have a credibility gap that will take some time to overcome. It is widely acknowledged that the official legal system

⁴ *Afghanistan, re-establishing the rule of law*, Amnesty International, AI Index: ASA 11/021/2003, 14 August 2003.

⁵ Ali Wardak, 'The Tribal and Ethnic Composition of Afghan Society in *Afghanistan: Essential Field Guides to Humanitarian and Conflict Zones* (Second Edition), edited by Edward Girardet & Jonathan Walter, Geneva: Crosslines Ltd, 2003.

⁶ *ibid.*

⁷ World Bank, Poverty Reduction and Economic Management Sector Unit South Asia Region, *Afghanistan: State Building, Sustaining Growth, and Reducing Poverty, A Country Economic Report*, Report No. 29551-AF, June 29, 2004.

⁸ *Land Issues within the Repatriation Process of Afghan Refugees*, UNHCR, Office of the Chief of Mission, Protection, Kabul, September 1, 2003.

⁹ *ibid.*

is in urgent need of reform, ranging from training the judiciary on legal standards to reviewing the gaps in the legal system. The institutions of law enforcement also need to be strengthened if the decisions of judges are to be enforced. Given both the problems of capacity and perception regarding the official system, it is not surprising that Afghans continue to rely on customary law to resolve most land and property disputes.

6.2 What is customary law in the Afghan context?

Customary law in the Afghan context contains both an objective and a subjective element from which it gains its obligatory character. It consists of tribal customs, principles and traditions that have gained their legitimacy through repetition over time (the objective element), and are generally accepted as legitimate by society, the government and the courts (the subjective element).

Customary law is an expression of aspects of Afghanistan's history, politics, society and identity. This has led to the adoption of definite attitudes on what constitutes legitimate behaviour on issues ranging from the gender divisions of labour, and what men and women wear, to land inheritance and marriage practices.¹⁰ Failure to abide by customary law is considered to be shameful and immoral, bringing the highest form of condemnation from the community. The *Jirga* or *Shura* is the informal institution in Afghan society that presides over the interpretation of customary law and dictates proper social relationships at the village, tribal and inter-tribal level.

The relationship between these informal institutions and formal courts varies by region. In some areas, judges instruct parties, particularly in relatively minor disputes, to attempt to mediate a settlement using a *Jirga* or *Shura* and will even refuse to hear a case until these attempts have been exhausted. In other parts of the country judges do not give any official recognition to customary mechanisms.¹¹ Most courts in Afghanistan have appellate jurisdiction so anyone not satisfied with a decision reached through mediation can still take their case before a judge. Thus, in many parts of Afghanistan the *Shura* is regarded as the court of first instance.

¹⁰ Adam Pain, *Understanding Village Institutions: case studies on water management from Faryab and Saripul*, Afghan Research and Evaluation Unit, 2004.

¹¹ Amnesty International, AI Index: ASA 11/021/2003, citing Nangahar and Herat.

Attempts to codify customary law have had limited success because it changes with time. Customary law is generally not written but is passed down orally, from generation to generation, by tribal elders who often do not know how to read or write. *Pashtunwali* (*Pashtun* customary law) is a comprehensive tribal law that dominates in *Pashtun* areas. Indeed, *Pashtunwali* has been described as an ‘essential part of *Pashtun* elegance’ and ‘embodying the collection of praiseworthy morals of a true *Pashtun*.’¹² *Pashtunwali*’s primary themes govern male behaviour and regulate disputes relating to land, women and honour.¹³ Similar rules are also used in non-*Pashtun* areas and, it is claimed that other ethnic groups often rely on the jurisprudence of *Pashtunwali* customary law.¹⁴ One expert commentator on Afghanistan has noted, ‘The values of the *Pashtun* and the Muslim religion, modified by local customs, permeate in varying degrees all other groups.’¹⁵

6.3 The *Jirga*

The *Jirga* and *Shura* play a central role in interpreting customary law to resolve disputes and make collective decisions about the affairs of traditional Afghan society.¹⁶ According to the Pashto Descriptive Dictionary, *Jirga* is an original Pashto word, which in its common usage refers to the gathering of people; it also means consultation.¹⁷ The word *Jirga* is also used in Persian/Dari. It is believed to derive from *jirg*, which means a ‘wrestling ring,’ or ‘circle,’ but is commonly used to refer to the gathering of people.¹⁸ Other scholars believe that the word *Jirga* originates from Turkish where it has a very similar meaning.¹⁹

The word *Shura* has been used in *Sharia* to indicate the importance of meeting, exchanging ideas and freely discussing an issue in order to try and find a solution.²⁰ Some scholars use the words *Shura* and *Jirga* interchangeably. Others

¹² See Prof. Karim Khurram, *The customary laws of Afghanistan*, A Report by the International Legal Foundation, ILF, 2002.

¹³ Larry Goodson, *Perverting Islam: Taliban social policy toward women*, *Central Asian Survey*, 20(4), 2001.

¹⁴ *ibid.* See also Carter and Connor, ACBAR, 1989.

¹⁵ Louis Dupree, *Afghanistan*. Princeton: Princeton University Press, 1980.

¹⁶ Ali Wardak, *Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan*, University of Glamorgan, nd.

¹⁷ *Pashto Descriptive Dictionary*, Kabul: The Academy of Sciences of Afghanistan, 1978.

¹⁸ *Ghyathul-Lughat* (1871) Edited by Maulana Gheyathoddin, Kanpur Press: New Delhi.

¹⁹ Faiz-Zad, M. (1989) *Jirga Haie Bozorge Milie Afghanistan*, Lahore.

²⁰ See, AHKAM AL KORAN, first volume, page 298; AHKAM AL KORAN, fourth volume, page 1400; ROH AL MANI, 25th volume, page 63.

use *Shura* to describe the equivalent to a *Jirga* in areas where other ethnic groups, such as Tajiks, Hazaras, Turkmen or Uzbeks, predominate.²¹ One study has stated that, ‘a *Shura* is a group of individuals which meets only in response to a specific need in order to decide how to meet the need. In most cases, this need is to resolve a conflict between individuals, families, groups of families, or whole tribes.’²² Others have emphasized that *Jirgas* are more integrated into Pashtun tribal society while *Shuras* have a more recent lineage in non-Pashtun areas.²³ However, even in Pashtun areas lay-persons might refer to a council of tribal elders as a *Shura*. The role of the *Jirga* and the *Shura* are essentially the same in upholding Afghan customary law.

The concept of the *Shura* or *Jirga* is also considered a very important part of Islamic society and *Sharia* law. References to it can be found in both the *Holy Quran* as well as in *Hadith*. In the *Holy Quran* Almighty Allah says, ‘*Wa shawer hum fel amr*’ which means social and political affairs should be discussed and consulted on.²⁴ The following passage from Abu Huraira, ‘*Marat ahad aksar mashwarat la shaba men rasol Allah*’ emphasises the importance that the Prophet Mohammed (Peace Be Upon Him) attached to consulting those close to him.²⁵

The concept of the *Jirga* is deeply embedded in Afghan culture and *Jirgas* play an important role in Afghan political life. The two houses of Afghan parliament have been named as *Wolasi Jirga* (Lower House) and *Mashrano Jirga* (Upper House).²⁶ For centuries, Afghanistan has convened *Loya Jirgas* (Grand Assemblies) in order to discuss vital national issues such as the selection of a new ruler, declarations of war, adoption of peace treaties or the discussion of new constitutions. The best-known *Loya Jirga* in Afghan history was the one held in Kandahar in 1747, which selected Ahmed Shah Durrani (Ahmad Shah Baba) as the first King of modern Afghanistan. He went on to lay the foundation of the modern Afghan State, using the legitimacy that he obtained from this selection. *Loya Jirgas* have been used to adopt new constitutions for Afghanistan most notably the ones held in 1922,

²¹ Carter and Connor, ACBAR, 1989.

²² *ibid*.

²³ *Human Security and Livelihoods of Rural Afghans 2002-2003, A report for the United States Agency for International Development*, Feinstein International Famine Center, TUFTS University, June 2004.

²⁴ Soorat Al Umran, Ayat 109.

²⁵ Ayat Termizi, Jihad Book, page 24, under the title of “MAJAFIALMASHWARAT”

²⁶ Article 82 of the 2004 Constitution of the Islamic Republic of Afghanistan.

1964 and 1976. The Afghan Transitional Authority, headed by President Hamid Karzai, was selected at an *Emergency Loya Jirga* in 2002 and a *Constitutional Loya Jirga* adopted a new constitution for Afghanistan in 2004.

It is difficult to generalize about *Jirgas* as they have been convened at different times and for different purposes. While the first *Loya Jirgas* only included men, women have attended *Loya Jirgas* since 1964, and there is no reason why women should not participate in *Jirgas*. Indeed one of the main distinguishing features of *Jirgas* is their flexibility and adaptability to the conditions under which they have been called. However, one central feature that is crucial to the success or failure of a *Loya Jirga* is the perception of its legitimacy by the general population.

6.4 The Structure of Pashtun local *Jirgas*

Shuras and *Jirgas* vary in their functions, rules and composition and often adapt themselves to different conditions. The prototype is the local *Jirga* that has evolved in Pashtun tribal society according to the dictates of the *Pashtunwali*.²⁷

The members of a *Jirga* or *Shura* are officially called *Marakchi*, but generally known as elders. They are men in a village or tribe who are neither elected nor appointed but are considered to be 'genuinely eager to serve and find solutions to disputes.'²⁸ They are often advanced in age and enjoy a high standing within their community. When a dispute needs to be resolved, the elders gather in a private home, a gathering place or the local Mosque. The proceedings will vary to some extent, but typically each speaker begins by sharing short stories, narratives, examples and proverbs before addressing the issues. They then freely discuss and evaluate the issues before them in a calm atmosphere. Every member is entitled to state his point of view and make suggestions. According to one scholar, 'The *Jirga* includes all adult males and rules by consensus. In theory, a *Jirga* can be convened at any level of tribal organisation, from the smallest lineage to an entire confederation. *Jirgas* are most commonly held at the lineage level, but there are larger tribal or even inter-tribal *Jirgas* as well, at least among the eastern *Pashtuns*.'²⁹

²⁷This account is largely based on Professor Khurram, ILF, 2002.

²⁸Ibid.

²⁹Rubin, B. *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, New Haven, Conn.: Yale University Press, 1995.

The number of elders needed in any given proceeding varies. Six or more elders may mediate a dispute between persons, villages or tribes. Half are drawn from one side and half from the other. Because *Jirga* members are expected to be impartial, if a party suspects undue favouritism by a member, he may object. If these suspicions prove to be well founded, the biased member may be replaced. Any party to a dispute who does not feel competent to defend himself properly may have someone represent him until a decision is rendered.³⁰

The length of the proceedings will depend on the nature and importance of the issues. Some issues require a day, others need weeks of deliberation. At the beginning of the session, cash or *Machilgha* equivalent to the value of the case is collected from the parties and given to a third party for safe keeping. These act as a sort of legal guarantee accepted by all tribes and will be forfeited if one party refuses to accept the decision of the *Jirga*. It has been claimed that sometimes a *Jirga* may delay reaching a decision so that the *Marakchi* may continue to benefit from the *Machilgha*.³¹ This obviously constitutes an abuse of the *Marakchi's* power and such practices are rare.

Members of the *Jirga* usually try to find common grounds between the disputants and resolve the conflict in a way that is acceptable to both parties. The elders actively use their traditional authority to influence or pressure the parties to agree to a settlement. Techniques of persuasion will often include references to God and honour as well as the importance of the reputation and unity of the village.³²

At the end of the proceedings, the *Jirga* will issue a decision or *pikra*. Some decisions called *Tselay* set forth general rules that have precedential value. *Tselay* that have been issued by the *Jirga* of an influential tribe may then be considered as precedents to be used by other *Jirgas*. The *Marakchi* rely on prior decisions and *Tselay*s to resolve conflicts. They also rely on *Nerkhs*, which set the damages for a particular wrong. *Nerkhs* are specific to each tribe but form a recognised body of customary law specifying the amount to be paid for particular offences.³³

³⁰ Professor Khurram, ILF, 2002.

³¹ This point was made by participants at a Norwegian Refugee Council (NRC)/United Nations High Commissioner for Refugees (UNHCR) seminar on the Guiding Principles on Internal Displacement in Kabul in December 2003.

³² Observations by NRC staff at *Jirgas*.

³³ Professor Khurram, ILF, 2002.

The men responsible for the enforcement and implementation of the *Jirga* decisions are known as *Arbakai*. In ancient Aryan tribes, the *Arbakai* led groups of warriors in wartime and maintained law and order in peacetime. Today, they tend to be young, unmarried male members of the tribe who have the responsibility to implement *Jirga* decisions. They are given considerable immunity in their communities. However, *Arbakai* do not enjoy any legal immunity before the State and can be held to account if they break the law.

A person dissatisfied with the decision of a *Jirga* may ask that another *Jirga* review the case. If a party is dissatisfied with the second *Jirga*, a member of the *Jirga* may ask for a third and ultimate review known as *Takhm*. Parties must accept the final decision of the *Takhm*. If a person refuses, the tribe will choose a suitable punishment.³⁴ Such punishments must not violate or contradict the law of Afghanistan.

6.5 *Jirgas* and Justice

The *Jirga* or *Shura* is a dispute resolution mechanism that plays an important role in community affairs. Afghan customary law and the *Jirga* system often emphasize harmony in the community over individual rights, a point to consider in evaluating the fairness of a decision. Although not religious bodies, some *Jirgas* include religious leaders, who base their opinions on Islamic principles of justice. However, Afghan customary law is not exclusively based on *Sharia* and differs from it in some important respects. As one commentator has noted, ‘In many respects, *Shariat* and custom conjoin. In others, *Shariat* departs. This is particularly the case for example with respect to *Shariat* rejection of usury (receiving interest on loans), with respect to women’s land rights and norms relating to commonage, all areas where what is customary strongly dominates.’³⁵ Another scholar has noted that most *Marakchi* are not religious leaders or scholars and are likely to only have a working knowledge of what could be termed ‘folk Islam.’³⁶

The concept of *Namos* is central to *Pashtunwali* and some of the most serious punishments in Afghan customary law are reserved for violations of *Namos*. The

³⁴ *ibid.*

³⁵ Liz Alden Wiley, *Land Rights in Crisis: Restoring land tenure to Afghanistan*, Afghan Research and Evaluation Unit, Kabul, March 2003.

³⁶ Wardak, University of Glamorgan, nd.

word translates literally as the ‘status, chastity, purity, virtuousness, and nobleness of the female members of the family.’ Under *Pashtunwali* it is the duty of all men to safeguard the *Namos* of his wife, sister, mother and any other female members of his family. *Namos* can also be seen as an obligation to protect home, land and country from aggression. A violation of a woman's honour is treated as a violation of the family, clan or tribe's honour. However, this concept does not recognise women as possessing individual rights and it is not uncommon for a woman to be killed by male relatives to uphold the honour of the family.³⁷

By contrast, the individuality of a woman is an important principle of the Islamic religion.³⁸ Islam approaches women directly, rather than through the agency of Muslim men, and women may embrace Islam through their independent will, even if their male relatives have not. To deny the right of a woman to become a Muslim even against the wishes of her male relatives would clearly be contrary to a basic tenet of Islam. A woman who becomes a Muslim must also personally accept the obligations it entails.³⁹ A woman is rewarded or punished before God on the basis of her own actions. No man is allowed to plead or intercede for a woman, nor is he held responsible for her actions and their consequences.⁴⁰

Islam does not provide different moral codes for men and women and both are expected to observe the general religious standards relating to personal conduct, social dealings and moral behaviour. The personal religious services for a woman in Islam are the same as for a man. She has to pray, fast, give alms, go on pilgrimage to the *Holy Kaaba* and remember God.⁴¹ Islam assumes that women will participate in public life and calls on them to show solidarity with the community of believers and to promote the well-being of their society. In all these matters there is no distinction between Muslim men and women. Under Islamic jurisprudence, a Muslim woman can propose to a man for marriage orally or in writing. She can freely choose her spouse, reject a suitor she does not like or obtain a divorce from an estranged husband against his will. A male relative normally formalises the marriage contract and a divorce, on a woman's

³⁷ Amnesty International, AI Index: ASA 11/021/2003.

