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Introduction to the Issues – HLP Rights and Sustainable Peace

Housing, land, and property (HLP) rights crises are present in all conflicts and postconflict settings, and their management by those engaged in peace efforts can often be decisive in determining the extent to which peace is sustained and the degree to which measures of remedial and restorative justice are enshrined within postconflict political and legal frameworks. Conflicts are inherently complex, fluid, and multidimensional phenomena. The causes, forms, and impacts of conflict are perceived very differently by different actors (both “insiders” and “outsiders”) and change over time, so that they cannot easily be predicted or reduced to simple statements of “fact.” Nevertheless, the importance of HLP issues will strike anyone who has researched or observed violent conflicts in any part of the world.

In many countries, disputes over housing, land, and property, often with ethnic or other group-identity dimensions, are one of the root causes of violent conflict. There are many different types of HLP disputes, and disputes may be perceived, described, or categorized in different ways by different actors. Some disputes involve different claims to property among actors who agree on the tenure systems in place; in other words, they agree on the rules of property ownership and use, but some stakeholders think that other actors are breaking the rules. Of course, even when actors agree on a single tenure system, their interpretations of the tenure system may be different. State legislation may be outdated, unclear, inherently contradictory, or ambiguous.

Other disputes involve actors who do not agree on the rules of use or ownership. One actor, for example, may base her claim on a particular statutory law. A second actor may base his claim on a different law, also in force, which contradicts the first – it is fairly common for countries to have contradictory and overlapping laws in force simultaneously. Another actor may argue that the traditional laws of a particular ethnic or religious group have precedence over statutory legislation. Conceptions of individual and community rights, and common or private property, may differ widely between individuals and communities in the same country. Some actors see particular forms of housing, land, and property rights as legitimate whereas others

may oppose them on various grounds, including the credibility of the historical development of property rights regimes in a particular geographical area, economic and political theories, or simple self-interest.

Rapid changes to property rights regimes are now occurring around the world, due broadly to processes of globalization as well as population growth, urbanization, environmental change, and economic expansion in the global South. Much of what has customarily been viewed as public – such as common-property resources like forests and pastures – is becoming enclosed, privatized, and commodified.¹ New forms of private property are being created from common resources, so that “property is seemingly everywhere,” yet resistances and disposessions mean that property rights systems are simultaneously “coming undone.”² In most countries in the global South, disputes over housing, land, and property represent a significant proportion of all the cases heard by any particular dispute resolution system, including the courts.

It has become common for theorists within various disciplines and of various ideological persuasions to conceive of property rights as a collection of different kinds of rights. A “bundle of rights” or entitlements may include the rights to possess; to use; to exclude others from using or to allow others to use; to sell; to give away; to dispose of by will; to recover from theft; and to receive compensation for damage.³ Each of these rights may be held by the same, or different, persons or organizations. Rights to land also include, in some cases, rights to airspace above the land, water and minerals below the soil, and other property, though in most cases, these are limited or appropriated by the state. In most situations, rights to property are socially “embedded” and deeply entangled with other forms of community- and family-level rights and responsibilities. Different kinds of users may be able to claim some, or all, of these rights over particular pieces of property. Certain rights may be held in common by members of a group whereas others might be exclusive to an individual. Property rights tend to be particularly complex in communities that rely on the utilization of natural resources for a wide variety of subsistence purposes. Given the wide range of rights that may exist, we can envisage an extremely broad range of HLP rights instruments that could theoretically be developed. In practice, most state-backed HLP rights instruments are based on models developed in western (and

¹ See e.g., Becky Mansfield (2007) “Privatization: Property and the Remaking of Nature-Society Relations. Introduction to the Special Issue.” *Antipode* 39, no. 3: 393–405.

² Bill Maurer and Gabriele Schwab (2006) *Accelerating Possession: Global Futures of Property and Personhood*, New York: Columbia University Press.

³ See e.g., Saturninas Borrás (2007) *Pro-Poor Land Reform: A Critique*, Ottawa: University of Ottawa Press, 25; Theo Van Banning (2002) *The Human Right to Property*, Antwerp/Oxford/New York: Intersentia; Patricia Kameri-Mbote and Migot Aketch (2008) *Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with the Public Trust*. Paper presented at KIPPRA workshop on land issues in Kenya, KICC, 31 July.

particularly European) contexts, and do not reflect the complexities of customary tenure systems.

Generally, this volume steers clear of the complex debates around which particular forms of HLP rights are appropriate for particular situations. It certainly avoids a blanket prescriptive approach that would recommend one form of right over another. It is instructive, however, to briefly consider the ways in which different kinds of rights are perceived, in order to provide some theoretical context for the chapters that follow.

