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Land policy in post-conflict circumstances: some lessons from East Timor

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Introduction

From Cambodia to Kosovo, and now East Timor, the United Nations has undertaken broad governmental functions in an effort to ensure that peace is maintained after the departure of the peacekeepers.¹ On its face, these “peace-building” missions have a powerful logic. Brokering a peace, but leaving behind a vacuum in institutional capacity, only encourages the return of conflict after the peacekeepers leave. Providing urgent humanitarian relief, but failing to integrate it with development aid, ignores the way that development assists in preventing future humanitarian crises. Providing development aid, but failing to establish the institutional conditions for sustainable development, is likely only to entrench a cycle of aid dependency and lead to allegations of waste and inefficiency. In all these senses, therefore, there appears to be the need for some form of UN political control in post-conflict circumstances, particularly so as to build institutional conditions for sustainable development and maintenance of peace agreements.²

Viewed in this way, this notion of UN involvement in peace-building can be seen as a product of certain converging issues in international relations and developmental discourse. First, it builds on the increased understanding that there is a continuum between relief and development: that, for example, UNHCR should seek both safe return of refugees and their successful reintegration into society.³ Second, it seeks remedies to the operational complexity of humanitarian interventions, particularly by offering a supranational agency that can co-ordinate disparate processes of peace-keeping, humanitarian relief, refugee return and development assistance.⁴ Third, it seeks to answer the problem of new states, so often born in circumstances of violence and conflict, by casting the UN as both midwife and guardian, intent on ensuring that its charge grows to maturity in a secure and sustainable environment.⁵ Fourth, it draws on “new institutionalist” theories in the development debate, which argue that effective economic development turns on institutional circumstances, in particular the institutions of

¹ The UN first began to discuss the concept of “peace-building” under the former Secretary-General, in Boutros Boutros-Ghali, *An Agenda for Peace 1995* (New York: United Nations, 2nd edition). Under Kofi Annan, peace-building missions may now be found in Afghanistan, Angola, Bougainville, Burundi, the Central African Republic, the Great Lakes Region, Guatemala, Guinea-Bissau, Haiti, Liberia, the Middle East, Somalia and Tajikistan: see UN Fact Sheet: UN Political and Peace-Building Missions, available at <http://www.un.org/peace/0800.pdf>. However, only in Namibia, Cambodia, Kosovo and East Timor have brought governmental and administrative functions been adopted by UN transitional administrations: see Rothert, Mark, “UN Intervention in East Timor”, *Columbia Journal of Transnational Law*, 39, 2000, 257.

² This argument for the UN to include a peace-building dimension to its peacekeeping operations is cogently put in Chopra, Jarat, “Peace-Maintenance: The Last Stage of Development”, *Global Society*, Vol. 11, No 2, 1997.

³ See Macrae, Joanna, “Aiding peace and war: UNHCR, returnee reintegration, and the relief-development debate”, *New Issues in Refugee Research*, UNHCR, Working Paper No. 14, December 1999.

⁴ For a discussion of the need for a political actor to set priorities and co-ordinate humanitarian activities in conflict affected countries, see Cunliffe, S. Alex, and Pugh, Michael, “The UNHCR as Lead Agency in the Former Yugoslavia”, *Journal of Humanitarian Assistance*, available at <http://www.jha.ac/articles/a008.htm>.

⁵ See for example the argument that effective peace-building begins with programmes to strengthen civil society, in Pugh, Michael, “Post-conflict Rehabilitation: Social and Civil Dimensions”, *Journal of Humanitarian Assistance*, available at <http://www.jha.ac/articles/a034.htm>

governance and law.⁶

Yet this new peace-building role for the UN also raises important questions of accountability and capacity. Even the Transitional Administrator of the United Nation's Transitional Authority in East Timor (UNTAET), Mr Sergio Viera de Mello, has said that:

[o]ne of the most significant lessons we have learnt is that a standard UN peacekeeping and peace building mission... is not an ideal structure to undertake the broad and expansive role of government in East Timor. There are several problems intrinsic to a UN mission operating as a civilian administration, including: the staff profile ... our recruitment processes, and UN procurement rules and regulations.⁷

In the wake of adverse assessments of UN peace-building missions in Kosovo and Sierra Leone, the Report of the Panel on UN Peace Operations (“the Brahimi Report”)⁸ was commissioned to consider UN peacekeeping and related field operations. Its recommendations range widely from the structure and role of various UN agencies, including the Department of Peacekeeping Operations, to the importance of “clear, credible and achievable” mandates. Most relevantly, for our purposes, the Brahimi Report recommends development of “peace-building strategies” (para. 2 (c)), including pre-selecting collegiate “rule of law” teams consisting inter alia of judicial and human rights specialists (para. 10).

Although little further detail is given, the assumption underlying these last recommendations is that, despite the variety of circumstances in which there will be UN peace-building missions, it is possible to develop in advance certain strategies, and pre-select specialist rule of law teams, so that future peace-building efforts may be facilitated. This paper considers this assumption in relation to land policy in post-conflict circumstances. It does so by analysing UNTAET’s land policy in the immediate aftermath of the conflict in East Timor; and it argues, in particular, that lessons from the successes and failures of this policy may be applied to generate certain recommendations for template land strategies in other peace-building and post-conflict environments.

Land policy in post-conflict environments: some general comments

Before embarking on this survey of land policy issues in post-conflict East Timor, and the ways in which template strategies may have been better used to manage them, it is

⁶ See for example World Bank, *World Development Report 1991: The Challenge of Development*, Oxford: Oxford University Press, 1992; World Bank, ‘The State in a Changing World’, *World Development Report 1997*, Washington, 1997. For an introduction to new institutional theories of economic development, see North, Douglass, *Institutions, Institutional Change, and Economic Performance*, Cambridge, New York: Cambridge University Press, 1997.

⁷ Viera de Mello, Sergio, “Statement by the Special Representative of the Secondary-General to the Lisbon Donors' Meeting on East Timor”, 22-23 June 2000, p. 5.

⁸ The Brahimi Report is available at http://www.un.org/peace/reports/peace_operations

necessary to make some preliminary comments concerning land policy generally in peace-building environments.

It is fair to say that land policy, as an element of peace-building missions, tends to be under-rated and has received little attention in the literature.⁹ Yet land policy clearly plays a fundamental role both in recovering from conflict, and ensuring that further conflict does not follow. In the first instance, land policy must deal with the immediate chaos of property destruction and population displacement caused by conflict. Returning refugees require shelter and incentives to return to their original areas. Disputes over remaining housing stock need to be minimised. Humanitarian and peacekeeping agencies require sites for their operations. Records relating to land need to be collected and restored. A functioning system of land administration needs to be re-built. All these issues require urgent attention, not simply to provide humanitarian relief and allow economic reconstruction, but to prevent a new round of land transactions causing further uncertainty to develop.