³⁸ Dr Hassan al-Turabi, *On the Position of Women in Islam and in Islamic Society*, 1973, See www.islamfortoday.com.

³⁹ Faqir, F. *Intrafamily Femicide in Defence of Honour: The Case of Jordan*, *Third World Quarterly*. Vol. 22(1), 2001.

⁴⁰ 'For on the Day of Judgement, every one of them will come to Him singly.' (Maryam, 96). Quoted by Dr al-Turabi, 1973.

initiative, can only be granted by a judge, but there is no place for forced marriages under Islamic law.⁴²

Historically, Islamic law gave Muslim women economic independence much earlier than the European legal systems. Women could own property in their own names and dispose of it in any manner.⁴³ *Sharia* generally provides for an equitable role for women in the economic life of Muslim society and there is no reason why women cannot be equal to men in the workplace.

Afghan customary law, by contrast, frequently denies the right of women to own land. While ownership of land by widows does exist, daughters on the whole are deemed to have surrendered their rights to their brothers, particularly when they marry.⁴⁴ One specialist on land rights has argued that the objective of this practice is less to deprive a sister of owning land than to prevent land being lost to another family through her.⁴⁵ This is a frequent practice in many different rural societies, both Muslim and non-Muslim, and reflects the deep-seated concern amongst land-poor peasant farmers. However, the denial of property rights to women contradicts *Sharia* and shows how customary law in Afghanistan sometimes conflicts with Islamic law.

Another criticism of the *Jirga* is that it is not representative of society. The informal criteria for determining who is eligible to be a *Marakchi* makes it possible for a *Jirga* to be dominated by a certain political or ethnic group. Some observers claim that armed commanders in some areas have manipulated *Shuras* and *Jirgas* as a means of legitimising their rule.⁴⁶ Such bodies may not represent the wider community and their decisions may lack legitimacy. Finally, because *Jirgas* do not follow the formal procedures for examining and assessing evidence, their decisions may not always be fair and non-discriminatory. While *Jirgas* gain their legitimacy through the perception of the community that their decisions

⁴¹ For God has proclaimed, 'And the believers, men and women, are allies of each other, enjoining the right and forbidding the wrong, establishing prayer, giving alms and obeying God and his messenger. As for these God will have mercy on them, God is Mighty and Wise.' (Tawba, 71). Quoted by Dr Hassan al-Turabi, 1973.

⁴² *ibid.*

⁴³ Christina Jones, *The Status of Woman in Islamic Law*, June 14th, 1998 in Göttingen, Germany.

⁴⁴ The legal aid centres managed by the Norwegian Refugee Council registered a number of such cases in 2003 and 2004.

⁴⁵ Liz Alden Wily, *Rural Land Conflict and Peace in Afghanistan*, Afghanistan Research & Evaluation Unit, Kabul, February 2004.

⁴⁶ Feinstein International Famine Center, TUFTS University, June 2004.

are just, the lack of clear rules about the admissibility of evidence, due process and transparent procedures is a particular concern.

Members of the *Jirga* tend to give considerable weight to subjective factors such as the ‘character’ of the different parties to a dispute and the witnesses that each side calls. Issues that would be excluded as ‘prejudicial’ in a court of law often play a central part in the deliberations of a *Jirga*. A judge in a courtroom is required to maintain strict impartiality and base his or her decisions solely on the facts and the relevant law. Members of a *Jirga* are likely to play a much more interventionist role. The *Marakchi* will also usually try to find common ground to resolve the conflict rather than uphold individual rights. This means that they could put pressure on one side to settle for less than his or her full entitlement in the interests of what they perceive to be the ‘common good.’ These perceptions may be biased on grounds of gender or ethnicity, or because one party to the dispute is more powerful.

6.6 Restorative justice, retribution and human rights

Many disputes over property in Afghanistan have both a civil and a criminal part. Disputes over land, for example, can often escalate into tension and violence between the two parties. *Pashtunwali* norms of criminal law are based on the notion of restorative and reparative justice rather than the notion of retributive justice. A wrongdoer will usually be required to compensate a victim and ask for forgiveness. In some cases, the victim may be permitted to take revenge, but generally a *Jirga* will instead try to restore the victim’s honour while avoiding the creation of fresh enmity.⁴⁷

To eliminate persisting conflicts between persons, families, or tribes, and to prevent future disputes, the *Nerkhs* and *Tselays* require the guilty party to visit the victim’s household and to make an appropriate gesture of remorse and atonement. This is known as a *Nanawati* and it can take many forms. In the case of accidental or intentional killings, for example, the *Nanawati* may involve helping to carry the victim’s corpse or even lying for a symbolic moment in the victim’s grave. The slaughter of a sheep at the gates of the victim’s house or the local

⁴⁷Wardak, University of Glamorgan, nd.

Mosque also frequently form part of a *Nanawati* and is regarded as a highly symbolic plea for forgiveness.⁴⁸

Pashtunwali also often requires the wrongdoer to pay a *Poar*, or blood money, to the victim. These *Poars* are generally fixed at a set rate according to the severity of the offence. *Poars* may take the form of cash or goods, but also often include female members of the wrongdoer's family. Such judgments, if the girl is either under age or given against her will clearly violate Afghanistan's Constitution, its civil and criminal codes, *Sharia* and international human rights law.

6.7 Customary law and Afghanistan's legal system

There is no doubt that customary law as interpreted by *Shuras* and *Jirgas* has a crucial role in mediating land disputes and settling property claims. The official court system lacks the capacity and credibility to handle the vast number of claims that currently exist. Most Afghans also prefer to use *Jirgas* and *Shuras* to resolve their claims and it is now widely recognised that customary law has a place in the Afghan legal system. At the same time, it is clear that *Jirgas* and *Shuras* have their limitations and are no substitute for the official courts.

As noted above customary law may only be applied where there is no provision in State or Islamic law.⁴⁹ Customary law is also not allowed to contradict the provisions of the law or principles of justice.⁵⁰ The 2004 Constitution also states that 'no law can be contrary to the beliefs and provisions of the sacred religion of Islam.'⁵¹

Customary law does play a valuable role in mediating in minor civil disputes, particularly on land and property issues, where the knowledge, experience and trust of the local community helps to settle disputes. Given the current state of land relations in Afghanistan, this is an extremely important task. As the World Bank has noted, 'Experiences elsewhere suggest that resolving land tenure issues can be complex and controversial, and for this reason it may be prudent to carry out more research in the area and for the Government to adopt an incremental and learning-by-doing approach that involves local communities, before scaling

⁴⁸ Professor Khurram, ILF, 2002.

⁴⁹ Civil Law of Afghanistan, Article 2.

⁵⁰ *ibid.*

up. International experience suggests that building on the best traditional practices can be an effective way to move forward.⁵²

UNHCR has similarly concluded that ‘it is important to also recognise the pivotal role that traditional and tribal mechanisms play in solving disputes. Rather than viewing them as a substitute to the official legal channel, one should look at them as being complementary. These practices are by large in conformity with human rights standards. In that respect, one should think of the *Shuras* and *Jirgas* as being dynamic institutions susceptible to change, which allows for the rectifying of practices that may seem incompatible. It is therefore recommended that the UN agencies study these successful and effective models with the purpose of identifying entry points for the international community to provide support.’⁵³

6.8 Two cases mediated by *Jirgas* in Afghanistan

The following two cases were solved through *Jirgas* in Afghanistan. The outcome of both cases illustrates some of the strengths and weaknesses of the *Jirga* system.

The first case was successfully solved after the intervention of NRC:

For almost one hundred years the people of two villages in Laghman Province, Afghanistan have been using a road that one group of villagers claim they constructed on government-owned land. During the jihad against the communists the two villages allied themselves to different Mujahedin factions and in 1992, most of the people of one village fled to Pakistan. The people from the other village blocked access to the road by those who remained. This dispute lasted for over 12 years. Two attempts to solve it using the courts failed and two Jirgas also failed to reach an agreement that was acceptable to both sides. Finally, in 2004 legal counsellors from the Norwegian Refugee Council’s Information and Legal Aid Centre in Jalalabad intervened in the case. The legal counsellors took statements from both groups of villagers and also met with the District Governor, the police, and other public officials. Lengthy negotiations followed before the two sides would even agree to another Jirga. One village demanded the exclusion of villagers associated with a particular local commander as a pre-condition and certain other

⁵¹ 2004 Constitution, Article 3.

⁵² World Bank, 2004.

⁵³ UNHCR, September, 2003.

rights guaranteed to them. Such pre-conditions are quite common before a Jirga can even start.⁵⁴ However a Jirga was eventually held, which agreed that both villages could have access to the road.

The second case was reported by the International Legal Foundation:

At one time, a dispute arose between two members of the Wazir tribe over water allocation. The altercation escalated to the point where one man shot and killed the son of the other family. The first family was then forced to flee from the village to Pakistan. In their absence, the village elders decided to mediate the dispute between the two families and determined that the dispute and resultant murder could be resolved by having the first family give two girls and pay a fine of 300,000 Pakistani Rupees to the second family. In addition, the Jirga ordered this family to express their approval of the Jirga's decision by having a girl of their family marry a member of the other family. The second family agreed to accept the two girls as recompense for the murder but rejected the 300,000 Pakistani Rupees. After this compromise was reached through the power of the Jirga, there was no further incident or dispute between the families.⁵⁵

In both cases the disputes were resolved peacefully and with both sides being prepared to make compromises. The first case shows how time consuming and complex it can be to solve a case through a *Jirga*. Before a *Jirga* can even be convened, the two sides have to agree to meet. Since participating in the *Jirga* process implies a willingness to compromise, obtaining this commitment is often a delicate task. One crucial precondition is that both sides perceive the process to be fair and legitimate and this can sometimes only be obtained through the intervention of neutral intermediaries. International organisations, and other outsiders, should, however, be very careful that they fully understand the complexities of a dispute before intervening.

Once a *Jirga* has reached a decision there is also no mechanism to enforce this on the two sides and either side is free to reject the proposed settlement. This happened twice in the first case, which remained unsolved for over 12 years. Finally, because the settlement was reached outside of the official legal

⁵⁴ Norwegian Refugee Council Jalalabad Legal Aid Centre, September 2004.

⁵⁵ Professor Khurram, ILF, 2002.

mechanisms, there might be problems in registering the agreement and ensuring that both sides abide by it in the future.

The same problems also apply to the second *Jirga* decision. In addition to this there are clearly unsatisfactory aspects to the decision. The *Jirga* resolved the dispute through ordering the marriage of three young girls who had played no part in the dispute. These girls were sacrificed in the interests of a settlement that left a serious crime unpunished and did not even address the original dispute over water rights. This example shows how a *Jirga* decision can violate both Afghan and international human rights law.

CHAPTER 7

7.0 Land, housing and property rights under international law

This chapter describes the protection given to land, housing and property rights under international law. Although this law is not directly applicable in Afghanistan's courts, it provides an important framework within which the courts should operate. Chapter eight provides guidance on how to use international human rights monitoring bodies to draw attention to particular violations of land, housing and property rights.

7.1 National and international law

International human rights law does not substitute itself for national law, but establishes a comprehensive set of standards that can be applied to all legal systems in the world.¹ The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide.

Once a State has ratified an international treaty it is bound by the provisions of this treaty. All States are additionally bound by principles of general, or customary, international law (for example, the outlawing of genocide, slavery and torture).² Some of the standards cited in this chapter are contained in treaties that are legally binding on Afghanistan. Others are contained in 'soft law' instruments such as declarations, resolutions, or bodies of principles or in the reports of international monitoring bodies and institutions. While not directly binding these standards have the persuasive power of having been negotiated by governments and/or adopted by political bodies such as the UN General Assembly. Sometimes these 'soft laws' affirm principles that are already considered to be legally binding as principles of general or customary international law. They often also spell out in more detail the necessary steps to

¹ Article 38 of the Statute of the International Court of Justice lists the means for determining the rules of international law as: international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions and the teaching of eminent publicists. General international law (customary international law) consists of norms that emanate from various combinations of these sources.

² Ian Brownlie, *Principles of Public International Law*, Clarendon Press, 4th edition, 1990. General international law (customary international law) consists of norms that emanate from various combinations of the sources listed in the Article 38 of the ICJ Statute.

take in order to safeguard the more broadly defined rights that are contained in treaty law.³

Many of the treaties that Afghanistan has ratified require it to submit regular reports to the bodies that monitor compliance with these treaties to explain how their provisions are being implemented. These bodies issue general comments and recommendations, review reports by States and issue concluding observations on the compliance of a State with the relevant convention. Some also permit individuals who believe that their rights have been violated with a mechanism for bringing individual complaints to these treaty monitoring bodies. In this way they can provide authoritative interpretations of the treaty provisions and the obligations that these place on States that have ratified them. Other mechanisms have also been established to examine issues of special concern to the international community or the situation in specific countries.

Afghanistan like all other countries is required to abide by instructions of the treaty-monitoring bodies for the treaties that it has ratified. If these bodies identify shortcomings in its law or practice, Afghanistan is required to remedy them. Afghanistan should also pay serious attention to the reports of the other mechanisms established within the framework of international human rights law as they also provide guidance about its international obligations. The procedures of some of these bodies, and the mechanisms for bringing cases or submitting evidence to them, is described in greater detail in chapter eight of this Guide.

7.2 Afghanistan and International Law

Afghanistan is constitutionally bound to abide by the United Nations Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.⁴

Afghanistan has ratified the six⁵ main human rights treaties: the International

³ For example, a considerable body of 'soft law' standards have been developed to protect people against acts of torture.

⁴ Chapter 1, Article 7 of the new Constitution adopted by the Constitutional Loya Jirga of Afghanistan in January 2004.

⁵ With the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003 [Migrant Workers' Convention].

Covenant on Civil and Political Rights,⁶ the International Covenant on Social Economic and Cultural Rights,⁷ the International Covenant on the Elimination of All Forms of Racial Discrimination,⁸ the Convention on the Elimination of All Forms of Discrimination Against Women,⁹ the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment,¹⁰ and the Convention on the Rights of the Child.¹¹ It has also recognized the competence of the Committee on the Elimination of Racial Discrimination to receive and examine individual complaints of violations.

Afghanistan has also ratified the four Geneva Conventions of 1949,¹² relating to armed conflict (although not the two Additional Protocols of 1977¹³), and is a party to the Rome Statute of the International Criminal Court 1998.¹⁴

7.3 The right to private property under international human rights law

The right of every individual to the peaceful enjoyment of his or her property or possessions¹⁵ is recognised both in the Constitution of Afghanistan and a number of international treaties to which Afghanistan is a party. These rights have been

⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976. ['ICCPR'].

⁷ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976. ['ICESCR'].

⁸ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* 4 January 1969. ['CERD'].

⁹ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 September 1981. ['CEDAW'].

¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* 26 June 1987 ['CAT'].

¹¹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990. ['CRC'].

¹² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 75 U.N.T.S. 287, *entered into force* 21 October 1950 ['Geneva Conventions'].

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, *entered into force* 7 December 1978 ['Protocols I and II'].

¹⁴ Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9.

¹⁵ Some human rights treaties refer to 'possessions' rather than 'property,' but these terms have been interpreted as interchangeable by treaty monitoring bodies. The term has also been interpreted broadly to include both moveable and immoveable property as well as shares, licences, patents, intellectual property, ownership of debts, etc.

enshrined in the Universal Declaration of Human Rights 1948 (UDHR),¹⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁷ and the International Covenant on Civil and Political Rights (ICCPR).¹⁸ The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, which oversee the implementation of the ICCPR and the ICESCR respectively, have also elaborated these rights in greater detail.¹⁹

International law recognises that individuals have the right to own property and the right to be protected against arbitrary or unlawful interference with their privacy and home. Everyone has the right to adequate housing. All individuals also have the right to the use and peaceful enjoyment of their property and no one shall be arbitrarily or unlawfully deprived of their property.