CONTESTED CONCEPTIONS OF PROPERTY RIGHTS

In most countries, the state acts as the ultimate guarantor of property rights to ensure that one rights holder does not infringe upon the rights of another to an unfair degree. However, the extent to which the state enjoys local legitimacy or has the capacity to effectively ensure that statutory laws are implemented varies widely. In many countries, customary laws, religious laws, or other systems compete with statutory laws for legitimacy. The nature and interpretation of customary and religious laws tends to vary widely within single nations, and customary law interacts in complex ways with statutory property rights systems. Ideas of tenure security vary widely among different actors, and statutory systems are not necessarily seen as pre-eminently legitimate or appropriate. Indeed, in many places, the state itself is the primary source of tenure insecurity through the illegal or legally dubious conversion of customary lands to private or governmental uses.

Neoliberal perspectives have emphasized the importance of formal markets in property and marginalized so-called informal markets that are regulated through customary rights systems. Formal rights, from a neoliberal perspective, are regulated by the state. However, the state's role is primarily regulatory: The state supports the functioning of the market.⁴ This is in contrast to more progressive concepts of the state, which involve a redistributive function.

Tenure security is the key to market function so that property can be effectively and efficiently transacted without the possibility of limitations to property rights resulting in transaction costs. The sociopolitical complexities in property rights hinted at earlier, particularly the notion of social embeddedness, is ignored in mainstream neoliberal discourse around property rights, and “the concept of private property rights is conceptualised narrowly with a primary focus on the right to alienate through sale and inheritance as *the* defining element of private property.”⁵

⁴ Wendy Wolford, (2007) “Land Reform in the Time of Neoliberalism: A Many-Splendored Thing.” *Antipode* 39, no. 3: 550–570.

⁵ Borras, *Pro-Poor Land Reform*, 25.

Many property rights theorists argue that freehold title to land, housing, or property rights best “guarantees” property rights. A freehold title represents the combination of a number of types of rights in one single instrument, usually held by a single rights holder, through a process of privatization. The use of title to leverage credit – through a mortgage, for example – is a foundation stone of neoliberal economics that constantly seeks to invent new financial instruments. This explains the interest over the last decade in the arguments of Hernando De Soto, who claims that assigning property rights to land, housing, and property in the informal realm provides poor households with the opportunity to gain access to credit and hence use their entrepreneurial skills to get out of poverty.⁶ However, a host of critics have contested these ideas.⁷ De Soto and his adherents have been accused of ignoring the very mixed impacts of the many land-titling programs implemented during the last few decades. Evidence has shown that titling programs result in a loss in tenure security for many who enjoyed user rights under informal or customary systems even as they may result in increased security for others.⁸ The economic benefits of titling are far from clear. Research from South and Central America suggests that land titling disproportionately benefits large-scale farmers and can reinforce existing inequalities.⁹ Experts have argued that providing the majority of the population with land tenure security is a matter of long-term political determination and a pluriform set of measures, rather than of a single “silver bullet” fix such as systematic registration.¹⁰

Debates and disputes between academics and practitioners in the field of HLP rights are not exhaustively discussed in the present volume, but references to such debates are found in many of the readings, particularly in Chapters 8 and 9.

HOUSING, LAND, AND PROPERTY DISPUTES AS CAUSES OF CONFLICT

In some countries, lack of access to housing, land, and property is a major livelihood constraint for many people. Absolute resource scarcity is an issue in some countries, but unequal distribution of resources is a more common problem. Where major

⁶ Hernando De Soto (2000) *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York: Basic Books.

⁷ See e.g., Espen Sjaastad and Ben Cousins (2008) “Formalisation of Land Rights in the South: An Overview” *Land Use Policy* 26: 1–9; Nyamu-Musembi (2006) *Breathing New Life into Dead Theories of Property Rights: De Soto and Land Relations in Rural Africa*. Institute of Development Studies (IDS).

⁸ Van Banning (2006), 345, cites the well-known example of Kenya, where formalization of land tenure has become “an instrument for the rich to encroach on untitled land.”

⁹ Stephen Baranyi, Carmen Deere, and Manuel Morales (2004) *Land and Development in Latin America*, Ottawa: North-South Institute/International Development Research Centre (IDRC).

¹⁰ Van Banning (2006), 346. This is not to deny the relevance of registration as part of wider measures, depending on the economic, political, and legal context.

local grievances exist, poverty can be an underlying reason for recruitment into armed groups, because militia members or members of regular forces are able to sustain themselves by looting. Land tenure may not often be mentioned as a reason for conflict, but it is linked to poverty that, in turn, is related to violence. Land scarcity, in the absence of off-farm livelihood options, is often a structural cause of conflict in parts of Africa and the developing world.