Secondly, land policy must work to create institutions and laws to meet claims for property restitution. Such claims will come from returning refugees, those who acquired titles under the previous regimes, and those who lost lands under previous regimes. Establishing certainty of titles will require resolution of these claims. Without that certainty, investment will be deterred, reconstruction slowed, and social and political stability put at risk. Yet resolving property restitution claims presents a host of difficult and complex issues. Experience from the developing world shows that there is no magic wand solution to intractable land conflict. Certainty of titles cannot be restored simply through state fiat. Because land is life in most countries suffering from violent conflict, community acceptance and political support are essential components of a viable system of land administration.

Third, land policy fundamentally shapes future social and economic structures. This is the long-term aspect of land policy. Should land management be organised on a collective, cooperative or individual basis? What restrictions should be placed on private property? Is land reform necessary to achieve social justice and reduce poverty traps? What relation should land policy bear to investment, family and inheritance law? How can agricultural productivity be increased without threatening environmental degradation? How can mineral, marine and forest resources be managed and biodiversity maintained? How should traditional tenure systems be incorporated into the formal legal system? What safeguards should be introduced to prevent abuse and inequality, including gender discrimination, at the community level? How can urban land policy prevent overcrowding, public health risks and the development of “shanty towns”?¹⁰

⁹ For a useful discussion urging greater attention to land policy in post-crisis reconstruction efforts, see Kitay, Michael, “Land Tenure Issues in Post Conflict Countries”, paper presented at the *International Conference on Land Tenure in the Developing World*, (University of Capetown, Capetown: South Africa, 27-29 January 1998), p. 5.

¹⁰ For a useful discussion of these long-term issues, see Kirk, Michael: “Land Policy and Changing Agrarian Structures: Needs, Options and Experiences with Land Reforms in Transforming Economies (with special Reference to German Unification)”, paper presented at the *International Conference on Land Tenure in the Developing World*, (University of Capetown, Capetown: South Africa, 27-29 January 1998).

All these issues pose substantial challenges to any attempt to create template land strategies for post-conflict and peace-building environments. Indeed, identified in this way, it can be seen that these land policy issues are not only central to reconstruction and restoration of security, but they form in themselves something of a continuum. In particular, it is important to recognise that, unless the immediate issues of property destruction and refugee return are handled well, resolution of more long-term issues relating to property restitution and land administration in general will be greatly complicated. This point will be illustrated by the following account of UNTAET's response to land policy issues arising in the immediate aftermath of the conflict in East Timor of late 1999. This account is based on the author's personal experience in the UNTAET Land and Property Unit from January to April 2000.

Overview of post-conflict land issues in East Timor

If one were hypothetically to create a "most challenging" land administration problem, it would contain many elements of post-conflict East Timor. In common with most new states, East Timor is emerging from a difficult colonial past. However, whereas most colonies only experienced one wave of dispossession, East Timor has suffered successive waves, from Portuguese colonisation through Japanese occupation to Indonesian invasion. These events have created multiple, and currently unresolved, competing claims to land. Indeed, as a result of its difficult colonial history, there are now four categories of potential land claimants in East Timor, namely current occupiers, underlying traditional interests, and holders of titles issued in both the Portuguese and Indonesian eras.

The conflict of late 1999 has further complicated this difficult colonial heritage. On 30 August 1999, almost 80 percent of East Timorese voters voted for independence from Indonesia. The ensuing rampage by pro-Indonesia militia, apparently supported and funded by Indonesian military interests, caused widespread population displacement and property destruction. These events created a humanitarian crisis. Most of the population was displaced; much of the infrastructure and housing stock was destroyed; economic activity almost completely ceased; severe food shortages were experienced; virtually all senior officials fled to Indonesia; and the institutions of government ceased to operate.

Re-establishing land administration in East Timor thus involves the tangled threads of post-colonial and post-conflict experience. Not only are the land claims engendered by colonial dispossession unusually complicated, they fall for resolution in an environment of widespread population displacement and property destruction. In this sense, therefore, East Timor may provide a useful case study of land issues in "complex emergencies". On the one hand, it suffers from problems common to most post-conflict environments, including return of refugees, provision of shelter and urgent humanitarian relief, and restoration of land records and other institutions of governance. On the other hand, it faces issues common to many post-colonial environments, including the status of traditional tenure, restitution of property to those dispossessed by colonial administrations, disposition of large landholdings held by colonial elites, and

development of policies to reduce landlessness and urban overcrowding.¹¹

Additionally, East Timor may also provide a useful case study of land issues in a UN peace-building mission environment. On 25 October 1989, the United Nations Security Council passed Resolution No 1272, establishing the United Nations Transitional Authority in East Timor (UNTAET). Article 1 vests all legislative and executive authority with respect to East Timor, including the administration of justice, in the hands of the UNTAET. Article 8 stresses:

the need for UNTAET to consult and co-operate closely with the East Timorese people ... with a view to developing local democratic institutions and transfer to these institutions of UNTAET administration and public service functions.

UNTAET's first regulation (No 1 of 1999) contains similar provisions. It announces that all legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is to be exercised by the Transitional Administrator, but that, in exercising these functions, the Transitional Administrator was to consult and cooperate closely with representatives of the East Timorese people (Article 1).¹²

An important preliminary issue has been the extent to which UNTAET, notwithstanding its broad formal authority, should consider the issue of competing land claims and resolve the question of underlying property ownership in East Timor. As has been noted, late in 2000 the National Cabinet, a body established within UNTAET to head the East Timor Administration, advised UNTAET's Transitional Administrator not to proceed with plans to establish a land claims commission. In part, this decision was due to a desire not to make fundamental determinations on land ownership in the absence of a democratic mandate from the East Timorese people. However, this freeze on establishing a land claim commission has given rise to a number of fundamental questions. In particular, to what extent may resolution of post-conflict issues, including re-establishing a system of land administration and providing sufficient certainty of titles for economic reconstruction, be held hostage to the politically charged question of post-colonial land claims? How can urgent measures to minimise conflict over depleted housing stock, particularly as between returning refugees and internally displaced persons, be taken without establishing who holds the underlying property title?

¹¹ For a more sustained discussion of these issues in East Timor, see Fitzpatrick, D., "Land Claims in East Timor: A Preliminary Assessment", *Australian Journal of Asian Law*, 2001 3(2), pp. 21-43; Fitzpatrick, D., "Property Rights in East Timor's Reconstruction and Development" in *East Timor: Development Challenges for the World's Newest Nation*, Institute of Southeast Asian Studies, Singapore 2001, pp. 177-193; and, Fitzpatrick, D., *Land Claims in East Timor* (in press, *Asia Pacific Press* 2001, 300 pages).