The ‘right to property’ is not an absolute right. The State can limit this right in certain circumstances, such as when it is necessary in the public interest. Any interference must be ‘lawful’ under both domestic and international law and a ‘fair balance’ must be struck between the interest of the general community and the right of the individual property owner.²⁰ The reason for the interference must be specified and the interference must be proportionate to this legitimate aim.

Interference may be justified, for example, in the interests of national security, public order or general welfare. However, where such actions discriminate against a particular racial or ethnic group, they would almost certainly be found

¹⁶ UDHR, Article 17 (1) 'Everyone has the right to own property alone as well as in association with others, and that (2) No one shall be arbitrarily deprived of his property. Article 25 (1) 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his (or her) family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'

¹⁷ ICESCR, Article 11(1) 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'

¹⁸ ICCPR, Article 17 (1) 'No one shall be subjected to arbitrary or unlawful interference with his (or her) privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

¹⁹ See, for example: General Comment No. 4 of the United Nations Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing contained in UN Doc. E/1992/23; General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights on Forced Eviction contained in UN Doc. E/C.12/1997/4; General Comment No. 27 of the United Nations Human Rights Committee on Freedom of Movement contained in UN Doc. CCPR/C/21/Rev.1/Add.9; General Comment No. 16 of the United Nations Human Rights Committee on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation contained in UN Doc. HRI/GEN/1/Rev.6.

²⁰ See *Sporrong and Lonroth v Sweden*, European Court of Human Rights, 1979, European Human Rights Reports, Vol 2, p.330 and *Soering v United Kingdom*, European Court of Human Rights, 1989, European Human Rights Reports, Vol 11 p.439.

to be 'disproportionate' and so constitute a violation.²¹ The requirements of 'proportionality' often require the payment of compensation, when someone has been deprived of his or her property.²²

In accordance with the principle of proportionality, the greater the level of interference, the greater the justification required.²³ For example, depriving someone of his or her property or restricting access to property may constitute a greater interference than merely controlling its use. The decision about whether a 'fair balance' has been struck should therefore be decided on a case-by-case basis.

Where an interference with the right to property takes place, the individual concerned has the right to a fair and public hearing by a competent, independent and impartial tribunal and with certain procedural guarantees. The right to property, therefore, needs to be considered alongside the 'right to a fair trial'.²⁴

Where a person is arbitrarily deprived of his or her right to property, she or he is also entitled to an effective remedy by competent national tribunals. Such deprivations often occur in the context of international armed conflicts, internal strife and communal or ethnic violence when people are forced to flee their homes or lands due to circumstances beyond their control. This can be considered as a violation of the right to freedom of movement and residence.²⁵ The Human Rights Committee has stated, 'The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.'²⁶

7.4 The Right to Restitution

The issue of land, housing and property restitution has become an increasing concern as the world grapples to deal with the problems facing millions of

²¹ For more details see the final section of this chapter.

²² See, for example, *Lithgow v United Kingdom*, European Court of Human Rights, 1986, European Human Rights Reports, Vol 8, p. 329.

²³ *ibid.*

²⁴ UDHR, Article 10; ICCPR, Article 14(1).

²⁵ UDHR, Article 13; ICCPR, Article 12(1).

²⁶ United Nations Human Rights Committee, 2 November 1999, General Comment 27: Freedom of Movement (Art. 12).

people who have been displaced from their homes due to armed conflict, violations of human rights, situations of generalized violence, and natural or man-made disasters. The ‘right to restitution’ is not explicitly enshrined in international law, but has been defined as ‘an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position.’²⁷

The basic concept of restitution is well established in international law and rests on the notion that an effective remedy should ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’²⁸ The ‘right to an effective remedy’ is found in most international human rights conventions and is widely understood to mean that victims of human rights violations have an enforceable right to have this violation remedied, repaired and reversed.²⁹ The ICCPR, for example, stipulates that:

States Parties shall undertake: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (c) To ensure that the competent authorities shall enforce such remedies when granted.³⁰

Restitution is also recognised as a remedy for victims of violations of international criminal and humanitarian law. The Fourth Geneva Convention

²⁷ *Housing and property restitution in the context of the return of refugees and internally displaced persons, Progress report of the Special Rapporteur, Paulo Sérgio Pinheiro, Addendum, Commentary on the Draft Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Commission on Human Rights (E/CN.4/Sub.2/2004/22/Add.1) 8 June 2004.

²⁸ *Chorzow Factory (Indemnity) Case (Germany v Poland)*, International Court of Justice, 1928.

²⁹ UDHR (Art. 8), ICCPR (Art. 2), CERD (Art. 6), CAT (Art. 11), CRC (Art. 39), the African Charter on Human and People’s Rights (1981), ILM No 21, p 59, entered into force 21 October 1986 (Art. 7), the American Convention on Human Rights (1969), OAS, OER/Ser.K/XVI/1.1, entered into force 18 July 1978, (Art. 25) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Council of Europe Treaty Series No. 5, entered into force 3 September 1953, (Art. 13).

³⁰ ICCPR, Article 2(3).

relative to the Protection of Civilian Persons in Time of War,³¹ and the Second Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts,³² both prohibit arbitrary displacement and the destruction of property. Both the *ad hoc* tribunal for the former Yugoslavia and the International Criminal Court also envisage restitution as a remedial measure for such violations.³³

The UN Commission on Human Rights has appointed a Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and it has adopted a set of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (the 'Van Boven-Bassiouni Principles').³⁴ These principles note that the right to a remedy includes, inter alia, reparation for harm suffered and that restitution is a particular form of reparation. According to the principles, restitution includes 'restoration of liberty, legal rights, social status, family life and citizenship return to one's place of residence, restoration of employment and return of property.'³⁵ Compensation differs from restitution and seeks instead to place a financial value on the suffering of the victim. This may be the only possible means of restoring an individual who has suffered physical or mental harm to his or her previous status, or assisting in the rehabilitation process. However, compensation is unlikely to be a sufficient remedy when people have been driven from their land or home to which they wish to return.

7.5 The right to return

The forced return of refugees and other displaced persons is, incompatible with international human rights standards and is a violation of the core principle of *non-refoulement*.³⁶ However, for those who have been forcibly uprooted from

³¹ Fourth Geneva Convention, Articles 49, 53, 70 and 134.

³² Protocol II, Article 17 of the Second Protocol Additional.

³³ See Rome Statute of the International Criminal Court (Art.5) and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (Art. 105).

³⁴ The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (UN Doc. E/CN.4/2000/62).

³⁵ Article 22.

³⁶ Convention relating to the Status of Refugees (1951), 189 U.N.T.S. 150, entered into force April 22, 1954 [Hereinafter 'Refugee Convention']. Article 33(1) provides that 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.'

their homes and lands, returning home in safety and dignity is often seen as the most desirable, sustainable, and dignified solution to displacement.

The right of refugees and internally displaced persons (IDPs) to return to their homes and places of habitual residence and to have their property restored to them has been recognized by the UN Security Council in relation to situations in Bosnia and Herzegovina,³⁷ Abkhazia and the Republic of Georgia,³⁸ Azerbaijan,³⁹ Cambodia,⁴⁰ Croatia,⁴¹ Cyprus,⁴² Kosovo,⁴³ Kuwait,⁴⁴ Namibia⁴⁵ and Tajikistan.⁴⁶ The right of return has also been included in a number of peace agreements concluded under UN auspices. Institutions have been created in a number of countries to strengthen its enforcement to help ensure that people's homes and lands are not simply regarded as part of the 'spoils of war.'⁴⁷

The UN High Commissioner for Refugees (UNHCR) seeks permanent solutions for the problem of refugees by assisting governments to facilitate the voluntary repatriation, or their assimilation within host communities.⁴⁸ While there is no hierarchy among the three durable solutions of voluntary repatriation, local integration into countries of asylum and resettlement in third countries, voluntary repatriation has come to be the preferred of the three where it is viable.⁴⁹

³⁷ Security Council resolution 752 (1992).

³⁸ Security Council resolutions 1287 (2000), 1036 (1996), 971 (1995) and 876 (1993).

³⁹ Security Council resolution 853 (1993).

⁴⁰ Security Council resolution 745 (1992).

⁴¹ Security Council resolution 1009 (1995).

⁴² Security Council resolution 361 (1974).

⁴³ Security Council resolutions 1244 (1999) and 1199 (1998).

⁴⁴ Security Council resolution 687 (1991).

⁴⁵ Security Council resolution 385 (1976).

⁴⁶ Security Council resolution 999 (1995).

⁴⁷ See for example, the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7: Agreement on Refugees and Displaced Persons (initialed in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995); the United Nations, Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, Paris (23 October 1991); Office of the Secretary-General of the United Nations, Set of Ideas on an Overall Framework Agreement on Cyprus (1992); Agreement on the Identity and Rights of Indigenous Peoples (Guatemala Peace Accords), UN Doc. A/49/882-S/1995/256 (31 March 1995); Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict (Guatemala), UN Doc. A/48/954-S/1994/751, Annex I (17 June 1994).

⁴⁸ Statute of the Office of the United Nations High Commissioner for Refugees (1950), G.A. res 428(V), Chapter 1, para. 1.

⁴⁹ See, for example, UNHCR Executive Committee Conclusion No. 56 (XL)-1989, 'Durable solutions and refugee protection' (13 October 1989); Conclusion No. 89 (LI) 2000.

Voluntary repatriation has become a focus of many country programs coordinated by UNHCR, including its Afghanistan program. Some argue that the increasing emphasis on repatriation may partly be motivated by the increasing reluctance of some countries to grant asylum to refugees. Nevertheless, it also provides an opportunity for millions of people throughout the world to return home.⁵⁰

As part of its work of promoting the creation of conditions that are conducive to voluntary return in safety and with dignity, UNHCR is paying increasing attention to the restitution of property for returning refugees. In the Conclusions adopted by UNHCR's Executive Committee in October 2004 it was recognised that:

in principle, all returning refugees should have the right to have restored to them or be compensated for any housing, land or property of which they were deprived in an illegal, discriminatory or arbitrary manner before or during exile; *notes*, therefore, the potential need for fair and effective restitution mechanisms, which also take into account the situation of secondary occupants of refugees' property; and also *notes* that where property cannot be restored, returning refugees should be justly and adequately compensated by the country of origin.⁵¹

UNHCR has also concluded that voluntary repatriation programs are unlikely to be sustainable if they do not address housing and property issues.⁵² Specific provisions to protect refugees' right to recover property are contained in a number of voluntary repatriation agreements with various asylum or host States.

The issue of property restitution is also relevant to the successful return of IDPs to their places of origin. IDPs have not crossed an international frontier and so do not fall within the protection of refugee law, however they are protected by other international norms. In response to the growing international concern about the numbers of internally displaced persons, a set of principles has been

⁵⁰ See Scott Leckie (ed) *Returning Home: housing and property restitution rights of refugees and displaced persons*, Transnational Publishers, Ardsely NY, 2003.

⁵¹ UNHCR Executive Committee Conclusion No. 101 (LV) 2004, 'On Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, 8 Oct 2004.

⁵² UNHCR Inter-Office Memorandum No. 104/2001, 28 November 2001.

developed which is consistent with international law and set forth the rights and guarantees relevant to the protection of IDPs in all phases of their displacement.⁵³

The UN Guiding Principles on Internal Displacement specifically recognise the right of IDPs to property.⁵⁴ They also stress that it is the duty of the competent authorities to establish conditions conducive to a sustainable return.⁵⁵ ‘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 dispossessed 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.’⁵⁶ The authorities should also facilitate access by international humanitarian organizations to assist IDPs in their return, resettlement and reintegration.⁵⁷

7.6 The right to adequate housing and protection against forced evictions

The right to adequate housing is enshrined in a number of international human rights instruments.⁵⁸ The UDHR stipulates, ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’⁵⁹

The right to adequate housing has been elaborated in the ICESCR, which states, ‘The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living

⁵³ Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2.

⁵⁴ *Ibid.*, Article 21.

⁵⁵ *Ibid.*, Article 28.

⁵⁶ *Ibid.*, Article 29.

⁵⁷ *Ibid.*, Article 30.

⁵⁸ ICESCR (art 1); UDHR (art 25); CERD (art 5(e)(iii)); CEDAW (art 14)(2)(h); CRC (art 27(3)); Refugee Convention (art 21); Migrant Workers' Convention, Article 43(d).

⁵⁹ UDHR Article 25.

conditions.⁶⁰ Housing rights are also enshrined and protected within other international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁶¹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁶² the Convention on the Rights of the Child (CRC),⁶³ the Convention Relating to the Status of Refugees,⁶⁴ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶⁵

The Committee on Economic, Social and Cultural Rights, which oversees the implementation of the International Covenant on Economic, Social and Cultural Rights, has issued a General Comment on how the right to adequate housing should be interpreted, which is included in an Appendix to this Guide.⁶⁶

The right to adequate housing means more than simply having a roof over one's head. It involves the right to live somewhere in security, dignity and peace. While the Committee recognises that the concept of 'adequacy' differs depending on the different conditions applicable in the relevant country, it lists seven basic criteria required for 'adequate housing.' They are security of tenure, habitability, affordability, accessibility, availability of materials, location and cultural adequacy. An important component of the right is the domestic legal remedies open to those facing potential violations. They include:

- Legal appeals aimed at preventing planned evictions or demolitions.
- Legal procedures seeking compensation following an illegal eviction.
- Procedures for tenants seeking to complain against illegal actions by their landlords.
- Procedures against alleged discrimination in the allocation of housing.

⁶⁰ IESCR Article 11(1).

⁶¹ ICERD Article 5(e)(iii).

⁶² CEDAW Article 14(2)(h).

⁶³ CRC Article 27(3).

⁶⁴ 'Refugee Convention' Article 21.

⁶⁵ 'Migrant Workers' Convention, Article 43(d).

⁶⁶ General Comment No. 4 (1991) (the right to adequate housing), UN Doc. E/1992/23 (1992), adopted Dec. 13, 1991.

- Complaints against unhealthy or inadequate living conditions.

The right to protection against forced evictions is clearly linked to the right to adequate housing and is increasingly recognised as human right under international law. The Committee on Economic, Social and Cultural Rights has issued a separate General Comment on this issue, which is relevant to the situation in Afghanistan.⁶⁷ The text is included as an Appendix to this Guide.

A forced eviction is defined as ‘the permanent or temporary removal against the will of individuals, families and/or communities from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’⁶⁸ Forced evictions are manifestly a violation of the right to adequate housing. The Committee has noted that they also frequently violate other human rights such as the right to life, security of the person, the right to non-interference with privacy, family and home, and the right to peaceful enjoyment of possessions. The State is required to refrain from carrying out forced evictions and to ensure that the law is enforced against its agents or third parties who carry them out.

The Committee distinguishes between forced evictions and those evictions that are carried out in conformity with international human rights law, even if these involve the use of force. Nevertheless, where such evictions take place, States are required to explore all feasible alternatives, in consultation with the affected persons, with a view to avoiding or minimizing the use of force. Legal remedies should be provided to those who are affected by eviction, including the right to adequate compensation. Evictions should also be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with the general principles of reasonableness and proportionality.

The Committee has also stressed the importance of appropriate procedural protections that should be applied in relation to forced evictions. They include:

- an opportunity for genuine consultation with those affected;

⁶⁷ General Comment No. 7 (1997) (on forced evictions), UN Doc. E/1998/22, annex IV (1998), adopted May 20, 1977.

⁶⁸ *Ibid.*, para 3.

- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- information on the proposed evictions, and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision of legal remedies ;
- provision, where possible, of legal aid to persons who require it in order to seek redress from the courts.⁶⁹

In addition, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights and every effort should be made to find alternative accommodation or access to productive land.⁷⁰

7.7 Housing and property restitution

In recognition of the importance of housing and property restitution to the sustainable return of refugees and IDPs, the UN Commission on Human Rights is currently drafting a set of Principles on Housing and Property Restitution for Refugees and Displaced Persons. These draft principles are meant to provide guidance to States as well as to international and non-governmental organizations addressing issues of population displacement, post-conflict peace building, and restitution.⁷¹

A Preliminary Study by the Special Rapporteur on housing and property restitution in the context of the return of refugees and internally displaced

⁶⁹ Ibid., para 15.

⁷⁰ Ibid., para 16.

⁷¹ *Housing and property restitution in the context of the return of refugees and internally displaced persons, Progress report of the Special Rapporteur, Paulo Sérgio Pinheiro, submitted in accordance with Sub-Commission resolution 2003/18, UN Doc. E/CN.4/Sub.2/2004, 1 May 2004.*

persons identified common obstacles to the implementation of housing and property restitution programmes.⁷² Obstacles include secondary occupation, property destruction or loss, ineffectual institutions and discriminatory restitution programmes. These Principles were adopted by the UN Sub Commission on the Promotion and Protection of Human Rights in August 2005 and are included in an Appendix to this Guide.

The principles stress that States must fully inform people who have been affected by displacement about the restitution process and take their views into account. Displaced people have the right to fair compensation payable in cases where housing and property restitution is not possible. In some situations, however, a combination of compensation and restitution may be the most appropriate form of restorative justice. Restitution programs should include tenants, the holders of social occupancy rights, and other legitimate occupants or users of housing, land or property. They should be afforded the right to return to and repossess and use their homes and/or lands on an equal basis with property owners.

The principles also call on States to respect the rights of secondary occupants who are equally affected by displacement and in need of accommodation and/or land to be protected against forced eviction. These legal protections should not prejudice the rights of legitimate owners and tenants to repossess the housing and property in question, but in cases where evictions of such secondary occupants are deemed justifiable and unavoidable, evictions should be carried out in a manner that is compatible with international human rights standards. Every effort should be made to identify alternative housing and/or land for those in need.

A major obstacle confronting successful restitution programs is the collection and official registration of accurate information regarding property ownership and use. This is a particular problem in Afghanistan, which has experienced prolonged conflicts. Official records have often been destroyed and property transactions have sometimes taken place under duress.

The principles call on States to endeavour to establish, or re-establish national multi-purpose cadastre systems for the registration of housing, land and property as an integral component of any restitution program. In particular,

⁷² See UN Document E/CN.4/Sub.2/2003/11.

they state that any judicial or quasi-judicial pronouncement regarding the rightful ownership of property must be accompanied by the official registration of that property according to relevant national procedures. In situations where such cadastre systems are already developed, States should take special measures to ensure that they are not destroyed in times of conflict or post-conflict. States should also seek to collect information relevant to facilitating restitution processes, for example by including housing and property restitution protections in registration procedures for refugees and displaced persons. Such information should be sought at all points in the displacement cycle, including at the time of flight. The principles also state that States must not recognize illegal property transactions, including any transfer made under duress.

The principles call on States and the international community to establish and support equitable, timely, transparent and non-discriminatory institutions, procedures and mechanisms to assess and enforce housing and property restitution claims. Whenever possible, such institutions, procedures and mechanisms should be established directly within peace settlements and voluntary repatriation agreements. Existing institutions that are able to address these issues should also be financially supported. The principles also recognise that traditional dispute resolution mechanisms may be used as part of this process, so long as they are in accordance with international human rights law and principles.

People can only assert their right to restitution if they are made aware of it. Claims processing centres should be established in areas where potential claimants currently reside. Mobile units should also be established and States should ensure that all aspects of the restitution claims process are simple, equitable, and free of charge. Claims forms should be developed which are simple, easy to understand and use, and available in the first language or languages of the groups affected. Counsellors should be made available to assist people in filling out and filing any necessary forms. Single women must not be discriminated against in this process and people who need special assistance, including illiterate and disabled people, should be provided with it.

7.8 The principle of non-discrimination

One of the most essential principles underpinning human rights law is that of

non-discrimination. Discrimination can be defined as adverse treatment for which there is no reasonable and objective justification. Discrimination is distinct from ‘positive action’ in which differential treatment may be justified in order to improve the condition of a marginalized or disadvantaged group in society.

The principle of non-discrimination runs through all human rights instruments as a central principle in the protection of human rights. For example, the International Covenant on Economic, Social and Cultural Rights states that rights contained in the Covenant be guaranteed without discrimination on account of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,’⁷³ and places an obligation on States to ‘ensure the equal rights of men and women.’⁷⁴ The International Covenant on Civil and Political Rights states, ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’⁷⁵

Discrimination is specifically prohibited in most human rights treaties and is also the subject to two specific instruments: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Afghanistan has ratified both of these treaties.

CEDAW states, ‘States Parties shall undertake all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.’ Article 5 (e) (iii) of CERD obliges States ‘to prohibit and eliminate racial discrimination

⁷³ Article 2 (2).

⁷⁴ Article 3.

⁷⁵ Article 26. See also Article 2 and Article 3.

in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (e) ... (iii) the right to housing.⁷⁶

Discrimination with respect to the provision of housing is also prohibited by the Refugee Convention which states, 'As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.'⁷⁷

From the above it is clear that no State should adopt any laws that unduly prejudice the restitution process, in particular through the adoption of arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations. States are also required to reverse the application of unjust, discrimination or arbitrary laws and to take immediate steps to repeal such laws. States must ensure that all national policies related to the right to restitution fully guarantee women's rights to non-discrimination and to equality in both law and practice. Finally, no one should be discriminated against, or face any other form of persecution or punishment simply for making a restitution claim.

⁷⁶ CEDAW Article 14.2 (h).

⁷⁷ Article 21.

C H A P T E R 8

8.0 Taking a case using international human rights mechanisms

This chapter outlines how international human rights mechanisms can be used to highlight cases relating to property rights in Afghanistan. It describes the different mechanisms that exist and the procedures that should be followed in each case. It also contains practical advice about submitting reports and complaints, and useful points to remember.

Anyone may bring a human rights problem to the attention of the United Nations (UN), and thousands of people around the world do so every year. One does not need to be a lawyer or even familiar with legal and technical terms to bring a complaint before the bodies concerned. There are also a variety of specialist organizations that exist to help people to bring cases or submit evidence. A list of some useful organizations is attached as an Appendix to this Guide.

8.1 What are international human rights mechanisms?

The origins of international human rights can be traced back several centuries, but the impetus for the modern human rights movement developed in response to the horrors of war crimes and genocide during the 1930s and 1940s. The United Nations Charter signed in 1945 specifically recognised an obligation to promote and encourage respect for human rights.¹ By virtue of their membership of the UN, States are accepting the obligations contained in the UN Charter. The two principal bodies responsible for questions relating to human rights within the UN system are the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights.

The Universal Declaration of Human Rights was proclaimed at the UN in 1948, and since that time a number of treaties have been adopted to give legal effect to these rights. When a State ratifies a human rights treaty, it assumes a legal obligation to implement the rights recognized in that treaty. Usually the State is required to produce a periodic report detailing how it is fulfilling its obligations under the treaty. These treaties are sometimes referred to as Conventions,

¹UN Charter 1945, Articles 55 and 56.

Covenants or Charters and States that have ratified or acceded to the treaty are known as States Parties.

International human rights law does not substitute itself for national laws. States are still free to determine their own domestic laws and policies and international law will only be directly applicable in the courts of a particular country if it is specifically authorised by a national legislature. However, in ratifying an international treaty, the State is agreeing to be bound by its provisions (unless it enters reservations to particular Articles when it ratifies) and it cannot subsequently invoke its national laws, constitution or traditional practices to justify a breach of this treaty.

A number of human rights treaty bodies have been created that monitor implementation of the different human rights treaties. These are committees of independent experts, who are often lawyers, academics or other professionals, and who often serve in a voluntary capacity. The committees are created in accordance with the provisions of the treaty that they monitor, which also specifies their various functions. They often include:

- Consideration of reports submitted by States that are parties to the treaty.
- Consideration of individual complaints or communications from people who claim that some of the rights enshrined in that treaty are being violated.
- Publishing general comments on the particular treaty to further explain some of the rights contained within it.

The treaty bodies discuss the reports that States are required to submit with the representatives of the State concerned. They may receive information on a country's human rights situation from other sources, including UN agencies, non-governmental organizations (NGOs), intergovernmental organizations, academic institutions and the press. They may also carry out fact-finding missions to the country in question. Based on the information that they receive, each treaty body publishes a report on how, or whether, the State is fulfilling its obligations to uphold the rights contained within the treaty concerned. These reports are called 'concluding observations' and provide an objective standard against which a government's record can be judged.

Some of the treaty bodies also hear complaints about alleged individual violations of human rights contained within the treaty. These complaints may either be brought by other States or by the individuals concerned. The procedure for taking an individual case is described in more detail below.

Treaty-monitoring bodies may only address an issue if it is contained in the particular treaty and if the State concerned has ratified the treaty and agreed to be bound by all of its provisions. A variety of regional human rights mechanisms have been created under the auspices of the Council of Europe, the Organization of American States and the African Union. These perform similar functions to the UN mechanisms within their own specific region. However, no such mechanisms exist in Asia and so Afghanistan must rely on the treaty mechanisms that have been created through the UN.

The UN has also created a variety of 'non-treaty mechanisms,' which are primarily concerned with monitoring broad patterns of human rights violations. These can examine the records of particular States and receive complaints about them, irrespective of whether they have ratified a particular convention. The various types of non-treaty bodies and their procedures are described in more detail below.

Most States take the work of both of these mechanisms seriously. They often send high-level delegations to the UN's headquarters in Geneva or New York when their own countries' record is being discussed and will lobby hard to receive a favourable report. The reports themselves often generate considerable publicity at the national and international level. The State concerned should address any concerns that have been raised, or recommendations made, in its own subsequent reports. Some human rights mechanisms also have procedures for examining individual complaints that are legally binding on the States concerned.

Increasing use is being made of international mechanisms as a means of improving the human rights situation in particular countries. By drawing attention to issues of concern and making constructive recommendations for improvements, these mechanisms can help to improve the general human rights situation in a country. The mechanisms can also sometimes be used to address an individual concern by ruling on whether particular actions or non-actions by the

authorities amount to a violation of a particular human right. In the adjudication of individual cases, international human rights norms are given concrete meaning and put into practical effect.

8.2 How to use international treaty mechanisms

Afghanistan has ratified the six main human rights treaties and is obliged to submit periodic reports on how it is implementing the provisions of the following treaties:

- The International Covenant on Civil and Political Rights
- The International Covenant on Economic Social and Cultural Rights
- The International Covenant on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
- The Convention on the Rights of the Child

Afghanistan is required to submit these reports once every four or five years (depending on the specifications in each treaty) and the relevant committee will then meet to discuss it. Meetings, which take place in Geneva or New York, are open to members of the public to observe, and they have an opportunity for discreet lobbying of individual committee members. The State is required to publish its own report in advance in order to give others an opportunity to respond. Information about the timetable for these reports and meetings can be obtained from the UN Office of the High Commissioner for Human Rights (OHCHR).

Alternative reports can also be submitted to the committees for consideration and they are a very useful lobbying tool. Alternative reports should be factual, balanced, credible, detailed and short (usually no more than 8 to 10 pages). They should be clearly addressed to the relevant committee and submitted in one of

the UN's working languages (English, French or Spanish). Some committees only work in one of these languages so it is worth checking first. Most of the committee members have other jobs and are only provided with limited professional secretarial support. They often receive considerable information about a particular country and are not able to read everything in the time available. If a long report is submitted, it should be accompanied by an executive summary.

The report should briefly introduce the organisation that is submitting it and explain its work and mandate. Information should always be properly sourced and no allegations should be made that cannot be supported. The report should not assume that all members of the committee will have a detailed knowledge of the country and should avoid using specialist terms that may not be understood outside the country. The information should be placed in context, particularly with regard to relevant laws and practices, but without being over-detailed. Attaching appendices to a report is a useful way of supplying additional information.

The report should provide as many examples as possible of the violations or infringement of human rights that it is addressing. It should also aim to show patterns of particular violations and systemic problems that need to be addressed. Listing a few isolated cases or making unsupported claims is not likely to convince the committee. The report should also offer constructive solutions to the problems that it identifies and contain some credible proposals for reform.

Most importantly, the report needs to establish that the problems that it identifies constitute actual violations of the human rights treaty that the committee is examining. For example, an allegation that people are being arbitrarily denied the right to return to their homes or being unlawfully evicted from their land contained in a report submitted to the Committee for the Elimination of All Forms of Racial Discrimination will only be of relevance if it can be shown that these violations were committed against people on the basis of their race or ethnicity.

One model for structuring a report is to follow the Article of the treaty concerned and submit information on it. This is not mandatory, but it is

necessary to state which particular articles are being violated in the report and why. It is also necessary to be familiar with the text of the relevant treaty and the mandate of the committee. For example, an allegation that people are being denied the right to adequate housing could be considered by the Committee on Economic, Social and Cultural Rights, which monitors the ICESCR, but not the Human Rights Committee, which monitors the ICCPR, because the latter treaty does not contain a right to adequate housing.

8.3 Taking an individual case

As well as considering periodic reports submitted by State Parties to their particular treaty, some treaty-monitoring bodies can also receive complaints from individuals in a country who claim that the rights guaranteed by the treaty are being violated.

Anyone who has been a victim of a human rights violation can make a complaint and the procedure for bringing an individual petition is relatively straightforward. The procedure usually takes at least a year, but it is possible to ask for interim measures in particular cases of urgency (for example, if an asylum seeker is facing deportation to a country where he or she may face torture, the committee could order a stay of deportation).

The petition or complaint need not take any particular form, but guidelines for submissions are available. The petition should provide basic personal information: name, nationality and date of birth. It should set out all the facts on which the claim is based in chronological order. It should detail the steps that have been taken at a domestic level to exhaust the remedies available, for example in Afghanistan. The petition should also state why the facts outlined constitute a violation of the convention concerned and which articles have been violated.

The most obvious points to consider when taking a case to an international treaty body are which treaty to use and which human rights violation to complain about. These points are inter-linked since only certain bodies may consider certain types of complaints.

Not all of the human rights treaties contain an automatic right for individuals to bring complaints under their procedures. The four conventions that provide

individuals with a right to bring individual complaints (or petitions) are:

- The International Convention for the Elimination of All Forms of Racial Discrimination
- The International Covenant on Civil and Political Rights
- The International Convention on the Elimination of All Forms of Discrimination Against Women
- The International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In the case of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, a State recognizes the Committee's competence by becoming a party to a separate treaty: the First Optional Protocol to the Covenant or the Optional Protocol to the Convention. In the case of the Convention against Torture and the International Convention on the Elimination of Racial Discrimination, States recognize the Committee's competence by making a declaration to that effect under a specific article of the Convention, articles 22 and 14 respectively.

Afghanistan has ratified all four of these treaties and has also recognized the competence of the Committee on the Elimination of Racial Discrimination to receive and examine individual complaints of violations of the International Convention on the Elimination of All Forms of Racial Discrimination. However, Afghanistan has not recognized the competence of the Committee against Torture to examine complaints, nor has it ratified any of the optional protocols to the fundamental human rights treaties. In practice, therefore, the only individual cases that can currently be brought are to the Committee on the Elimination of All Forms of Racial Discrimination.

Complaints to this Committee must be submitted within six months of the final decision by a national authority in a case. Complaints under this Convention may be brought not only by or on behalf of individuals but also by or on behalf of groups of individuals (in contrast to complaints under the Optional Protocol to the International Covenant on Civil and Political Rights or the Convention against Torture).

Once a complaint has been made, it is registered by the relevant committee and the person making the complaint is informed of the registration. At that point, the case is transmitted to the State Party concerned to give it an opportunity to comment. The State is requested to submit its observations within a set time frame. The Committee on the Elimination of All Forms of Racial Discrimination requires State Parties to respond within three months and the individual then has six weeks to comment on this response. Other committees have varying procedures.