In addition to these structural aspects, HLP issues can also be proximate, or visible, causes of conflict: For example, when land disputes, tenure insecurity, or inequality in land access are recognized as major grievances that can motivate violence. Usually, grievances over land are combined with other political problems. Conflicts are, by definition, complex and have a number of causes. The nature of mediation and dispute resolution mechanisms are important factors in determining whether parties involved in a conflict will resort to violence; if they are seen as biased or ineffective, violence is always a possibility. Political and military interference in local or traditional systems, such as courts or mediation committees, can exacerbate tensions and lead to violence. In many places, local conflict reconciliation mechanisms are compromised during times of war, but can still offer a potential for addressing HLP disputes if they can regain credibility after conflict ceases.

Of course, not all land-scarce countries or areas with unequal land ownership suffer conflict. Research suggests that the key determinant of whether violence will occur is not the extent of grievance in any given society, but rather the forms of social and political organization and cleavage that enable “boundaries” to be formed and people mobilized for violent ends. Unfortunately, HLP access disputes often have ethnic dimensions because land use patterns and customary land tenure systems frequently have an ethnic basis. Hence, the frequency of disputes involving farmers and pastoralists, and the use of the “ethnic card” by conflict entrepreneurs.

In addition to the legalistic aspects of land access and control, there are other dimensions – economic, political, social, religious, and spiritual – that are equally important. For example, land may often be significant as a means of production, an area where political authority is expressed and taxes may be raised (the concept of “territory”), a means by which families and individuals maintain social status and also as a source of feelings of ancestral belonging, as ancestors are buried within traditional territories. Land and the housing and property rights often associated with it are, therefore, by definition emotional issues and linked to cultural and other values.

Control over natural resources affects land uses and commercial development of natural resources often involves individualization of communal (indigenous) rights, with loss of access resulting for some. This indicates an important aspect that is often forgotten: Land rights problems are not purely home-grown. Land issues may be embedded within other struggles – for example, over mining rights, protected

areas, or hunting concessions. Where there is ethnic and regional competition over scarce resources, it is usually the result of opportunistic politicization of identity. In “wars of abundance,” belligerents rely on their capacity to exploit and commercialize the resources, so such wars become self-financing, self-sustaining, and therefore not readily open to mediation.

Furthermore, the way that many of these wars are financed highlights that they develop within a globalized war economy in which the industrialized countries of the Global North and rapidly growing emerging markets such as China, India, and Brazil play a role: Most of the world’s civil wars in poor countries involve a struggle for control of natural resources that are ultimately sold to wealthy and rapidly developing countries. The global economy has a huge influence in the modern climate of economic liberalization. Global forces can impinge on local land use directly, for example, when foreign investment results in the purchase of land for commercial enterprises, or indirectly, when global markets or donor conditionalities stimulate national prioritization of cash crop production and hence local land use patterns.

In all conflicts, housing becomes scarce as homes are destroyed, available housing is often occupied by persons with no legal rights to do so, ownership and tenancy disputes between competing parties often emerge and turn violent, and generally, the housing, land, and property sectors become a source of tension and instability. With habitable housing and land as two of the very few assets available to people in postconflict settings, problems of illegal occupations, squatting, and exploitative rent increases are common to all postconflict settings. Many demobilized combatants, some born in exile or long absent from their home areas, require access to housing and land in order to put food on the table, rather than resorting to banditry. Peace is often followed by a localized economic bubble associated with investment by United Nations agencies and international NGOs, and the liberalization of the economy. Rapid exposure of conflict-stunned communities to global markets and international investors can lead to disenfranchisement and conflict. HLP transactions are likely to rapidly increase in frequency, as UN and other organizations require office space and housing, and if this land rush occurs in a situation of land tenure insecurity, confusion and disputes will result. The negative effects of rapid economic change on the population may be reduced if the property rights of the poor can be secured.

And yet, despite the clear links between conflict and the HLP sectors, only recently has the international community become structurally involved in addressing these ubiquitous links. Attention to and action on housing, land, and property rights and conflict by the international community, although still in need of considerable enlargement, has expanded significantly in recent years. The issue has now been considered by numerous international agencies, institutions, and procedures, including the UN Security Council, and recently an HLP Sub-Cluster was

established under the UN's Cluster Approach to humanitarian emergencies. The following extract issued by the UN Secretary General in late 2007 urges greater attention to HLP issues by States and the UN.