¹² UNTAET has now successfully organised national elections, and a national assembly has been established to frame a constitution that will be put to the East Timorese people in 2002. For a discussion of the authority and mandate of UNTAET, see Fitzpatrick, D., "UNTAET and East Timor: The Current Legal and Institutional Context", in D. Rothwell and M. Tsamenyi (eds.), *The Maritime Dimensions Of Independent East Timor*, Wollongong Papers on Maritime Policy, pp. 1-15.

These questions will be illustrated in the following part, which highlights the three major land policy issues facing UNTAET in the immediate aftermath of the violent events of late 1999. In summary, these three issues were:

- Ad hoc housing occupation and conflict caused by population displacement and property destruction;
- Allocation of public and abandoned properties for humanitarian, security and commercial purposes; and
- Re-establishing a form of land administration, particularly so as to minimise the risks of a developing informal market in private land.

As all of these issues are likely to arise in other post-conflict and peace-building environments, they are canvassed in some detail in the hope that lessons may be learnt from the successes and failures of UNTAET's policy responses.

It is emphasised that this paper does not consider the more long-term land policy issue of property restitution. Currently, property restitution processes are being undertaken in a range of post-conflict environments, including most notably Bosnia and Kosovo. They raise a number of complicated questions, particularly relating to (1) refugee rights in international law to restoration of property, and (2) appropriate mechanisms to unravel racially discriminatory laws of a pre-conflict regime. Because these questions deserve separate and extended treatment, and because this paper's focus is on land issues arising in the earliest months of a peace-building mission, restitutionary issues relating to who eventually should be determined to have title in post-conflict environments will not be considered.

Land policy issue 1: ad hoc housing occupation and conflict

At the time of the vote for independence in August 1999, Indonesian statistics gave the population of East Timor as almost 900,000. As a result of the militia violence, over 450,000 people were estimated to have been internally displaced within East Timor itself, and a further 300,000 fled or were forcibly transported across the border to West Timor. The greatest concentrations of internally displaced persons (IDP's) were in the Northern sub-districts of Manatuto and Bazar Tete, and in Pante Macassar in the enclave of Oecussi.¹³ The greatest concentrations of refugees were from sub-districts near to the border, where as much as 50 percent of the population were estimated to have been forcibly trucked to West Timor.¹⁴

At the date of writing, approximately 50,000 still remained in the West Timor refugee camps. Of these, it is difficult to determine how many are pro-autonomy militia or their

¹³ World Food Programme Map WFP/VA ET 25.10.99 (copy on file with author).

¹⁴ UNTAET Civil Affairs, *Summary Report of the Situation in Ermera District after the Popular Consultation*, 4 November 1999, Dili East Timor, p. 2 (copy on file with author).

supporters, or genuine pro-independence returnees intimidated into staying by militia pressure and disinformation. In February 2000, the Jesuit Refugee Service estimated that approximately 70 percent would like to return to East Timor; 20 percent would seek local integration into West Timor or transmigration within Indonesia; and the actions of 10 percent were unpredictable. However, of the 70 percent returnees, there would be those whose decision to return would depend on their reception in East Timor. For example, those in families of mixed marriages between East Timorese and Indonesians or people of Chinese ethnicity, were unsure of their social and legal status. Equally, those who had committed relatively minor crimes of arson and looting, also often wished to return but were unsure of what punishment awaited them.¹⁵

Not surprisingly, this extraordinary displacement – more than 75% of the population – created a humanitarian crisis. Security had to be re-established; food and water provided; transport and return arranged; and housing and shelter re-built. Population flight also stripped East Timorese institutions of expertise in governance and administration.¹⁶ Because they were either non-East Timorese or pro-autonomy supporters, all senior civil servants including the judiciary, and most lawyers and public notaries, fled to Indonesia after the vote. The institutions of government simply ceased to function. Most relevantly, for our purposes, the population displacement re-awakened endemic cycles of land conflict. Population flight, particularly during the violence of Japanese and Indonesian occupations, has been a tragic pattern in East Timor's history. In these times of violence, those who have fled land, or been forcibly removed, have often returned to find it occupied by others. The conflict that results has often not been resolved, and thus has re-emerged in the next round of displacement as people take advantage of abandonment, and/or collaboration with the invader, to re-possess lands long claimed by their forebears.¹⁷

While this pattern of displacement and land conflict has been common in rural areas, on this occasion it is now most apparent in Dili, the capital of East Timor. With large numbers of returnees, critical shortages of housing and shelter; and a lack of regional economic activity, the inevitable result was whole-scale migration to Dili. Indeed, in March 2000, one senior CNRT official estimated to the author that a large proportion of all habitable houses in Dili were occupied by people other than their pre-30 August 1999 owners. One ethnic group in particular, from the region around Bacau, had moved into vacant houses in Dili, and allegedly violently resisted attempts at reoccupation by their original owners. Reportedly, it was social conflict caused by this group that led to much

¹⁵ Jesuit Refugee Service, *General Observations on JRS Visit to Refugee camps in West Timor*, February 2000, (copy on file with author).

¹⁶ For a general description, see the World Bank, *Report of the Joint Assessment Mission to East Timor*, 8 December 1999.

¹⁷ Examples of such disputes were raised in personal discussions with John Tyynela, UNTAET legal and judicial officer in Aileu District, 28 February 2000, and Kate Bandler, UNTAET Human Rights Officer for Liquisa District, 22 March 2000. For a discussion of widespread unlawful occupation of abandoned and empty land after 1975, see Sousa Xavier, P. de, 1998. "Judul Studi tentang Hukum Pertanahan Adat Timor Timur di Kecamatan Uato-Carbau Kabupaten Viqueque", Sekolah Tinggi Pertanahan Nasional Yogyakarta, honours thesis, p. 32 (copy on file with author).

publicised violence in and around the Dili markets.¹⁸

Destruction of property and records

Seriously compounding these problems of population displacement was the destruction of land records, housing, and infrastructure. Militia groups, apparently under direct orders from the Indonesian military, directly targeted land title offices and records. In Dili, they entered the land titles building, took the records outside, set fire to them with petrol, and then torched the building itself. As a result it was estimated, by former East Timorese land titles officers who sifted through the remains, that approximately 80 percent of all underlying records of land in Dili were burnt and irrecoverable. Additionally, because most inhabitants of Dili were forced to flee so quickly, most copies of land titles records or certificates were left behind and also burnt in the general destruction. In other regions the destruction was even more complete, as all land titles offices were completely burnt and destroyed. Even the Catholic Church reportedly lost many of its land records in the militia violence.¹⁹

In all this destruction, one small gleam of light was the fact that the Dili land titles book itself was rescued by the Indonesian head of the land titles office.²⁰ As a land professional who reportedly could not abide the destruction of records, his intent was for safe keeping and presumably eventual return. The book itself contains details of all Indonesian titles in Dili, and all subsequent transactions registered with the land titles office. However, it does not include copies of underlying transactions and bureaucratic approvals, known in Indonesian as the *warkah*. Although this means that the book will contain evidence of registration only, and not the transaction or process that led to the registration, it would nevertheless be an invaluable source of reference for any future land claims authority. Indonesia, however, currently refuses to return it until successful completion of current Indonesia/East Timor “assets and liabilities” negotiations.