There are two major stages in any case, which are known as the ‘admissibility’ stage and the ‘merits’ stage. The ‘admissibility’ of a case refers to the formal requirements that the complaint must satisfy before the relevant committee can consider its substance. A case may be ruled inadmissible on the following grounds:

- The application is anonymous.
- The person entering the complaint has not been a victim of the violation, or has no authority to act on behalf of the victim. Complaints cannot be made in the abstract.
- The alleged violation occurred before the State had ratified the treaty or before the treaty had come into effect.
- The right which has been allegedly violated is not contained within the relevant human rights treaty.
- The time limit for submitting a complaint has expired.
- The State concerned has entered a reservation to the Article containing this right or has entered another reservation to the complaints process that prevent the committee from hearing the case.
- Sufficient information may not have been included to substantiate the complaint leading the committee to conclude that it is ‘manifestly ill-founded.’
- The complaint is already being dealt with by another human rights committee.

- The case is an abuse of the complaints process because it is considered to be frivolous, vexatious or otherwise an inappropriate use of the complaint procedure.
- The committee is not satisfied that all reasonable attempts have been made to exhaust domestic remedies through the national courts and administrative procedures.

This final point is the most common reason why complaints are ruled inadmissible. As stated above, international human rights law does not substitute itself for national law and the treaty monitoring bodies are reluctant to intervene in cases that could be settled at the domestic level. However, this rule may be waived if a complainant can show that these mechanisms would be plainly ineffective either because the law is very clear on the point at issue, or because justice cannot be obtained within the national courts or administrative procedures. In such cases the complainant must demonstrate objectively why domestic remedies are non-existent or illusory, or show why it was not possible to exhaust the remedies in the particular case. In Afghanistan for example, a complainant would be expected to have exhausted all legal and administrative procedures before submitting a case, but may be able to convince a treaty-monitoring body that the lack of effective rule of law mechanisms in parts of the country make domestic remedies impossible.

If the committee rules that the case is admissible it will go on to consider the merits of the claim. The ‘merits’ of the case are the substance, on the basis of which the committee decides whether or not any rights under a treaty have been violated. Again the State is invited to comment and the complainant gets an opportunity to respond. The Committee on the Elimination of All Forms of Racial Discrimination also allows for three months and then six weeks for these procedures. If the State fails to respond in either of these steps, the committee will make its decision solely on the basis of the original complaint.

The committee takes its decision on the merits of the case in closed session, but must make its findings public. The decisions of the committees are final and there is no appeal procedure. If the complaint is upheld, and a violation is found, the State is informed and asked to report within three months on what measures it has taken to address the violation and provide the victim with an effective

remedy. This will normally be in the form of reparations, compensation or restitution. It could also involve guarantees of non-repetition, disciplinary action against State officials or a change to national law or policy. A violation can be the result of a particular act by the State or an omission, such as a failure to prevent an illegal act or to provide the victim with an effective remedy.

In all cases where a violation has been found, the State is legally obliged to respond to the ruling of the relevant committee. Taking an individual case to a treaty monitoring body is, therefore, an effective mechanism in providing a remedy for individuals who have suffered a violation.

8.4 How to use non-treaty mechanisms

One of the ways in which the UN Commission and Sub-Commission on Human Rights carry out their tasks is by supervising studies, drafting reports and engaging in monitoring. These country-specific and thematic mechanisms include special rapporteurs, representatives and independent experts or working groups. They are often created by resolution in response to situations that are considered to be of sufficient concern to require an in-depth study. The procedures report publicly to the UN Commission on Human Rights each year, or to the Sub-Commission, and some also report directly to the UN General Assembly.

The mandate of these mechanisms is established by the UN itself, rather than a treaty that individual States must first ratify. Non-treaty mechanisms are primarily concerned with monitoring broad patterns of human rights violations. They can also receive information from a variety of sources and this helps them with their own reports. Most experts research and study issues of concern, carry out country visits, receive and consider complaints from victims of human rights violations and intervene with governments on their behalf. In some cases, the experts also recommend programmes of technical cooperation to governments and donors. They have also helped develop international legal standards in areas such as internal displacement and the right to restitution. An example of the work of a non-treaty mechanism was the visit to Afghanistan by the Special Rapporteur on the Right to Adequate Housing in September 2003

and the subsequent discussion of this at the UN Commission on Human Rights in March 2004.²

States are not obliged to submit reports to these bodies and they do not generally consider individual complaints, unless these help to illustrate a more general situation. This can either be in relation to a particular country or a particular theme. A full list of the mechanisms that currently exist (in December 2004) is given below.

8.5 Country mandates

- Afghanistan
- Belarus
- Burundi
- Cambodia
- Chad
- Democratic People's Republic of Korea
- Democratic Republic of the Congo (Zaire)
- Haiti
- Liberia
- Myanmar (Burma)
- Palestinian Territories occupied since 1967
- Somalia
- Sudan
- Uzbekistan

² Statement of Mr. Miloon Kothari, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Commission on Human Rights, Sixtieth session, 30 March 2004, Agenda item 10.

In addition to these country mandates there are also a number of thematic mechanisms. A full list (in December 2004) is given below.

8.6 Thematic mechanisms

- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
- Working group on people of African descent
- Working Group on Arbitrary Detention
- Special Rapporteur on the sale of children, child prostitution and child pornography
- Special Rapporteur on the right to education
- Working Group on Enforced or Involuntary Disappearances
- Special Rapporteur on extrajudicial, summary or arbitrary executions
- Independent Expert on the question of human rights and extreme poverty
- Special Rapporteur on the right to food
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
- Special Rapporteur on freedom of religion or belief
- Special Rapporteur on the right to physical and mental health
- Special Representative of the Secretary-General on the situation of human rights defenders
- Independent Expert on combating impunity
- Special Rapporteur on the independence of judges and lawyers
- Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

- Representative of the Secretary General on internally displaced persons
- Special Rapporteur on the use of mercenaries
- Special Rapporteur on the human rights of migrants
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
- Independent Expert on the effects of structural adjustment policies and foreign debt
- Independent expert on terrorism and human rights
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
- Special Rapporteur on trafficking in persons, especially in women and children
- Special Rapporteur on violence against women, its causes and consequences

Like the members of the treaty-monitoring bodies, these mechanisms consist of experts and groups of experts from a variety of different backgrounds, who work in a voluntary capacity to monitor particular themes or countries on behalf of the UN. Each procedure has its own slightly different working methods, but the experts are appointed in the same way and the basic considerations are the same with respect to preparing a communication and drawing attention to human rights concerns.

It should also be noted that some of these procedures have overlapping mandates and that these bodies often work together. Action by more than one rapporteur or working group will often carry more weight and is likely to influence a State even more than where only one procedure expresses concern. The non-treaty mechanisms also often coordinate their work with the treaty-monitoring bodies, through OHCHR and UN agencies in the field.

8.7 The 1503 procedure

It is also possible to complain directly to the UN Commission on Human Rights about a violation using what is known as the 1503 procedure. The UN Commission is a political body composed of State representatives and generally deals with situations in countries rather than individual complaints. However, the Commission has the mandate to examine ‘situations that appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms’ occurring in any country of the world. Any individual or group claiming to be the victim of such human rights violations may submit a complaint, as well as person, or group, with direct and reliable knowledge of such violations. Where an NGO submits a complaint, it must be acting in good faith and in accordance with recognized principles of human rights. The organization should also have reliable direct evidence of the situation it is describing.

The procedures for submitting a complaint under the 1503 procedure are similar to those that exist under the treaty mechanisms. There is an initial screening process to decide whether the complaint is admissible or should be rejected as manifestly ill-founded. The complainant does not need to be a victim, nor must the complaint be based on a particular human rights treaty. However, attempts should have been made to exhaust domestic remedies and the submission of complaints overlapping with other procedures should be avoided.

If the complaint makes it to the next stage of the process, it will be acknowledged and forwarded to the State concerned for comment. From this point on the procedure becomes confidential and the complainant will not be informed of the State's response to the complaint or the reasons why the complaint is eventually upheld or dismissed.

The Working Group on Communications considers the complaint and any response from the State concerned. The Working Group on Situations can refer meritorious cases to the UN Commission on Human Rights with a recommendation for action. In theory this means that complaints can be brought to the highest level of the United Nations human rights machinery, which could result in significant pressure being brought to bear upon a particular State. In practice, however, most cases do not reach this level and the complainant has no

way of knowing of the decisions taken at various stages of the process or the reasons for them. After the UN Commission has considered the situations before it, the Chairperson announces at a public meeting the names of the countries examined under the 1503 procedure and those no longer dealt with under the procedure.

The 1503 process is also extremely lengthy and there is no procedure for 'interim measures' in urgent cases. The 1503 procedure is more suited to drawing attention to mass violations of human rights related to particular government policies, than in providing a remedy for individuals who have suffered a violation. If a case is being dealt with under this process it will not usually be considered by other mechanisms at the same time. Some States prefer having a complaint made against them under the 1503 procedure as it means that they are not subject to public scrutiny.

8.8 The Commission on the Status of Women

While the 1503 procedure is designed to reveal gross violations of human rights in particular countries, the confidential complaint procedure of the Commission on the Status of Women is designed to identify global trends and patterns concerning women's rights. As with the 1503 procedure, it does not to afford direct redress to victims of human rights violations.

The Commission's Secretariat receives complaints each year from individuals and organizations. It acknowledges their receipt and briefly describes the procedure to complainants. The Secretariat then summarizes the complaints and sends them to the Governments concerned for comment. Complainants' names, however, are only divulged to the Governments concerned (and subsequently to the Commission) with the complainant's express permission.

Complaints are then considered by a Working Group on Communications composed of five members of the Commission on the Status of Women, representing all geographical regions, which meets during the Commission's annual session. During its private meetings, the Commission considers all communications and the replies of Governments. The focus of the Commission is on cases that 'appear to reveal a consistent pattern of reliably attested injustice and discriminatory practices against women.' The Working Group then

prepares a report for the Commission that 'will indicate the categories in which communications are most frequently submitted to the Commission.' Individual complainants are not provided with Governments' replies or the report of the Working Group.

The Commission on the Status of Women considers the Working Group's report in a closed meeting. It then reports to the Economic and Social Council, making recommendations for action by the Council on the 'emerging trends and patterns of communications.' It is not authorized to take any other action.

Where to send complaints?

Complaints to the Human Rights Committee (ICCPR), the Committee on Economic, Social and Cultural Rights (ICESCR), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD) should be sent to:

Petitions Team

Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

Complaints to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) should be sent to:

Committee on the Elimination of Discrimination against Women c/o
Division for the Advancement of Women, Department of Economic and
Social Affairs

United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America

Complaints under the 1503 procedure should be sent to:

Commission/Sub-Commission Team (1503 Procedure)
Support Services Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

Complaints to the Commission on the Status of Women should be sent to:

Commission on the Status of Women
c/o Division for the Advancement of Women, Department of Economic
and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America

Further information about the reporting cycle of the treaty-monitoring
bodies and the work of the non-treaty mechanisms can be obtained from:

Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

A P P E N D I C E S

UNITED NATIONS



Economic and Social
Council

Distr.

GENERAL

E/CN.4/Sub.2/2005/17

28 June 2005

Original:English

COMMISSION ON HUMAN RIGHTS

Sub-Commission on the Promotion and

Protection of Human Rights

Fifty-sixth session

Item 4 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**Housing and property restitution in the context of the return
of refugees and internally displaced persons**

Final report of the Special Rapporteur, Paulo Sérgio Pinheiro

**Principles on housing and property restitution for refugees
and displaced persons**

Summary

At its fifty-sixth session the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2004/2, welcomed the progress report of the Special Rapporteur and requested the Office of the United Nations High Commissioner for Human Rights to circulate the draft principles on housing and property restitution for refugees and displaced persons contained therein widely among non-governmental organizations, Governments, specialized agencies and other interested parties for comment, and requested the Special Rapporteur to take those comments into account in the preparation of his final report to be considered by the Sub-Commission at its fifty-seventh session.

This final report submitted by the Special Rapporteur reflects the results of this intensive consultation process and presents the Principles on housing and property restitution for refugees and displaced persons in their final version.

The addendum to this report contains explanatory notes on the principles. The explanatory notes identify the provisions of international human rights, refugee and humanitarian law and related standards which serve as the foundation on which the principles themselves are built.

GE.05-14695 (E) 040705

Introduction

1. At its fifty-sixth session, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2004/2, welcomed the progress report of the Special Rapporteur on housing and property restitution in the context of the return of refugees and internally displaced persons, which contained draft principles on housing and property restitution for refugees and displaced persons (E/CN.4/Sub.2/2004/22) (hereinafter “Draft Principles”), as well as a supplementary draft commentary on the draft principles themselves (E/CN.4/Sub.2/2004/22/Add.1).

2. In resolution 2004/2 the Sub-Commission requested the Office of the United Nations High Commissioner for Human Rights to circulate the Draft Principles widely among non-governmental organizations, Governments, specialized agencies and other interested parties for comment, and requested the Special Rapporteur to take those comments into account in the preparation of his final report to be considered by the Sub-Commission at its fifty-seventh session. In addition, over the last year, the Special Rapporteur has similarly solicited comments from various agencies and experts, in order to invite a wide range of views, comments and input on the Draft Principles.

3. Since the Sub-Commission’s fifty-sixth session, the Special Rapporteur has received many thoughtful and detailed written comments on the Draft Principles from non-governmental organizations, Governments, specialized agencies and other interested parties. The Special Rapporteur was extremely gratified by the careful and kind attention focused on the Draft Principles by so many interested parties, and wishes to gratefully acknowledge

each contribution offered towards the development of this important work.

4. In order to further facilitate dialogue on the Draft Principles, an Expert Consultation on the Draft Principles on Housing and Property Restitution was held at Brown University in Providence, Rhode Island, United States of America, on 21 and 22 April 2005. The Expert Consultation allowed the Special Rapporteur to discuss the development of the Draft Principles in partnership with a broad range of international experts. The participants at the Expert Consultation brought to the forum a diverse and impressive range of expertise, including proficiency in the areas of refugee assistance and refugee law, internally displaced persons, restitution programme development and implementation, conflict and post-conflict situations, peace-building and peace negotiations, international housing rights, gender equality in situations of displacement and, of course, commendable expertise in the areas of international humanitarian law, and international human rights law.¹

5. The Expert Consultation was coordinated jointly by the Watson Institute for International Studies at Brown University and the Centre on Housing Rights and Evictions (COHRE), with the generous support of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Norwegian Refugee Council (NRC). The Special Rapporteur would like also to take this opportunity to gratefully acknowledge each of these agencies for its very kind and generous support.

6. The Expert Consultation invited participants to comment on the substantive and technical content of the Draft Principles, thereby ensuring that the final articulation of the Principles themselves address, as clearly and concisely as possible, real-world obstacles which may be experienced during the implementation of restitution programmes. As such, the Principles incorporate a forward-looking and holistic approach to housing, land and property restitution under international law. This approach is at the same time rooted in the lessons learned by experts in the field, and the “best practices” which have emerged in previous post-conflict situations wherein restitution has been seen

¹ The Participants in the Expert Consultation were Ingunn-Sofie Aursnes, Paul Bentall, George Bisharat, Widney Brown, Pierre Buyoya, Roberta Cohen, Mayra Gómez, Agnes Hurwitz, Lisa Jones, Isabel G. Lavadenz Paccieri, Scott Leckie, Dan Lewis, Karolina Lindholm-Billing, Gert Ludekin, Carolyn Makinson, John Packer and Rhodri Williams.

as a key component of restorative justice. As such, the Principles incorporate some of the most useful provisions from various pre-existing national restitution policies and programmes, including those developed for Bosnia and Herzegovina, Burundi, Cambodia, Cyprus, Guatemala, Kosovo, South Africa and Rwanda.