UN Secretary-General (28 October 2007) *Report of the Secretary-General on the Protection of Civilians in Armed Conflict (S/2007/643)*.

[...] The present report provides an update on progress made in implementing... and strengthening the framework for the protection of civilians elaborated by the [Security] Council and other partners in recent years. It takes stock of positive developments and ongoing or new concerns that affect civilians in conflict situations around the world. In doing so, it highlights four challenges of particular importance to us all: the denial of life-saving access to civilians in need; the abhorrent practice of sexual violence in conflicts and its devastating impact on individuals and communities; the critical need to address more consistently the impact of conflict on housing, land and property; and the importance of eliminating the unacceptable humanitarian toll of cluster munitions. The report ends by proposing a set of key actions for the Security Council's consideration, all aimed at further strengthening the protection framework in areas that require more prompt and systematic action.

3. My visits to a number of conflict-affected countries have convinced me that for those displaced and victimized by war, our actions matter far more than our words. Their plight has left me with a deep sense of responsibility to ensure that where we cannot prevent armed conflict, the protection of civilians is, and must remain, an absolute priority: for me, as Secretary-General, for the United Nations, for the Security Council and, above all, for the Member States, with which the primary responsibility for protecting civilians lies. Enshrined in all major moral, religious, and legal codes, and not specific to any particular culture or tradition, the protection of civilians is a human, political and legal imperative that recognizes the inherent dignity and worth of every human being. It is a cause that unites us all in the responsibility to protect civilians from abuse, to mitigate the impact of warfare and to alleviate their suffering [...]

C. A more effective response to housing, land and property issues

52. Another critically important challenge is the need to more effectively address housing, land and real property issues, which are often the origins of, or result from, conflict and which are therefore inextricably linked to the achievement and consolidation of lasting peace and the prevention of future violence.

53. The majority of internal conflicts in recent memory have involved underlying disputes over housing, land or property. In places such as Côte d'Ivoire, Darfur, the Kivus of the Democratic Republic of the Congo, Liberia and Timor-Leste, conflict was driven to varying degrees by disputes over land resulting from such factors as increased demographic pressure, scarcity of resources, agricultural transformation, exploitation of natural resources, insecurity of tenure and inequalities in land distribution (in particular along ethnic, religious or other divides).

54. Housing, land and property disputes and problems are also an almost inevitable consequence of armed conflict, as people flee their homes and lands in search of safety, or are forced to flee, in particular through ethnic cleansing or sectarian violence, as currently plagues Iraq. Such situations invariably give rise to complex issues that, if not prevented in the first place, must be addressed later if any future peace is to be sustained and further violence prevented. These include forced evictions; property transactions made under duress; illegal destruction or appropriation and occupation of abandoned property; the illegal confiscation of land; discriminatory application of abandonment laws; and the loss or deliberate destruction of documentary evidence of ownership. Such problems are further compounded by the application of inheritance laws that deny women and minors the right to inherit, own or use land and property.

55. A critically important step towards resolving such issues is publicly upholding and ensuring the right to safe and unimpeded return for refugees and internally displaced persons from the very moment they become displaced. Ensuring the right to return constitutes a categorical rejection of the gains of ethnic cleansing and sectarian violence and offers some measure of justice to those displaced from their homes and land, thereby removing a source of possible future tension and conflict. After four years of conflict and continuing displacement in Darfur, reaching common agreement on land tenure and compensation for the loss of property has emerged as a key element of sustainable peace. A recent report on Southern Sudan observes that the arrival of returnees in South Kordofan exacerbated long-standing tensions between different land users, with killings and injuries related to land conflicts constituting the single largest risk to returnees and local communities.¹¹

56. The Council has long recognized the importance of safe and unimpeded return for refugees and internally displaced persons, as demonstrated in resolutions on the occupied Palestinian territory, Cyprus, the former Yugoslavia, Croatia, Georgia, Kosovo, Timor-Leste and the Sudan. In some cases, such as in Bosnia and Herzegovina, it has also condemned the wrongful appropriation and destruction of homes and property. However, for the reasons cited above, such recognition of the right to return must be applied by the Council with more systematic regularity. It must, moreover, be accompanied by increased attention to its practical implementation, including the need for a more comprehensive, systematic and consistent United Nations-wide approach to housing, land and property issues in both conflict and post-conflict settings.

57. Some United Nations peace operations have been directly involved in addressing these issues. The United Nations Interim Administration Mission in Kosovo administered and managed the Housing and Property Directorate and Claims

¹¹ Sara Pantuliano, M. Buchanan-Smith, and P. Murphy (2007) *The Long Road Home: Opportunities and Obstacles to the Reintegration of IDPs and Refugees Returning to Southern Sudan and the Three Areas*, Overseas Development Institute. Humanitarian Policy Group.