Even without the Dili land titles book, this widespread destruction of land records is not as devastating as it would be in developed land systems. Most land in East Timor is unregistered and governed by customary law. It seems likely that there are still customary authorities who retain institutional memory of land titles and transactions in their area. Moreover, in some areas, the Indonesian administration official charged with witnessing and verified unregistered land transactions, the *camat* or sub-district head, has remained behind because he or she is East Timorese and retains community support.²¹ These former officials may play an important role in verifying land claims.

¹⁸ Personal communication, Francesca Gutierrez, CNRT Legal Officer, 7 March 2000, Dili East Timor.

¹⁹ Personal communication, Manuel Abrantes, Head of the Catholic Peace and Justice Commission, Dili East Timor, 8 March 2000.

²⁰ Interestingly, Patrick McAuslan – a well-known expert on land law and administration – reportedly predicted in late 1999 that this might have occurred, on the basis of similar rescues of land records in other post-conflict situations.

²¹ Personal communication, Manuel Abrantes, Head of the Catholic Peace and Justice Commission,, Dili East Timor, 8 March 2000.

Nevertheless, land that was subject to written records tends to have been valuable urban and plantation land, and conflict over this land is thus likely to generate most heat in elite economic and political circles. Moreover, the general absence of written records from the Indonesian era will necessitate reliance on oral evidence and community recognition to verify claims. Sifting oral testimony in developed legal systems, particularly in the absence of documentary evidence, presents notorious difficulties for judges and juries. In East Timor, it will be compounded by the relative inexperience of its lawyers and mediators. This fact highlights the fundamental importance of capacity-building programmes for effective post-conflict reconstruction and development.

Destruction of infrastructure

Another militia target was infrastructure. UNTAET estimates that fishermen lost most of their boats and equipment, and farmers lost up to 50 - 60 percent of their assets, including both implements and livestock.²² The World Food Programme also reported infrastructure destruction of over 95 percent in the Districts of Dili, Ermera, Suai and Quelicai; between 90 - 95 percent in Maliana, Ainaro, Manatuto and Iliomar; between 80 - 90 percent in the Districts of Los Palos, Viqueque, Same, and Atabai.; and between 70 - 80 percent in Baucau.²³ In total, the World Bank estimated that almost 70 percent of physical infrastructure was destroyed or rendered inoperable by militia action in September 1999.²⁴ The result was devastation of a type usually confined to a war zone. Although roads and bridges remained largely intact, to allow the militia to escape, the destruction of almost all other infrastructure meant that economic reconstruction has had to begin almost from scratch.

Destruction of housing

Destruction of housing was also a clear objective of the militia. In Dili, for example, a milk truck was used to pump in petrol from house to house, before each was lit and destroyed. According to the World Food Programme, there was almost complete damage or destruction in the Districts of Manatuto, Viqueque, Bobanaro, Suai and Oecussi. Over 30 percent of houses were significantly damaged in the Districts of Liquisa and Maliana. Up to 30 percent were significantly damaged in the Districts of Dili, Aileu, Maubisse, Loro, Baucau, Balibo and Los Palos.²⁵ One result was that, when IDP's and refugees returned to seek shelter, there was an understandable rush to occupy habitable houses. This, in turn, generated some social conflict and a relatively widespread pattern of ad hoc occupation by persons other than the pre-violence occupier.

²² UNTAET Civil Affairs, *Summary Report of the Situation in Ermera District after the Popular Consultation*, 4 November 1999, Dili East Timor, p. 2, (copy on file with author).

²³ World Food Programme Map WFP/VA ET 25.10.99 (copy on file with author).

²⁴ World Bank. 1999. *Report of the Joint Assessment Mission to East Timor*, Washington D.C., USA, 8 December 1999.

²⁵ World Food Programme Map WFP/VA ET 24.10.99 (copy on file with author).

Messages from the Bishops of Baucau and Dili requesting that people refrain from unlawful occupation were largely ignored in the rush for shelter and properties. By March 2000, ad hoc housing occupations were reportedly causing conflict in Dili, Baucau, Viqueque and Anauro. In Dili, it was a particular problem in both the Kintalbot and Komoro sub-districts.²⁶ Indeed, these two quite different areas provide an example of different aspects of the problem. Kintalbot is an area with slums which were largely unregistered in the Indonesian system of land titling. It was largely occupied by poor and displaced persons, generally from areas other than Dili. The Komoro housing estate, on the other hand, is an up-market area of mainly Indonesian-owned estate housing. In some cases, this housing was allegedly occupied by opportunists, who then sought to rent them out to foreigners at increasingly lucrative rates.²⁷

UNTAET's response to ad hoc occupations and conflict over housing

It was this problem of ad hoc occupations and conflict over housing, the consequence of population displacement and property destruction, that constituted the first major land policy issue for UNTAET. The following section discusses the way in which UNTAET's response proved to be inadequate, thus complicating the longer term task of re-establishing a system of land administration.

Overall responsibility for return of refugees from West Timor to East Timor was held by UNHCR, although implementation of return was left largely to the International Organization for Migration (IOM). No agency held clear responsibility for return of persons displaced within East Timor, and most returned by foot or using their own transport. UNHCR policy on the refugees in West Timor was to provide for their protection and facilitate their return. This alone was an exceptionally difficult and – as the deaths of UNHCR workers in West Timor illustrates – ultimately dangerous task. Those performing the work were exceptionally dedicated but hampered by a lack of resources and undoubtedly chaotic circumstances.

Nevertheless, both UNTAET and UNHCR developed no detailed policy as to the place of refugee return in East Timor. Refugees were simply asked where they wanted to go – most replied Dili – and were simply delivered there without questions as to their place of origin or intended place of shelter. Most accordingly spent a night or two – the maximum allowed – in a transit centre in Dili, and were then left to find their own shelter and food. In many instances, these returnees remained in Dili because this was the only place that had significant economic activity. In February 2000, this led a senior member of CNRT – the umbrella East Timorese political group – to furiously claim to the author that returning refugees were being “dumped” in Dili without thought to the effect of this policy on overcrowding and housing conflict in the city.²⁸

²⁶ Personal communication, Francesca Gutteres, CNRT Legal Officer, 7 March 2000, Dili East Timor.

²⁷ Ibid.

²⁸ Personal communication, Joao Gonzalves, 7 March 2000, Dili East Timor.