7. Without doubt, this rigorous review process has improved the quality, depth and relevance of the Draft Principles. This final report submitted by the Special Rapporteur reflects the results of this intensive consultation process and presents the Principles on Housing and Property Restitution for Refugees and Displaced Persons in their final version. The addendum to this report presents explanatory notes on the Principles. The explanatory notes identify the provisions of international human rights, refugee and humanitarian law and related standards which serve as the very foundation on which the Principles themselves are built.

8. It must be noted that the Principles continue to reflect widely accepted principles of international human rights, refugee and humanitarian law and related standards, including those enshrined in the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the 1951 Convention relating to the Status of Refugees; the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the Second Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts. The Principles also reflect other relevant international human rights and related standards, in particular, the Guiding Principles on Internal Displacement, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,² and relevant UNHCR Executive Committee Conclusions.

² The Commission recommended to the General Assembly that it adopt the Basic Principles and Guidelines as contained in the annex to Commission resolution 2005/35.

9. At a later stage, it will be possible, and extremely worthwhile, to elaborate a more expansive and comprehensive commentary on the Principles which would encompass all of the relevant international law, as well as other applicable standards, which may be helpful in the interpretation of these Principles. The elaboration of such an exhaustive text is, however, beyond the current scope of this study. Rather, the development of a comprehensive commentary can, and should, be considered a project for future development. Certainly, this approach has been utilized in previous cases where human rights standards have been articulated and adopted by human rights bodies such as the Sub-Commission. It is hoped that the creation of a comprehensive commentary will be one of the many ways in which the Principles on housing and property restitution for refugees and displaced persons will continue to live on.

Annex

Principles on Housing and Property Restitution for Refugees and Displaced Persons

Preamble

Recognizing that millions of refugees and displaced persons worldwide continue to live in precarious and uncertain situations, and that all refugees and displaced persons have a right to voluntary return, in safety and dignity, to their original or former habitual homes and lands,

Underscoring that voluntary return in safety and dignity must be based on a free, informed, individual choice and that refugees and displaced persons should be provided with complete, objective, up-to-date and accurate information, including on physical, material and legal safety issues in countries or places of origin,

Reaffirming the rights of refugee and displaced women and girls, and recognizing the need to undertake positive measures to ensure that their rights to housing, land and property restitution are guaranteed,

Welcoming the many national and international institutions that have been established in recent years to ensure the restitution rights of refugees and

displaced persons, as well as the many national and international laws, standards, policy statements, agreements and guidelines that have recognized and reaffirmed the right to housing, land and property restitution,

Convinced that the right to housing, land and property restitution is essential to the resolution of conflict and to post-conflict peace-building, safe and sustainable return and the establishment of the rule of law, and that careful monitoring of restitution programmes, on the part of international organizations and affected States, is indispensable to ensuring their effective implementation,

Convinced also that the implementation of successful housing, land and property restitution programmes, as a key element of restorative justice, contributes to effectively deterring future situations of displacement and building sustainable peace.

Section I. Scope and Application

1. Scope and Application

1.1 The Principles on housing and property restitution for refugees and displaced persons articulated herein are designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.

1.2 The Principles on housing and property restitution for refugees and displaced persons apply equally to all refugees, internally displaced persons and to other similarly situated displaced persons who fled across national borders but who may not meet the legal definition of refugee (hereinafter “refugees and displaced persons”) who were arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence, regardless of the nature or circumstances by which displacement originally occurred.

Section II. The Right to Housing and Property Restitution

2. The right to housing and property restitution

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

Section III. Overarching Principles

3. The right to non-discrimination

3.1 Everyone has the right to be protected from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status.

3.2 States shall ensure that de facto and de jure discrimination on the above grounds is prohibited and that all persons, including refugees and displaced persons, are considered equal before the law.

4. The right to equality between men and women

4.1 States shall ensure the equal right of men and women, and the equal right of boys and girls, to housing, land and property restitution. States shall ensure the equal right of men and women, and the equal right of boys and girls, inter alia, to voluntary return in safety and dignity, legal security of tenure,

property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property.

4.2 States should ensure that housing, land and property restitution programmes, policies and practices recognize the joint ownership rights of both male and female heads of the household as an explicit component of the restitution process, and that restitution programmes, policies and practices reflect a gender-sensitive approach.

4.3 States shall ensure that housing, land and property restitution programmes, policies and practices do not disadvantage women and girls. States should adopt positive measures to ensure gender equality in this regard.

5. The right to be protected from displacement

5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.

5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.

5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

6. The right to privacy and respect for the home

6.1 Everyone has the right to be protected against arbitrary or unlawful interference with his or her privacy and his or her home.

6.2 States shall ensure that everyone is provided with safeguards of due process against arbitrary or unlawful interference with his or her privacy and his or her home

7. The right to peaceful enjoyment of possessions

7.1 Everyone has the right to the peaceful enjoyment of his or her possessions.

7.2 States shall only subordinate the use and enjoyment of possessions in the public interest and subject to the conditions provided for by law and by the general principles of international law. Whenever possible, the “interest of society” should be read restrictively, so as to mean only a temporary or limited interference with the right to peaceful enjoyment of possessions.

8. The right to adequate housing

8.1 Everyone has the right to adequate housing.

8.2 States should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing.

9. The right to freedom of movement

9.1 Everyone has the right to freedom of movement and the right to choose his or her residence. No one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one shall be arbitrarily or unlawfully forced to leave a certain territory, area or region.

9.2 States shall ensure that freedom of movement and the right to choose one's residence are not subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with international human rights, refugee and humanitarian law and related standards.

Section IV. The Right to Voluntary Return in Safety and Dignity

10. The right to voluntary return in safety and dignity

10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin.

10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.

10.4 States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons.

Section V. Legal, Policy, Procedural and Institutional Implementation Mechanisms

11. Compatibility with international human rights, refugee and humanitarian law and related standards

11.1 States should ensure that all housing, land and property restitution procedures, institutions, mechanisms and legal frameworks are fully compatible with international human rights, refugee and humanitarian law and related standards, and that the right to voluntary return in safety and dignity is recognized therein.

12. National procedures, institutions and mechanisms

12.1 States should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner.

12.2 States should ensure that housing, land and property restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women, as well as the equal rights of boys and girls, and reflect the overarching principle of the “best interests of the child”.

12.3 States should take all appropriate administrative, legislative and judicial measures to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner.

12.4 States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms, including guidelines pertaining to institutional organization, staff training and caseloads, investigation and complaints procedures, verification of property ownership or other rights of possession, as well as decision-making, enforcement and appeals mechanisms. States may integrate alternative or informal dispute resolution mechanisms into these processes, insofar as all such mechanisms act in accordance with international human rights, refugee and

humanitarian law and related standards, including the right to be protected from discrimination.

12.5 Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

12.6 States should include housing, land and property restitution procedures, institutions and mechanisms in peace agreements and voluntary repatriation agreements. Peace agreements should include specific undertakings by the parties to appropriately address any housing, land and property issues that require remedies under international law or threaten to undermine the peace process if left unaddressed, while demonstrably prioritizing the right to restitution as the preferred remedy in this regard.

13. Accessibility of restitution claims procedures

13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination. States should not establish any preconditions for filing a restitution claim.

13.2 States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive. States should adopt positive measures to ensure that women are able to participate on a fully equal basis in this process.

13.3 States should ensure that separated and unaccompanied children are able to participate and are fully represented in the restitution claims process, and

that any decision in relation to the restitution claim of separated and unaccompanied children is in compliance with the overarching principle of the “best interests of the child”.

13.4 States should ensure that the restitution claims process is accessible for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum or countries to which they have fled. States should ensure that all affected persons are made aware of the restitution claims process, and that information about this process is made readily available, including in countries of origin, countries of asylum or countries to which they have fled.

13.5 States should seek to establish restitution claims-processing centres and offices throughout affected areas where potential claimants currently reside. In order to facilitate the greatest access to those affected, it should be possible to submit restitution claims by post or by proxy, as well as in person. States should also consider establishing mobile units in order to ensure accessibility to all potential claimants.

13.6 States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims.

13.7 States should develop restitution claims forms that are simple and easy to understand and use and make them available in the main language or languages of the groups affected. Competent assistance should be made available to help persons complete and file any necessary restitution claims forms, and such assistance should be provided in a manner that is age and gender sensitive.

13.8 Where restitution claims forms cannot be sufficiently simplified owing to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner that is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf.

13.9 States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin.

13.10 States should ensure that persons needing special assistance, including illiterate and disabled persons, are provided with such assistance in order to ensure that they are not denied access to the restitution claims process.

13.11 States should ensure that adequate legal aid is provided, if possible free of charge, to those seeking to make a restitution claim. While legal aid may be provided by either governmental or non-governmental sources (whether national or international), such legal aid should meet adequate standards of quality, non-discrimination, fairness and impartiality so as not to prejudice the restitution claims process.

13.12 States should ensure that no one is persecuted or punished for making a restitution claim.

14. Adequate consultation and participation in decision-making

14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities.

14.2 States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively. The needs of vulnerable individuals

including the elderly, single female heads of households, separated and unaccompanied children, and the disabled should be given particular attention.

15. Housing, land and property records and documentation

15.1 States should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution programme, respecting the rights of refugees and displaced persons when doing so.

15.2 States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure. These determinations shall comply with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

15.3 States should ensure, where appropriate, that registration systems record and/or recognize the rights of possession of traditional and indigenous communities to collective lands.

15.4 States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection in situ or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognizing the authenticity of said copies.

15.5 States and other responsible authorities or institutions should provide, at the request of a claimant or his or her proxy, copies of any documentary

evidence in their possession required to make and/or support a restitution claim. Such documentary evidence should be provided free of charge, or for a minimal fee.

15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property or place of habitual residence. Such information should be sought whenever information is gathered from refugees and displaced persons, including at the time of flight.

15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing

their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.

15.8 States shall not recognize as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried out contrary to international human rights standards.

16. The rights of tenants and other non-owners

16.1 States should ensure that the rights of tenants, social-occupancy rights holders and other legitimate occupants or users of housing, land and property are recognized within restitution programmes. To the maximum extent possible, States should ensure that such persons are able to return to and

repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.

17. Secondary occupants

17.1 States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, that evictions are carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.

17.2 States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner. 17.3 In cases where evictions of secondary occupants are justifiable and unavoidable, States should take positive measures to protect those who do not have the means to access any other adequate housing other than that which they are currently occupying from homelessness and other violations of their right to adequate housing. States should undertake to identify and provide alternative housing and/or land for such occupants, including on a temporary basis, as a means of facilitating the timely restitution of refugee and displaced persons' housing, land and property. Lack of such alternatives, however, should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution.

17.4 In cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, States may consider establishing mechanisms to provide compensation to injured third parties. The egregiousness of the underlying displacement, however, may arguably give rise

to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.

18. Legislative measures

18.1 States should ensure that the right of refugees and displaced persons to housing, land and property restitution is recognized as an essential component of the rule of law. States should ensure the right to housing, land and property restitution through all necessary legislative means, including through the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices. States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law.

18.2 States should ensure that all relevant laws clearly delineate every person and/or affected group that is legally entitled to the restitution of their housing, land and property, most notably refugees and displaced persons. Subsidiary claimants should similarly be recognized, including resident family members at the time of displacement, spouses, domestic partners, dependents, legal heirs and others who should be entitled to claim on the same basis as primary claimants.

18.3 States should ensure that national legislation related to housing, land and property restitution is internally consistent, as well as compatible with pre-existing relevant agreements, such as peace agreements and voluntary repatriation agreements, so long as these agreements are themselves compatible with international human rights, refugee and humanitarian law and related standards.

19. Prohibition of arbitrary and discriminatory laws

19.1 States should neither adopt nor apply laws that prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations.

19.2 States should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution, and should ensure remedies for those wrongfully harmed by the prior application of such laws.

19.3 States should ensure that all national policies related to the right to housing, land and property restitution fully guarantee the rights of women and girls to be protected from discrimination and to equality in both law and practice.

20. Enforcement of restitution decisions and judgements

20.1 States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgements.

20.2 States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement and enforce decisions and judgements made by relevant bodies regarding housing, land and property restitution.

20.3 States should adopt specific measures to prevent the public obstruction of enforcement of housing, land and property restitution decisions and judgements. Threats or attacks against officials and agencies carrying out restitution programmes should be fully investigated and prosecuted.

20.4 States should adopt specific measures to prevent the destruction or looting of contested or abandoned housing, land and property. In order to minimize destruction and looting, States should develop procedures to inventory the contents of claimed housing, land and property within the context of housing, land and property restitution programmes.

20.5 States should implement public information campaigns aimed at informing secondary occupants and other relevant parties of their rights and of the legal consequences of non-compliance with housing, land and property restitution decisions and judgements, including failing to vacate occupied

housing, land and property voluntarily and damaging and/or looting of occupied housing, land and property.

21. Compensation

21.1 All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

21.2 States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.

Section VI. The Role of the International Community, Including international Organizations

22. Responsibility of the international community

22.1 The international community should promote and protect the right to housing, land and property restitution, as well as the right to voluntary return in safety and dignity.

22.2 International financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, should take fully into account the prohibition against

unlawful or arbitrary displacement and, in particular, the prohibition under international human rights law and related standards on the practice of forced evictions.

22.3 International organizations should work with national Governments and share expertise on the development of national housing, land and property restitution policies and programmes and help ensure their compatibility with international human rights, refugee and humanitarian law and related standards. International organizations should also support the monitoring of their implementation.

22.4 International organizations, including the United Nations, should strive to ensure that peace agreements and voluntary repatriation agreements contain provisions related to housing, land and property restitution, including through the establishment of national procedures, institutions, mechanisms and legal frameworks.

22.5 International peace operations, in pursuing their overall mandate, should help to maintain a secure and stable environment wherein appropriate housing, land and property restitution policies and programmes may be successfully implemented and enforced.

22.6 International peace operations, depending on the mission context, should be requested to support the protection of the right to housing, land and property restitution, including through the enforcement of restitution decisions and judgements. Members of the Security Council should consider including this role in the mandate of peace operations.

22.7 International organizations and peace operations should avoid occupying, renting or purchasing housing, land and property over which the rights holder does not currently have access or control, and should require that their staff do the same. Similarly, international organizations and peace operations should ensure that bodies or processes under their control or

supervision do not obstruct, directly or indirectly, the restitution of housing, land and property.

Section VII. Interpretation

23. Interpretation

23.1 The Principles on housing and property restitution for refugees and displaced persons shall not be interpreted as limiting, altering or otherwise prejudicing the rights recognized under international human rights, refugee and humanitarian law and related standards, or rights consistent with these laws and standards as recognized under national law.

Appendix 2.

The right to adequate housing, Committee on Economic, Social and Cultural Rights General Comment No. 4., The right to adequate housing , (Art. 11 (1) of the Covenant), Sixth session, 1991 (Extracts)

1. Pursuant to article 11 (1) of the Covenant, States parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

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6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of “family” must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not

just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost”.⁸ Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute “adequate housing” for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing

finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(E) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) Cultural adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

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17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported

by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18. In this regard, the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19. Finally, article 11 (1) concludes with the obligation of States parties to recognize “the essential importance of international cooperation based on free consent”. Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.

Appendix 3.

The right to adequate housing, (Art. 11 (1) of the Covenant), forced evictions, Committee on Economic, Social and Cultural Rights General Comment No. 7, Sixteenth session, 1997 (Extracts)

1. In its General Comment No. 4 (1991), the Committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. It concluded that forced evictions are prima facie incompatible with the requirements of the Covenant. Having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.