Commission, initially established by the United Nations Human Settlements Programme, which has decided over 27,000 claims as of October 2007. The Land and Property Unit within the United Nations Transitional Authority in East Timor developed proposals for institutionally addressing property questions. Grievances that were left unaddressed are considered to have contributed to the recent political violence in Timor-Leste. By contrast, the United Nations Transitional Authority in Cambodia and UNAMA have not systematically addressed property issues. With regard to the example of South Kordofan above, the report asserts that despite the risk posed by conflict over land, the issue has not received adequate attention or analysis within United Nations reintegration efforts.

58. When peace operations do not engage in these activities, it does not necessarily mean that the issues are left unaddressed. In Afghanistan, the Office of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organizations engaged in activities to promote and assist restitution, including the provision of legal aid to returnees. In Burundi, the Peacebuilding Fund has provided, through UNHCR, initial financial support to establish a national property claims mechanism.

59. Important though these efforts are, they do not constitute an approach that ensures consistent, systematic and comprehensive treatment of housing, land and property issues. Such an approach should include:

- (a) Preventive and deterrent actions, such as the strategic deployment of peacekeeping troops to prevent evictions and the illegal appropriation of land and property, and the identification and prosecution by national courts or the International Criminal Court of those criminally responsible for the illegal appropriation or destruction of land and property;
- (b) Preparatory actions, such as the early identification and registration of land and property abandoned by internally displaced persons and refugees to facilitate restitution or, where necessary, compensation, and the issuance of ownership documentation where this has been lost or destroyed;
- (c) Restorative actions, such as the inclusion of the right to return and restitution of housing, land or property in all future peace agreements and all relevant Council resolutions, and the inclusion of housing, land and property issues as an integral part of future peacekeeping and other relevant missions, with provisions for dedicated, expert capacity to address these issues.

International attention to HLP concerns is increasingly forming the basis for policy discussions of these within influential national governments. Detailed attention to HLP issues has also been forthcoming from a growing number of governments that recognize the central relationship between how HLP issues are addressed and longer-term peace objectives. In the following passage, David Ashley provides guidance to government officials working on foreign policy and development issues on how best to consider HLP problems.

David Ashley (2006) *Housing, Land & Property Issues in Post-Conflict Situations* (unpublished paper presented at Centre on Housing Rights and Evictions (COHRE) expert meeting, Improving Peacekeeping Operations, Chiang Mai, August 2006).

- Conflict destroys property, drives people from their homes and land (which are then often occupied by others), and invariably weakens the State. Housing, Land and Property (HLP) issues therefore arise after every conflict. Where competition over land was a major driver of conflict, or where significant destruction or population movement took place, HLP issues may also be an important and difficult subject of the peace negotiations.
- In post-conflict situations, tackling HLP issues is important to facilitate refugee/IDP return and sustainable economic recovery, as well as to respect human rights and prevent asset grabbing. Failure to do so can lead to tensions and even renewed conflict. However, their complex, long-term, multi-dimensional and politically sensitive nature mean HLP issues are often neglected.
- Frequently-used approaches to HLP issues in post-conflict situations include:
 - Restitution of property to displaced persons, which can help facilitate refugee return and reverse forced displacement including ethnic cleansing. But restitution programmes require a minimally functional State, resources, political will and a legally clear and reasonably just pre-war situation to which it is possible to return.
 - Creating dedicated mechanisms to resolve HLP disputes.
 - Supporting registration of HLP: existing property records should be protected during and after conflict. But building a comprehensive register is difficult, expensive and slow: registering property transactions may be a useful first step.
 - Some post-conflict countries have successfully implemented comprehensive HLP reform, but this requires careful preparation, wide consultation and a broad political consensus.
 - Increasing the stock of available housing and land – or providing alternative livelihood options – reduces HLP disputes and provides possibilities for those without access to housing or land even before the conflict. Encouraging returnees to go into temporary transit centres and a system to temporarily allocate available properties may help avoid future problems.
- Common dilemmas are whether to compensate for damage or destruction; how far to tackle HLP issues unrelated to the conflict; and how to combat discrimination against women on issues of inheritance or ownership.
- Options for action include encouraging recognition of HLP as an important peacebuilding topic, including inclusion in peacekeeping mandates and peace agreements; advocating for and supporting sound HLP policies; and lobbying against HLP-related human rights abuses such as forced displacement or discriminatory laws.