In March 2000, attempts by the author to develop better coordination between UNTAET and UNHCR relating to housing policy and the process of refugee return foundered in the face of overwhelmingly difficult conditions and some bureaucratic inertia within the Governance and Public Administration Pillar of UNTAET itself. As a result, by April 2000, the following consequences had ensued. First, a significant proportion of intact housing in Dili was occupied by persons other than their former owners. Second, those houses that were occupied were extremely overcrowded. Third, conflict - sometimes violent - over housing was causing social unrest. And fourth, further uncertainty was developing as those occupying houses then sought to lease them to whoever was willing to take the risk. In these circumstances, not surprisingly, the market for housing in Dili quickly experienced hyper-inflation as employees of international agencies poured into Dili, and rushed to enter into rental agreements with anyone appearing to own or control a habitable house.

In the meantime, of course, UNHCR and a number of NGO's were distributing emergency shelter kits. These largely consisted of tarpaulins and some building materials, and were never intended as a permanent shelter solution. UNHCR alone planned to distribute some 35,000 such kits. These were generally distributed on an as needed basis, with a focus on rural areas. While at first distribution was frustratingly slow, due to shipping and material problems, ultimately this programme proved relatively successful. But UNHCR disclaimed any direct responsibility for provision of more permanent private or public housing, and in the result there was never any clear integration between programmes to provide temporary shelter and housing policies relating to the process of return.

This is not to say that UNHCR had a mandate to cover these matters. Their task was difficult enough without taking on de facto governmental responsibility for housing and shelter issues. Ultimately, this story is not so much a criticism of UNHCR but of the planning and policies of UNTAET itself. Jim Fox has commented that:

The Agreements of 5 May 1999 between Indonesia and Portugal that set out the arrangements for the popular consultation on the future of East Timor envisaged some role for the United Nations regardless of the outcome of the ballot. The United Nations thus had four precious months to develop contingency planning for a variety of outcomes. There is no evidence, however, that such contingency planning was carried out and as a result, as late as November [1999], the United Nations was still struggling to develop a mission with the capacity to provide a transitional government for the territory.²⁹

This was particularly true in the case of housing and refugee return. Extraordinarily, no provision was made for housing issues in the original planning of UNTAET. There was no division or department of housing, and the nearest body - UNTAET's Land and

²⁹ Fox, J., 2000. "East Timor: The Task of Creating a New Nation", in D. Rothwell and M. Tsamenyi (eds.), *The Maritime Dimensions Of Independent East Timor*, Wollongong Papers on Maritime Policy, p. 43.

Property Unit - lacked resources and a mandate to cover housing issues. Indeed, it is remarkable that even in the budget for 2000 - 2001, put forward in mid-2000, no specific provision was made for construction of public housing;³⁰ and, as a result, there is still no significant “safety valve” to help unravel and regularise the rush to occupy habitable housing that occurred in late 1999 and early 2000.

To particularise this allegation of policy failure, then, UNTAET failed to provide the following:

- Formal mechanisms to resolve housing conflict, other than a nascent court system desperately overburdened by criminal cases;
- Any public housing other than attempts in March 2000 to secure pre-fabricated “Kobe” houses for international staff (but not the East Timorese!);
- Any form of effective inter-agency body to manage housing conflict caused by the delivery of returnees to Dili;
- Any administrative regime to govern transactions concerning private land as foreigners entered into dealings with those occupying habitable housing; and
- Any systematic incentives for refugees and internally displaced persons to return to their original areas.

In short, there was virtually no planned policy response to the relatively predictable effects on housing of widespread property destruction, mass population return, and the rapid influx of well-remunerated international personnel.

Those who planned UNTAET might well say that provision of housing was ultimately a matter for private investment, and beyond its mandate of reconstruction and preparation for independence. But how could effective measures be taken to re-establish land administration and resolve land claims, when large numbers of returnees and foreigners were allowed into a city of depleted housing stock without any planning as to its effect on housing prices and social conflict? How could private investment be encouraged when no measures were taken to prevent occupation of private land on the basis of principles of “might is right” and “first in first served”? While there are never any magic solutions in this type of situation, a range of urgent interim measures could have been taken to ameliorate the land administration problems caused by the process of refugee return in East Timor. These are outlined in the section below.

³⁰ Ibid, p. 45.

Land policy issue 2: temporary allocation of public and abandoned properties

In contrast to its failure to develop policy on housing conflicts, UNTAET did quickly establish effective procedures for temporary allocation of public and abandoned properties. This policy arose because, in the earliest months of its operations, the greatest pressure placed on UNTAET's Land and Property Unit was not to help manage the process of refugee return, but to allocate sites for security operations, humanitarian organisations, international agencies and diplomatic missions. Allocation of such sites was based on UNTAET's authority over all public and abandoned land under UNTAET Regulation No. 1 (Article 7). This authority was itself a sub-category of UNTAET's general legislative and executive authority under Security Council Resolution No. 1272. The following section canvases UNTAET's mechanisms for allocating public and abandoned properties in the belief that they may provide a useful "template strategy" for other peace-building environments.

Under the policy, certain basic principles guided allocation of public and abandoned properties. These included the need to protect property from further damage; the importance of regularising and "capturing" occupation by those unable to claim authority from the previous occupier; the need to ensure community consultation and consensus in the property allocation process; and the general futility of evicting returnees without alternative premises being available to them. Most importantly, the policy developed a "competing equities" principle of balancing the interests of returning owners with those seeking temporary use of abandoned properties. In applying this fundamental principle, UNTAET District Administration were required to assess the likelihood of return by lawful owners, the type of use and nature of proposed investment (if any) by the applicant for a property allocation, and the degree of community objections.³¹

Utilising these principles, was established three categories of public and abandoned land allocations: short term (up to three months), medium term (between three and twelve months), and long-term (between one and five years). For the all-important category of abandoned land, short term allocations were to be made where little or no investment was required, there was a reasonable likelihood of return by the owner(s), the type of use was such that the property could easily be vacated should the owner(s) return, and/or where persons had already moved into the abandoned property and hence needed to be brought into the system of property allocation. Examples meeting these criteria included occupation of vacant houses in reasonable repair by displaced persons, use of premises by humanitarian agencies with short term needs, and storage of items on vacated land suitable for that type of use.

³¹ See generally UNTAET, Draft Guidelines for the Administration of Public and Abandoned Properties by District Administrations, 29 February 2000 (copy on file with author), pp. 6-7. Development of these guidelines was a joint effort between the author, Mike Brown, Andrew Whitely, John Tynela, Nigel Thomson and Cath Elderton. Particular credit must go to Andrew Whitely for creating the original "competing equities" approach, Mike Brown for ensuring UNTAET acceptance and CNRT approval of the guidelines, and Nigel Thomson for overseeing application of the guidelines.