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3. The use of the term “forced evictions” is, in some respects, problematic. This expression seeks to convey a sense of arbitrariness and of illegality. To many observers, however, the reference to “forced evictions” is a tautology, while others have criticized the expression “illegal evictions” on the ground that it assumes that the relevant law provides adequate protection of the right to housing and conforms with the Covenant, which is by no means always the case. Similarly, it has been suggested that the term “unfair evictions” is even more subjective by virtue of its failure to refer to any legal framework at all. The international community, especially in the context of the Commission on Human Rights, has opted to refer to “forced evictions”, primarily since all suggested alternatives also suffer from many such defects. The term “forced evictions” as used throughout this general comment is defined as the 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. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

5. Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States parties. Even in situations where it may

be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is required so that any limitations imposed must be “determined by law only insofar as this may be compatible with the nature of these [i.e. economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society”.

6. Many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.

8. In essence, the obligations of States parties to the Covenant in relation to forced evictions are based on article 11.1, read in conjunction with other relevant provisions. In particular, article 2.1 obliges States to use “all

appropriate means” to promote the right to adequate housing. However, in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (as defined in paragraph 3 above). Moreover, this approach is reinforced by article 17.1 of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, *inter alia*, the right to be protected against “arbitrary or unlawful interference” with one's home. It is to be noted that the State's obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

9. Article 2.1 of the Covenant requires States parties to use “all appropriate means”, including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its General Comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.

10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are

especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.

12. Forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction.

13. States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”.

14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights

law and in accordance with general principles of reasonableness and proportionality. In this regard it is especially pertinent to recall General Comment 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person's home can only take place “in cases envisaged by the law”. The Committee observed that the law “should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”. The Committee also indicated that “relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted”.

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

17. The Committee is aware that various development projects financed by international agencies within the territories of State parties have resulted in

forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which states, inter alia, that “international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account”.

18. Some institutions, such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of and human suffering associated with forced evictions. Such practices often accompany large-scale development projects, such as dam-building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and States parties to the Covenant. The Committee recalls in this respect the statement in the Vienna Declaration and Programme of Action to the effect that “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights” (Part I, para. 10).

Appendix 4.

Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari, Addendum, Mission to Afghanistan (31 August-13 September 2003), E/CN.4/2004/48/Add.2, 4 March 2004. (Summary and Recommendations)

Summary

The Special Rapporteur visited Afghanistan from 31 August to 13 September 2003 upon the agreement of the Islamic Transitional Administration of Afghanistan to examine issues of relevance to his mandate, including the situation of housing and land, and related services such as water and sanitation, public policy on human settlements, shelter, legislation that exists to protect a range of human rights relevant to adequate housing, with particular focus on the poor and the vulnerable groups, and to emphasize gender aspects of these and other issues.

The Special Rapporteur engaged in extensive dialogue with relevant government offices, United Nations and international agencies, and civil society organizations, with a view to identifying practical solutions in a country where, during both the 23 years of conflict and the past 2 years of post-conflict situation, the struggle for housing and land rights, including for the over 2 million refugees returned from Pakistan and Iran, has been a critical factor, and a contributing factor to the insecurity and tension in parts of the country.

The mission was conducted in the cities of Kabul, Kandahar and Jalalabad, and in the rural areas in the provinces of Kabul, Kandahar, Nangarhar and Parwan. Throughout the mission of the Special Rapporteur, it became clear that a number of key issues need to be addressed in order to ensure adequate housing as a component of the right to an adequate standard of living, such as: land occupation; severe destruction of houses and land, sanitation facilities, water sources and livelihood, etc., as a result of over two decades of conflict; regular occurrence of forced evictions without compensation and alternative arrangements; land speculation with money allegedly stemming from poppy and marijuana cultivation invested into real estate and thereby increasing prices dramatically, making houses and land inaccessible for large parts of the population. Reported incidents of imprisonment and in some cases torture and

inhuman or degrading treatment of those resisting forced evictions and of human rights defenders protecting housing and land rights further confirm the need for addressing the situation with an indivisibility-of-rights approach.

In order to achieve the right to housing and land for all, the Special Rapporteur underlines that the complexity of housing and land rights in Afghanistan will necessitate working at all levels of the system: from combating corruption and inefficiency in the judiciary and governmental and provincial institutions, to coming to grips with land occupation to the detriment of the poor and the landless by commanders and other powerful members of the establishment, to arresting land speculation and to the provision of essential services, including water and sanitation to the large proportion of the Afghan population living in extreme poverty. Although the challenge and the complexity of issues involved seem daunting, the Special Rapporteur was encouraged by the emerging realization during and after his mission by governmental and non-governmental actors alike of the importance of addressing housing, land and property issues as an integral part of security and sustainable development strategies. The report also shows individual innovative and successful initiatives that have been launched which can be further developed to contribute to the implementation of the right to adequate housing.

Based on the findings of the Special Rapporteur, the report contains general and specific recommendations for the Transitional Government and other stakeholders to adopt to establish a comprehensive approach to housing, land and property rights, based on a conscious combination of the humanitarian, the human rights and sustainable development approach.

The recommendations of the Special Rapporteur include: the development of a comprehensive National Housing and Land Policy, establishing a clear division of responsibility within the Government and institutions as to decision-making and taking into particular consideration the needs and rights of women and vulnerable groups; the moratorium on forced evictions until such a policy has been developed; the development of appropriate monitoring mechanisms for the implementation of the right to adequate housing, such as through strengthening the capacities of the Afghan Independent Human Rights Commission; and that the newly established Special Property Disputes Resolution Court should be given appropriate resources, particularly with

regard to its capacity to consider complaints from provincial areas. The Special Rapporteur also emphasizes that the need to strengthen the capacities of the Ministry of Women's Affairs and the United Nations Development Fund for Women (UNIFEM) and the need for the Transitional Government in particular, and the international community, to develop a joint comprehensive approach to ensure the rights and needs of women with respect to housing and land.

Conclusions and recommendations

The Special Rapporteur's mission to Afghanistan coincided with the preparations of the Constitutional *Loya Jirga*, increased security tensions in certain rural provinces, and continuing incidents of land occupation and forced evictions countrywide. The Special Rapporteur is encouraged by the fact that his visit and the initiatives of other actors seemingly have contributed to a new resolve amongst United Nations agencies, AIHRC and civil society to focus on housing, land, property and forced eviction issues. He will continue to follow the situation in Afghanistan closely

and hope that his dialogue with the Transitional Government, UNAMA, AIHRC, UN-Habitat, UNHCR, UNICEF and other bodies will continue.

The existing obstacles against the implementation of the right to adequate housing and land are of enormous proportions and facing the challenge will necessitate joint efforts by not only the Transitional Government but also national non-governmental actors and the international community alike. In the attempts to ensure and improve the security situation across Afghanistan, the non-implementation of land and housing rights, such as forced evictions and land occupation, as a potential reason for prevailing and future insecurity, must be recognized. The main challenge will be to elaborate a conscious combination of the humanitarian, the human rights and the sustainable development approach. Towards this end, the international community needs to direct financial and technical assistance.

The Special Rapporteur, therefore, strongly argues for the adoption of an indivisibility approach with respect to the right to adequate housing and other related rights to his mandate, including the right to land, the right to health, the right to food, the right to security of the person and the home, and freedom of

movement. In addition to his recommendation throughout his report, the Special Rapporteur would like to submit the following recommendations:

(a) Mapping the housing needs of the country and interpreting the data from a human rights perspective would be a first step towards progressive realization of the right to adequate housing;

(b) The Special Rapporteur also recommends the development of a comprehensive national housing and land policy, establishing a clear division of responsibility within the Government and institutions as to decision-making and taking into particular consideration the needs and rights of women and vulnerable groups, including returnees, IDPs, the poor, persons with disabilities and minorities. A national housing and land policy will also have to establish a participatory consultation process to follow in cases of resettlement, property, housing and land restitution, land distribution and alternative housing and land for those made homeless and landless;

(c) Whether in elaborating housing policies and programmes or adopting specific legislation, particular attention must be given to the need to address - as a matter of priority - the situation of women, including the need of protection of households headed by women and vulnerable women in poor housing and living conditions, IDPs, nomads, minorities and the poorest and most needy segment of the population, and ensure their participation in the development of policies and programmes;

(d) Strengthening the Ministry of Women's Affairs and enhancing the present limited capacity of UNIFEM is necessary in order to develop a joint comprehensive approach, including the Government and the international community as a whole, to ensure the rights and needs of women with respect to housing and land;

(e) Particularly at the provincial level, comprehensive regional, rural and urban, development plans need to be elaborated, with the involvement of the Ministry of Urban Development and Housing and the Ministry of Rural Rehabilitation and Development, based on a national housing and land policy, taking into particular consideration the need to include special provisions in the above plans to address issues such as land distribution to the homeless and low-cost housing for the poorest segments of society;

(f) It is recommended that the Transitional Government, together with UNAMA, should take the lead in developing appropriate monitoring mechanisms for the implementation of the right to adequate housing, such as through strengthening the capacities of AIHRC and the establishment of an inter-ministerial housing and land rights committee with involvement of relevant ministries, local authorities, United Nations programmes and agencies and civil society. Steps should be taken, including by the international community, to ensure the establishment of the inter-ministerial land commission proposed by the Ministry of Refugees and Repatriation to examine the possibility of distributing land to returnees;

(g) Increased coordination within the international community could be achieved through a joint United Nations housing and land task force, at the national level, as has been established on the provincial level with positive results. Within the framework of the Common Country Assessment to be undertaken United Nations agencies and programmes, which will lead to a United Nations Development Assistance Framework for the next five years, due attention should be given to the right to adequate housing, and related rights addressed in this report;

(h) The Special Rapporteur urges further integration of human rights perspectives into national and sectoral policies, housing programmes and rehabilitation initiatives, including through the National Solidarity Programme, with a particular focus on the development and participation of women's shuras, and the Provincial Reconstruction Teams;

(i) The Special Rapporteur recommends the development of a national legislation on housing and land rights, incorporating and codifying into one comprehensive source, customary law, civil law, religious law and State law, including women's right to inheritance of housing and land, and in compliance with international human rights treaties ratified by Afghanistan. This is of particular importance since the recently adopted Constitution, while recognizing the need for compliance with

international human rights instruments, does not explicitly guarantee the respect of the right to adequate housing and related rights;

(j) The Special Property Disputes Resolution Court should be given appropriate resources, particularly with regard to its capacity to consider complaints from provincial areas. Especially in the provincial areas, the issue of access to courts, particularly for women, and corruption within the judicial system need to be addressed;

(k) A moratorium on all forced evictions should be made until a national housing and land policy has been adopted and an effective judicial system to address disputes in this regard is in place. The Special Rapporteur also recommends that the potential role of an enhanced ISAF force in the transitional period be explored, to include the protection of those potentially threatened by forced evictions;

(l) In the context of the consistent pattern of forced evictions and land grabbing across the country, the Special Rapporteur recommends the Transitional Government and relevant actors from the international community, to contribute to the removal of the climate of impunity that currently exists for those who are responsible for such acts. The Special Rapporteur urges an intensification of investigations into such human rights violations and, when appropriate, prosecution of those actors, including commanders and other members of the security establishment;

(m) In all matters of housing and land, including in cases of land distribution and prevention of illegal land occupation and forced evictions, adequate legislation needs to be complemented by measures to ensure effective implementation;

(n) The Special Rapporteur recommends that the main ministries taking active responsibility for the improvement of access to adequate housing also adopt an environmental strategy in order to ensure that the right to adequate housing entails the right to live in a safe environment. The Special Rapporteur urges the Government to take into account the contents of general comment No. 15 on the right to water, giving particular attention to the individuals, most often women and children, and communities living in extreme poverty;

(o) There is a need to strengthen human rights education in the country, including of State actors and the judiciary, particularly on economic, social and cultural rights and women's rights, such as through participation in community forums, other local institutions and through radio broadcasts. All relevant

actors, including the Transitional Government, AIHRC and civil society organizations need to intensify awareness-raising efforts and training programmes, towards this end. A particularly useful model which could be considered for cities and provinces of Afghanistan is the “Human Rights Cities” initiative developed by the People's Movement for Human Rights Education (PDHRE) and currently being jointly coordinated by PDHRE and UNDP;

(p) Given the decades of conflict, Afghanistan has not been able to fulfil its reporting obligations under ratified human rights treaties. To enhance the country's integration in the human rights system, the Special Rapporteur recommends that the Transitional Government consider planning for the submission of such reports. From his experiences during a mission in a post-conflict situation, the Special Rapporteur believes that special procedures of the Commission on Human Rights can play an important role in addressing the human rights situation in the country and recommends that Afghanistan issue a standing invitation to such procedures.

Appendix 5.

Select list of currently applicable laws relating to land and property rights in Afghanistan

Law on Expropriation/ Acquisition for public purpose (1935, 2000)

Property taxation (1965, 1976)

Survey and registration (1965)

Distributive reform (1975, 1976 & 1979)

Acquisition & sale of land (1979)

Mortgages (1979)

Cooperatives (1979)

Pasture (1970)

Forests (2000)

Poppy production (2000)

Restitution (1992, 1999, 2000)

Classification of land classes (1965, 2000)

Land dispute resolution (2002, 2003)

Law on making land available for investment (2003)

Restitution of public lands (2004)

Law on Property Dealers

Law on Municipalities

Law on incomes and expenses of Municipalities' public services

Decree on Sanitation and Greenery of Cities

Decree on Tax collection

Decree on fixing rental for municipalities' properties

Decree on housing affairs under Kabul Master Plan

Decree on Implementation of Kabul Master Plan

Decree on Distribution and Sale of residential, commercial and multi-storied state land plots in Kabul

Decree on Distribution and Sale of State Apartments

Decree on Rent, Lease and *rahn*

By-law “Central Institute of project development” (PAMO)

Order of the Head of the State to identify and confirm the competence and responsibility of Ministry of Urban Development, and Ministry of Public Works

Land taxation law (1979)

Water law (1982)

Cadastre and surveys law (1988)

Emarat Islami's land arrangement law (2001)

Pasturage and grassland law (2001)

Civil code (1977)

Provision of the usage of water in agriculture 1982

Provision of land lease 1998

Provision of rural development 1974

Attorney General Law of Afghanistan Democratic Republic 198

Provision on distribution and selling of residential apartments

Appendix 6.

Decree 89 of the head of the Transitional Islamic State of Afghanistan Regarding the Creation of a Special Property Disputes Resolution Court.

Date: 1382/9/9 or 30 November 2003

Article One:

Based on the grave necessity for looking after returned refugees in Afghanistan and addressing their complaints, as well as to hasten the process of resolving property disputes, a Special Property Disputes Resolution Court (the “Court”) shall be created within the framework of Supreme Court on the terms contained herein.

Article Two:

(1) The Court will consist of two levels (primary and appellate).

(2) The Court at the primary level will be divided into two courts, with one focused on cases involving real estate located in Kabul Province and one focused on cases involving real estate located in provinces other than Kabul Province. Both of these courts are located in Kabul.

(3) The court focusing on disputes involving real estate in the provinces may, with the permission of the Chief Justice of the Supreme Court, travel to the provinces to hear certain of these cases in accordance with the provisions of this decree.

(4) The Court at the appellate level (the “Mahkamae Nehayee”) may review cases heard at the primary level involving real estate located in either the provinces outside of Kabul Province or within Kabul Province.

Article Three:

(1) For the purpose of ensuring justice, decisions or judgments of the Court's appellate level (Mahkamae Nehayee) can be reviewed, according to the provisions of Article 482 of the Civil Procedure Law, published under Official Gazette No. 722, dated 31 Asad 1369.

(2) Revising and rehearing of decisions or judgments of the Court's appellate

court shall be based on a proposal of the Supreme Court High Council in accordance with Paragraph (1) of this article and an order of the President to send the decision or judgment to a Revision Committee.

Article Four:

(1) The Chairman and judges of the Court's primary and appellate courts shall be appointed on the recommendation of the Chief Justice of the Supreme Court chairman and with the approval of the President.

(2) The Chairman and judges of the Court's appellate court, which constitutes three persons, shall be from among the members of the Supreme Court and appointed through President.

(3) The Revision Committee consists of three persons from among Supreme Court members who are appointed by the President.