Medium term allocations were to be made where there was little reasonable likelihood of return by any owner(s), a reasonable degree of investment was required generally involving rehabilitation or repair rather than structural work for commercial activity, and/or the type of use was such that the applicant could vacate the property with reasonable notice should the owner(s) return. Examples meeting these criteria included any occupation involving repair or rehabilitation of significantly damaged business, residential or public premises. Long-term allocations were to be made where there was little reasonable likelihood of return by any owner(s), and significant investment - including of a commercial or international rental kind - was proposed. Examples making these criteria included any business activity involving significant capital import, any occupation involving rebuilding badly damaged buildings, and uses associated with the long-term institutional development of a democratic and independent East Timor. Long-term allocations could only be revoked upon three months' notice by UNTAET.³²

After considerable consultation and discussion, these categories received approval from East Timorese representative groups, and a decentralised system of public and abandoned property allocation began to work well. Indeed, so well did the policy operate that it is suggested it could be adopted as a template for future UN peace-building missions. After all, its basic imperative – balancing the interests of returning refugees with the need to allocate sites for operational purposes – will be common to most post-conflict environments. Moreover, having helped draft the policy, the author knows from personal experience that, if a pre-existing template of this kind had been available to UNTAET, it would have saved considerable time and facilitated the urgent task of allocation of properties for humanitarian and security purposes.

Flying on one wing: balancing public and abandoned property allocation with regulation of private land titles and transactions

This said, and for all its relative success in East Timor, ultimately any policy on allocation of public and abandoned properties must co-exist with equally effective policies relating to transactions in private land. This point may be illustrated by reference to the UNTAET public and abandoned property policy itself. Because, at the time it was drafted, there was neither effective regulation nor administrative machinery to govern transactions in private land, the policy carefully avoided certain basic questions of underlying title to private land. For example, what acts were necessary for an owner to “return”, and thus rob his or her property of its status as “abandoned”? How was a returning “owner”, or “lawful property rights holder”, to be defined? What was the status of abandoned properties sold by Indonesian titleholders through power of attorney without any physical act of return? In short, fundamental issues concerning the ownership of *private* land eventually had to be determined if UNTAET’s regulation of *abandoned* land was to have legal clarity and consistency.

In formal legal terms, these questions could have been answered by reference to Indonesian law, which under UNTAET Regulation No. 1 retained transitional validity

³² Ibid, pp. 14-16.

subject to certain internationally recognised standards.³³ Interestingly, a similar modified maintenance of pre-conflict law was adopted by UNMIK in Kosovo.³⁴ However, unlike in Kosovo, a land claims commission was not established by the UN in East Timor, and no other administrative or judicial mechanism has been developed to determine the issue of property restitution or title to private land. Indeed, the whole question of property ownership has been left to the future democratically elected government of East Timor. Thus, although under UNTAET Regulation No. 1, Indonesian law could have been used to resolve basic questions of abandonment and ownership, the practical realities were that there was no specific mechanism to apply that form of law; and that, moreover, the great majority of East Timorese people would not accept the law of a corrupt and oppressive regime – howsoever modified by international standards – as the basis for determining fundamental issues of land ownership. There is thus still in East Timor:

- No functioning land registry,
- No system to record or verify private land transactions,
- No effective regime to govern and legalise foreign interests in land, and
- No framework to determine competing claims to land.

The way in which this policy inaction has contributed to a chaotic informal market in land in East Timor is considered further below. For present purposes, the important point is that over time this failure to record or regulate title to private land increasingly placed inappropriate burdens on UNTAET's public and abandoned property policy. This policy was, by its nature, only intended to be temporary until comprehensive mechanisms to re-establish land administration were developed. It was never intended to carry the full load of formal land administration. But, in circumstances where almost two years had elapsed since UNTAET was established, and there was still no sign of any form of land claims commission, or any regulation of transactions in private land, many successful East Timorese applicants for a temporary allocation of an "abandoned" property understandably came to expect that in reality the allocation amounted to de facto ownership. Moreover, the more temporary allocations that were made under the policy, the more difficult it would be in institutional and social terms to reverse these allocations and evict current occupants under any final form of land claims legislation. In the result, therefore, decisions by District Administration officials under the public and abandoned property policy, increasingly came to substitute for more long-term ownership determinations that should have been made by a judicial institution.

³³ For example, under Articles 2 and 3 of UNTAET Regulation No. 1, all public officials are required to make decisions that conform to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on Elimination of all Forms of Discrimination Against Women, and the International Convention on the Rights of the Child. For a more detailed discussion of UNTAET Regulation No. 1, see the excellent article by HansJorg Strohmeyer, one time Head of UNTAET's Legal Office: "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", 95 *American Journal of International Law* 46.

³⁴ See *ibid*, Strohmeyer, pp. 58-9.

Thus we return to a fundamental issue: how could UNTAET re-establish a viable system of land administration, particular relating to abandoned properties, without straying into the politically charged area of underlying title? How could urgent issues of return, abandonment and occupation be managed without making fundamental decisions as to underlying title? The difficult task for UNTAET was to create sufficient space for interim land administration, particularly so as to manage the process of return and reconstruction, without prejudicing the long-term consensus and democratic mandate required to establish a viable system to resolve land claims. In the section below, certain measures to inject partial certainty into private land administration, without necessarily requiring final determination of underlying ownership, will be discussed. Again, it is suggested that these measures may also be relevant to other post-conflict environments, particularly in those situations where political issues render immediate establishment of a land claims commission unwise or problematic.

Land policy issue 3: a developing informal market in private land

The importance of these proposed interim measures relating to private land administration may be further highlighted by the third major land policy issue facing UNTAET its early months, namely the development of an unregulated and informal market in private land.

Land markets are never static. While formal land administration may have ceased after the militia rampage, land transactions continued and gathered momentum as economic life returned to East Timor. In urban areas, in particular, an informal market for land rapidly developed as entrepreneurs took advantage of an influx of foreigners. Land and lease prices soared as international staff scrambled for residences, and foreign investors, largely servicing the international market, completed for sites. The resulting risks included widespread fraud, the pricing of East Timorese out of the market, uncertainty as to the legal framework for foreign investment in land, and further difficulty for re-establishing a functioning land registry. Most relevantly, the task of re-establishing land administration was complicated as a new layer of land transactions was built on uncertain foundations of opportunistic occupations rather than certainty of titles.

Much-needed private investment was undoubtedly deterred by this developing uncertainty.³⁵ In one case, a foreign investor made substantial improvements to a Dili property, under lease from the apparent owner, only to be forcibly removed by a group claiming to be its true owners. In another, a foreign investor made substantial improvements, again under lease, only to be forcibly removed by the landlord himself. In a third case, a foreigner, with a prospective investment of approximately US\$300,000, entered into an agreement for a commercial outlet in Dili with its former Indonesian owner. That owner was no longer resident in East Timor. The investor was then told by Dili District Administration that the property was abandoned rather than owned by a non-

³⁵ A comprehensive account of the importance of encouraging private sector involvement in post-conflict reconstruction may be found in Gerson, A., "Peace Building: The Private Sector's Role", *American Journal of International Law*, 95, 102.

resident Indonesian, and therefore fell within its jurisdiction to allocate. This reportedly led the foreign investor to withdraw his investment.

These cases also served to highlight the lack of an appropriate legal framework for managing foreign investment in private land in East Timor. As we have seen, a relatively efficient administrative regime was established by UNTAET for the temporary allocation of public and abandoned properties; but there was no equivalent development in relation to private land. Under UNTAET Regulation No. 1, the applicable law for foreign investment in private land was Indonesian law subject to certain international human rights standards. Yet, under Indonesian foreign investment law, foreigners can only receive very limited rights of personal use and occupation. Those rights are vested in the person rather than the land, and therefore cannot either be transferred, or form the basis for creating any other rights to the land.³⁶

Foreign citizens may only obtain real rights in land through incorporation of an Indonesian corporate entity under the applicable foreign investment laws. Such corporations may not hold freehold title, but may hold the lesser rights of commercial exploitation, building or use. Generally speaking, such rights are not obtained from private land holders, but directly from the state itself. In short, the large number of leases obtained by foreigners over private land in East Timor had, and indeed continue to have, dubious formal legal validity. They are inconsistent with Indonesian foreign investment law, and therefore UNTAET Regulation No 1; and no formal corporate and investment framework has yet emerged to govern their validity.

One result has been that legitimate investors have been deterred, while those thriving on relative lawlessness have been encouraged. In one case, for example, a foreign investor entered directly into an agreement with a traditional group of land holders in Liquisa District. The agreement granted the investor the right to quarry material from the group's land, and provided in return for absurdly low royalties to be paid to the group. The agreement only came to the attention of UNTAET because the quarry in question was the only working quarry in East Timor. It was quickly declared invalid by the Liquisa District Administrator, ironically on the formal basis that it contravened Indonesian law relating to foreign investment and ownership of mineral rights. But the fact that it was entered into, in the first place, highlights the risks of not quickly developing a regime to govern post-conflict transactions in private land. In other words, not only is there a danger of creating a new round of uncertain transactions and deterring much-needed private investment; there is also a corresponding risk of exploitation and unregulated foreign acquisition of interests in private land. Needless to say, this latter risk is particularly sensitive to the East Timorese because of their history of colonial exploitation and dispossession.

Quite aside from these risks of exploitation and economic uncertainty, UNTAET's failure to introduce either a land claims commission, or any mechanism to record or regulate

³⁶ For a survey of these basic principles of Indonesian land law, see Gautama, S., and Harsono, B., "Agrarian Law", *Survey of Indonesian Economic Law*, Padjadjaran University Law School, 1972, Bandung.

transactions in private land, also dramatically restricted the ability to develop land-related policies for a range of other important areas. This included comprehensive regulations relating to:

- Formal land administration, including conducting cadastral surveys, recording transactions in and/or titles to land, regulating the provision of private services in the land market, and developing a regime for land tax.
- Formal land law, including defining the nature of formal rights to land, the status of registered land titles, the extent of any restrictions on transferring rights to land, the regulation of land rental markets, and the recognition of traditional rights to land.
- Conflict-resolution, including establishing land conflict mediation and adjudication services, and regulating the role of traditional authority figures.
- Land use, including developing spatial planning instruments and zones for residential, commercial, industrial, agricultural, grazing, mining and forestry uses.
- Environmental protection, including establishing regimes for resource management, environmental impact assessment, conservation of biodiversity, and protection against soil erosion.
- Housing and shelter, including building public housing and infrastructure for poor and displaced groups.
- Village development programmes, including developing public utilities, agricultural extension services and perhaps rural credit projects.

In other words, again it can be seen that post-conflict land policy operates as a continuum: that, unless measures are taken to inject some form of certainty into private land administration, then a range of other basic land-related issues cannot be fully addressed or resolved.

Template strategies for land policy in post-conflict circumstances

To summarise, then, land issues arising in the immediate aftermath of East Timor's conflict of late 1999: first, there was the immediate uncertainty caused by population displacement and property destruction. This led to widespread “unlawful” occupation of abandoned houses, and caused substantial conflict over remaining housing stock. Second, there was the need to allocate public and abandoned properties for humanitarian, security and commercial purposes, without prejudicing the legitimate interest of returning refugees. Third, there was the developing uncertainty of a new round of transactions built on foundations of occupation rather than ownership. This not only deterred private investment, and raised risks of fraud and exploitation, it also complicated efforts to introduce a range of land-related measures. The following section seeks to draw lessons

for post-conflict land policy from the way that these issues were handled in the early months of UNTAET's operations. Because the second land policy issue was handled relatively well, the focus will be on the first and third issues, namely population flight and return, and managing the development of an informal market in private land.

Re-visiting land policy issue 1: a template policy for population flight and return?

Large-scale population displacement has been an all too common feature of modern conflict. UNHCR estimates that at the end of the twentieth century there were approximately 15 million refugees in the world.³⁷ While, in most cases, these people never return to their original lands, increasing numbers have returned or been repatriated in more recent times. Thus, for example, whereas approximately 1.2 million refugees returned to their home countries between 1985 and 1990, it is estimated that this number rose to 5 million in the years between 1990 and 1995.³⁸ Sometimes this process of return has occurred with great rapidity, and conflict over land and remaining housing stock has inevitably followed.

Kosovo provides an example. Over a period of weeks, more than 800,000 Kosovo Albanians, earlier expelled from Kosovo by Serb forces, returned in an extraordinary mass movement of humanity. As many as 500,000 internally displaced Kosovo Albanians also returned with great speed. The inevitable result was conflict over land and housing. Many returnees occupied houses abandoned by Kosovo Serbs; others were allocated properties by the Kosovo Liberation Army (KLA) on the basis of their KLA contacts or affiliations; others simply moved into what intact housing was available; and finally others again took possession of houses as part of organised criminal action. Not surprisingly, minimising disputes arising from this sudden and dramatic change in land occupation has created major difficulties for the United Nations Mission in Kosovo (UNMIK).³⁹

Although Kosovo provides the most extreme modern example, this phenomenon of rapid displacement and return has not been confined to the Balkans. We have seen that as many as 700,000 East Timorese were displaced in late 1999, with most returning after security was established by INTERFET. Also in 1999, 253,000 Afghan refugees returned from Iran and Pakistan to Afghanistan; 57,000 Liberians returned to Liberia from neighbouring countries in West Africa, and 52,000 Congolese returned to the Republic of the Congo after peace was established in July 1999.⁴⁰ Finally, and most topically, it is likely that large numbers of Afghan refugees and internally displaced persons will return again or be repatriated once relative peace and security is restored in their country.