Article Five:

Property or real estate in this decree includes land, residential areas, apartments, shops, Mendavi (market) and other immovable properties.

Article Six:

Property disputes covered under this decree include and are limited to those which took place in the absence of the owners from the date 7th Saur 1357 (27 April 1987).

Article Seven:

(1) The Court's primary court (both for cases in Kabul Province and for cases outside Kabul Province) is obliged to decide on all filed cases within two months from the date of being filed.

(2) The Court's appellate court (Makamae Nehayee) is obliged to decide on all filed cases within one month from the date of being filed with it.

(3) The two-month deadline in Paragraph (1) of this article may be extended by up to ten days in special and exceptional situations (i.e., complicated cases).

(4) The Revision Committee shall review submitted cases within a one-month period after receiving the President's verdict regarding such submitted cases.

Article Eight:

Proof of forgery of property documents submitted under this decree, and the annulment thereof, is the authority of the Court. When property documents submitted under this decree are determined to be forged, for the purpose justice, the matter may be referred to the relevant authorities.

Article Nine:

(1) Possession of property based on forged documents is illegal and the ownership of such property shall belong to the entitled person as based on the final decision of the Court. The cost of producing any new deeds any other related expenditures may be charged to the forger in accordance with the provisions of law.

(2) When illegally possessed or occupied property is, based on the final judgment of this Court, returned to its actual owner, compensation from the date of such illegal possession or occupation until the date of this Court's order for the actual owner to recover such property, shall be given from the illegal possessor or occupier to the actual owner.

Article Ten:

Cases of property disputes result from the direct application of natural persons and entities, and such cases may be referred to the Court, through relevant governmental authorities.

Article Eleven:

This decree is not applicable when one side in the dispute is a government administration. Such cases are reviewed in accordance with relevant laws and with the authority of the relevant court.

Article Twelve:

Judgments and decisions of the Court's appellate court are generally obligatory

and enforceable, with both parties and relevant authorities obliged to ensure their implementation.

Article Thirteen:

The Revision Committee is obliged to timely review claims prescribed under Article Seven hereof and report on the implementation of decisions made to the Office of the President.

Article 14:

(1) The Ministry of Interior is specifically obliged to implement the final judgments and decisions of the Court, whether at the primary, appellate or highest level.

(2) Other relevant governmental authorities are obliged to implement this decree and to cooperate with the Court.

Article Fifteen:

This decree, from the date of promulgation, is enforceable and should be published in the Official Gazette. From the date of this decree, the dispute resolution commission referred to in Article Five, Decree No. 136, dated 19/6/1381, published under Official Gazette No. 804 is dissolved, and such Decree No. 136 dated 19/6/1381, published under Official Gazette no.804, Decree no.161 dated 30/8/1381 regarding the amendment of Article 2 of such Decree 136, and the decree creating the dispute resolution commission referred to above in this Article, are annulled.

Hamed Karzai

President of Transitional Islamic State of Afghanistan

Appendix 7.

Decree Of the President of the Afghan Interim Administration On Dignified Return of Refugees, Ref No.(297), Date: 13,03,1380.

The Afghan Interim Administration, Confident that the Bonn Agreement on Afghanistan dated 14.09.1380 (5 December 2001) has laid down the foundation for lasting peace, stability and social and economic progress in Afghanistan, safeguards the right and freedom of all returnees, observes the freedom of returnees to establish residence, to participate in the process of reconstruction, consolidation of peace, democracy and social development, AIA guarantees their safe and dignified return, expresses its gratitude and thankfulness to the countries that have given them refuge in the very difficult and hard days Afghanistan experienced, and expects that in conformity with the principle of voluntary repatriation, Afghans will be given the opportunity to decide freely to return to their country, and declares the following:

Article 1. Returning Afghan nationals, who were compelled to leave the country and found refuge in Iran, Pakistan and other countries of the world, will be warmly welcomed without any form of intimidation or discrimination.

Article 2. Returnees shall not be subject to harassment, intimidation, discrimination or persecution for reasons of race, religion, nationality and membership of a particular social group, political opinion or gender, and will be protected by the State.

Article 3. All returnees, irrespective of their political affiliations, are exempted from prosecution for all (with the exception of individual criminal accusations) criminal offenses committed up to 01.10.1380 (22 December 2001), prior to, or in exile against the internal and external security of the country, according to enacted laws.

Article 4. The provisions of Article 3 of this decree will not apply to those returnees who have committed acts constituting a crime against peace or humanity, or a war crime, as defined in international instruments, or to acts contrary to the purpose and principles of the United Nations.

Article 5. The recovery of movable and immovable properties such as land, houses, markets, shops, sarai, apartments and etc. will be effected through relevant legal organs.

Article 6. All returnees will be guaranteed the same human rights and fundamental freedoms enjoyed by other citizens.

Article 7. The implementation of the provisions of this decree is the responsibility of the Ministry of Repatriation; law and order organs are obliged to assist the Ministry of Repatriation in this task.

Article 8. UNHCR and other relevant international agencies will be allowed to monitor the treatment of returnees to ensure these meet recognized humanitarian law and human rights standards, and to ensure that commitments contained in this decree are implemented.

Article 9. This decree is valid as of 1.10.1380 (22 December 2001) and will be printed in the Official Gazette.

Hamed Karzai,

President, Afghan Interim Administration

Appendix 8.

Useful international organisations

Inter-Governmental Organisations

United Nations High Commissioner for Refugees

Case Postale 2500

CH-211 Geneve 2 Depot

Switzerland

Telephone: +41 22 739 8111

<http://www.unhcr.ch/>

Office of the UN High Commissioner for Human Rights

OHCHR-UNOG

CH 1211 Geneva 10, Switzerland

Telephone: +41-22-9179000

Fax: +41-22-9170099

E-mail: webadmin.hchr@unog.ch

<http://www.unhchr.ch/>

United Nations Development Programme

One United Nations Plaza

New York, NY 10017, USA

Telephone: +212 906 5000

<Http://www.undp.org/>

International Organisation of Migration

17 Route des Morillons

CH-1211 Geneva 19

Switzerland

Tel: +41 22 7179111

Email: info@iom.int

<http://www.iom/>

Organization for Security and Co-operation in Europe

Office for Democratic Institutions and Human Rights

Aleje Ujazdowskie 19

00-557 Warsaw

Poland

Telephone: +48-22-520 06 00

Fax: +48-22-520 06 05

E-mail: office@odihr.osce.waw.pl

[Http://www.osce.org/odihr](http://www.osce.org/odihr)

Non-Governmental Organisations (NGOs) and Professional Associations

Amnesty International (AI)

International Secretariat

1 Easton St

London WC1X 8DJ

UK

Telephone: +44 20 7413 5500

Fax: +44 20 7956 1157

E-mail: amnestyis@amnesty.org

<http://www.amnesty.org/>

Federation Internationale des Ligues des Droits de l'homme (Fidh)

17 Passage de la Main d'Or

75011 Paris, FRANCE

Telephone : +33-1-43 55 25 18

Fax : +33-1-43 55 18 80

E-mail : fidh@csi.com

<http://www.fidh.imagnet.fr/>

Human Rights Watch (HRW)

350 Fifth Avenue, 34th Floor

New York, NY

10118-3299 USA

Telephone: +1-212-290 4700

Fax: +1-212-736 1300

E-mail: hrwnyc@hrw.org

<http://www.hrw.org/>

International Association of Judges

Palazzo di Giustizia

Piazza Cavour

00193 Roma

Italy

Tel.: +39 066 883 2213

Fax.: +39 066 87 1195

E-mail: secretariat@iaj-uim.org

<http://www.iaj-uim.org>

The International Bar Association

271 Regents Street

London W1B 2AQ

UK

Tel.: +44 20 7629 1206

Fax.: +44 20 7409 0456

<http://www.ibanet.org>

International Commission of Jurists

P.O. Box 216

81a Avenue de Chatelaine

1219 Geneva

Switzerland

Tel.: +41 22 979 3800

Fax.: +41 22 979 3801

E-mail: info@icj.org

<http://www.icj.org>

International Committee of the Red Cross

19 Avenue de la Paix

CH 1202 Geneva

Switzerland

Telephone: +41-22-734 60 01

Fax: +41-22-733 20 57 (Public Information Centre)

E-mail: webmaster.gva@icrc.org

<http://www.icrc.org/>

International Helsinki Federation for Human Rights:

Rummelhardtg. 2/18

A-1090Vienna

AUSTRIA

Telephone: +43-1-408 88 22

Fax: +43-1-408 88 22-50

E-mail: office@ihf-hr.org

<http://www.ihf-hr.org/>

International Service for Human Rights:

1 Rue deVarembé

P.O. Box 16

Ch-1211 Geneva CIC

Switzerland

Telephone: +41-22-733 5123

Fax: +41-22-733 0826

Lawyers Committee for Human Rights (LCHR)

333 Seventh Avenue, 13th Floor

New York, NY 10001

United States

Telephone: +1-212-845 5200

Fax: +1-212-845 5299

E-Mail: lchrbin@lchr.org

[Http://www.lchr.org/](http://www.lchr.org/)

G L O S S A R Y

Allegation a claim as yet neither proved nor disproved regarding a specific incident;

Application a letter or other form of submission asking a judicial body to consider a case;

Arrest the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

Asylum asylum is sought by individuals who do not wish to return to a country, usually their own, where they are at risk. If granted, it means being allowed to remain in a country which is not their own. It may be temporary or permanent;

Atonement to show remorse and seek to make amends for harm done;

Cadastre a listing of properties based on surveys and mapping; includes the coordinates of each property which are therefore able to be identified on associated maps;

Common property land that is owned jointly by all members of a specific community; usually used with respect to pasture, swamps and forests;

Communication a letter or other form of submission transmitting information to an international body. The term is often used within the UN to refer to applications under an individual complaint procedure. The person who writes a communication is often referred to as the author of the communication;

Corroboration evidence which supports or confirms the truth of an allegation;

Court judgment a legally-binding decision in which a court expresses its conclusions in a case;

Criminal charge official notification given to an individual by the competent authorities that he or she has committed a criminal offence;

Customary land law rules relating to how land is owned and transacted that have been established through practice and by adherence by members of the group;

Declaration a particularly formal resolution, usually of the United Nations

General Assembly, which is not as such legally-binding, but sets out standards which States undertake to respect;

Deportation expulsion from a country;

Derogate to temporarily suspend or limit;

Detention depriving a person of personal liberty except as a result of conviction for an offence;

Domestic law or legal system national law or legal system; law or legal system which is specific to a particular country;

Eligible applicant a term used in Afghanistan to define those persons who are eligible to receive land from the state;

Enforcement (of obligations) making the obligations effective; ensuring that they are respected;

Entry into force (of a treaty) the moment at which treaty obligations begin to apply;

Entitlement State law recognition of specific land ownership, usually through the registration of the owner and the land owned, and the issue of a certificate of some kind;

Excess land a term used in Afghanistan to describe areas of land above the land ceiling;

Fact-finding carrying out an investigation to discover the facts;

Foreclosure the process whereby the lender becomes the owner of a mortgaged property when the borrower defaults on repayment of the loan;

Implementation (of obligations) the way in which obligations are carried out or respected, or measures aimed at achieving this;

Impunity Being able to avoid punishment for illegal or undesirable behaviour;

Individual complaint a complaint relating to a specific set of facts affecting an individual or individuals;

Instrument a general term to refer to international law documents, whether legally binding or not;

Inter-governmental body a body or organisation composed of the

governmental representatives of more than one country;

Judicial procedure a procedure before a judicial body;

Jurisdiction (of a State) area or persons over which a State exercises its authority; **Jurisdiction (of a judicial body)** matters which fall within the jurisdiction of a judicial, or quasi-judicial, body are those which it has the authority to examine;

Land ceiling the maximum area of land that may legally be owned by a single owner;

Land document title deeds, a bill of sale or other documents that the law permits to be used as evidence of ownership of the land;

Land holding covers both the owning of land itself or the rights associated with the land

(such as a usufruct - the right to use the land);

Land tenure the arrangements through which land (or rights in land) is owned and transacted (gifted, sold, inherited, lent, etc.).

Lease a right to use a property for a specified time;

Leave permission;

Legally-binding if something is legally-binding on a State, this means that the State is obliged to act in accordance with it, and there may be legal consequences if it does not do so;

Litigation the process of bringing and conducting a case before a court;

Lodging a complaint registering a complaint;

Mandate the authorised powers of a mechanism the document which explains what the mechanism is authorised to do;

Merits the stage of an individual complaint procedure at which the judicial, or quasi-judicial, body examines the facts of a case and decides if a violation has occurred;

Monitoring seeking and receiving information for the purpose of reporting on a subject or situation;

Mortgage an interest over a property that is created as security against a loan or

a debt, and which ceases once the loan or debt has been paid;

Mortgagee the lender who provides the loan and who thereby gains an interest in the property that may only be activated under certain conditions;

Mortgagor the borrower who uses his property as security for a loan;

Non-governmental actors private persons or groups (or organisations) acting independently of the authorities;

Observations comments, assessment;

Perpetrator the person who has carried out an act;

Petition request for action, e.g. request for a matter to be investigated;

Provisional measures temporary measures which can be requested by a judicial or quasi-judicial body before having completed its consideration of a case, in order to avoid irreparable damage;

Public interest the grounds upon which a national government is permitted to take private property for national benefit (such as for building dams, schools or roads);

Public land land that is either owned by all citizens together or that is held to be unowned and/or un-ownable;

Private land land that may be owned by individuals or other legal bodies or persons;

Quasi-judicial procedure a procedure before a body which considers cases in a similar way to a judicial body, but which is not composed of judges and the decisions of which are not of themselves legally-binding;

Ratification the process through which a state agrees to be bound by a treaty;

Recommendation a suggested course of action. Recommendations are not legally-binding;

Registration a formal process of recording land rights or land ownership in a land register that then becomes the primary legal source of determining who is the owner of a certain plot of land;

Reparation Measures to repair damage caused; for example, compensation;

Reservation at the time of agreeing to be bound by a treaty, a State can register

a reservation: a statement intended to modify its obligations under the treaty in some way;

Resolution official decision of an international body, often adopted through a vote. It is usually a recommendation and therefore not legally binding;

Restitution to restore someone to his or her previous position or to reverse the harm done to him or her;

Restorative justice judicial actions that aim to provide restitution to people who have suffered harm;

Rules of procedure the detailed rules which a judicial or quasi-judicial body adopts, setting out the way in which proceedings before it should be carried out;

Sanction a penalty imposed for a State's failure to respect its legal obligations;

Sharecropper usually a landless farmer who pays for the use of a plot by giving the landowner a share of the crop as agreed between them. Sometimes a sharecropper owns the land but shares the crop with the person providing inputs to enable him to farm it. Or a farmer may mortgage his farm and pay back the debt through giving the creditor a share of the crop;

Statutory land law State laws, laws made by national governments.

State responsibility holding a State accountable under international law;

State Party (to a treaty) a State that has agreed to be bound to a treaty;

Supervisory body a body set up to supervise the ways in which States implement their obligations under a treaty;

Tenant although used often to mean a person who is renting in land, 'tenant' may also refer to any land occupant, including a landowner or sharecropper;

Title deed a certificate that indicates the owner of a described and mapped plot of land according to official registers;

Transmission (of an allegation) sending the allegation, e.g. to the State concerned;

Treaty international law document which sets out legally-binding obligations for States;

Treaty article the term used to refer to individual sections of a treaty;

Treaty body a body set up by a treaty;

Violation (of obligations) a failure by a State to respect its obligations under international law;

Afghani: The Afghan currency, also known as Afs';

Jerib: The common measure of land; five jeribs comprise one hectare (2000 sq. metres).

Dates: Afghanistan follows a solar calendar beginning in 622 AD, the year of the *Hijrat*. The first day of the year coincides with the first day of spring. The approximate corresponding western date is derived by adding 621 years, two months and 21 days to the Afghan date.