³⁷ UNHCR, *The State of the World's Refugees*, Geneva Switzerland 2000, p. 280, available at <http://www.unhcr.org/cgi-bin/txis/vtx/template?page=publ&src=static/sowr2000/toceng.htm>.

³⁸ Macrae, *supra* note 3, paragraph 1.1.

³⁹ For a description, see Habitat (United Nations Centre for Human Settlements), *Housing and Property Rights in Kosovo*, March 2000 (second edition), available at www.grid.unep.ch/btf/missions/habitat/. See also Strohmeyer, *supra* note 33, pp. 46-7.

⁴⁰ UNHCR, *Global Report 1999*, Geneva Switzerland, pp. 17-18.

Clearly, this trend of mass displacement and return calls for development of effective policy responses. While no doubt circumstances will vary from conflict to conflict, sufficient common elements appear to exist so as to allow development of template policies. In terms of land policy, for example, it is almost inevitable that population displacement and property destruction will lead to widespread ad hoc occupation of vacant houses and conflict over remaining housing stock. The more this occurs the more difficult it will be to resolve competing claims to underlying title. How can an effective land claims process be established when intact housing, at least in urban areas, has been occupied without reference to their pre-conflict owners? The greater the extent of this ad hoc occupation, the more likely there will be a new round of transactions built on the shaky foundations of opportunistic possession rather than legal ownership. This will also greatly complicate efforts to resolve competing land claims, and re-establish sufficient certainty of titles to facilitate economic reconstruction.

What lessons, therefore, can be learnt from East Timor for developing template land policy to manage mass population flight and return? A number of preliminary comments are apposite. First, not much can be done about refugees and internally displaced persons who return voluntarily using their own transport. In normal circumstances of conflict and war, it is extremely difficult to stop such unassisted returnees from going where they want and occupying whatever abandoned housing that they might may find. Second, the process of return may be so massive and so rapid as to overwhelm even the best planned and most efficient of international intervention. In Kosovo, for example, almost all refugees and internally displaced persons had returned before the United Nation's Mission in Kosovo could begin effective operations, and thus any attempt to minimise ad hoc occupations and housing conflict was all but impossible.

Third, effective policy responses require that there be – as there was in East Timor – relative security and stability. In other words, circumstances must be truly “post-conflict”, and not, as so often occurs, a situation where refugees return in circumstances of ongoing conflict and insecurity (reference). A related point is that there must be a sufficient degree of local political support for any UN land administration activities. Again, this did not necessarily exist in Kosovo as in some areas the KLA began to take on land administration functions, including in relation to applications, registrations, surveys and dispute-resolution.⁴¹ In short, the following suggestions for template land strategies in post-conflict situations are far more likely to succeed if there is a relatively favourable set of circumstances, including sufficient (1) levels of peace and security, (2) control over the return of refugees, and (3) support from local political groups. They are offered, therefore, as a basis for further discussion and development, rather than as complete answers to all post-conflict circumstances; and they recognise the fundamental fact that template strategies for peace-building missions can only ever hope to ameliorate rather than resolve what are inherently chaotic and difficult situations.

⁴¹ Habitat, supra note 39, p. 7.

Diversion of returnees

A most important component of minimising land policy problems caused by the return of refugees and IDP's is to divert such returnees, particularly those that lack housing of their own, to temporary transit housing centres. This would help minimise any rush to occupy habitable houses, and thus facilitate, in the long run, the task of re-establishing land administration. How could such centres be established? First, administrative control must be quickly asserted over housing estates abandoned by civil servants and officials associated with a discredited former regime. In East Timor, for example, housing estates were established for senior public servants and others closely aligned with the Indonesian regime. These estates were quite extensive due to the disproportionate size of the public service in East Timor, and the desire to separate some Indonesian personnel from the restive local population. They were not destroyed during the militia violence precisely because of the identity of their inhabitants, but they were all abandoned as those associated with the Indonesian regime fled after the vote for independence. Unfortunately, however, these estates were not quickly secured by UNTAET, and were rapidly occupied by returnees, many of whom then leased them out to international personnel.

Administrative control could have been quickly asserted over these estates because they were separate areas designed with security as a prime consideration. In some cases, they were surrounded by fences. In other cases, they could have been secured by padlocks. Large notices could also have been put up, warning any intending occupiers that they had no rights to the housing and were liable to be evicted once alternative sites for shelter were established. Of course, none of these measures would necessarily have prevented ad hoc occupations of former civil servant housing estates; but they may have minimised it, and would, at the least, put the occupiers on notice that they eventually faced eviction should they be unable to prove an entitlement to the house in question. This would have helped prevent the situation that developed in East Timor, where allegedly some politically influential East Timorese with interests in some leases to foreigners resisted efforts to re-establish a formal system of land administration because that may have threatened this lucrative source of income.

Second, temporary transit housing centres could have been established through provision of pre-fabricated "Kobe" housing. Indeed, it is suggested that one of the first measures in post-conflict international intervention should be delivery of such housing. In East Timor, UNTAET finally ordered Kobe housing in March 2000, but this was only earmarked for international staff, and arose as a result of over-crowding and poor morale on the floating hotel that UNTAET had commissioned for Dili harbour. If this housing was available in March, there is no reason why it could not have been ordered far earlier, as one of the first measures in the planning of UNTAET. After all, it was quite predictable that property destruction and population return would put great pressure on housing stock, and that the influx of large numbers of international personnel would cause hyper-inflation in housing markets. These events could have been significantly ameliorated if pre-fabricated housing had been delivered as a matter of urgency.⁴²

⁴² It is to be noted, however, that international personnel should not be forbidden from obtaining leases over

Third, transit housing could have been established through creation of “tent cities”. Because post-conflict population return can be so rapid, as was illustrated most dramatically in Kosovo, speed of policy response is essential. In this regard, it may well be necessary to enlist the assistance of peacekeepers and other security forces to supply and/or construct the tent cities. That assistance may be garnered on the basis that, without effective measures to prevent returnees rushing to occupy whatever housing is available, the involvement of security forces would ultimately become necessary to mediate conflicts and organise evictions. Although co-operation between UNHCR and security forces is controversial, it needs to be recognised that preventing housing conflict in the aftermath of population flight and return requires an integrated approach between all relevant agencies.

This raises the final key aspect of this diversionary strategy, namely coordination between administrative authorities, UNHCR and IOM. Any such coordination need only be relatively simple, and involve very little additional resources. In particular, it may be appropriate for returnees to be asked to produce any means of identification that shows their original place of habitation. Should the returnees not have such identification, or be unwilling to produce it, they should be asked to nominate a specific place or address which they intend to inhabit once they are returned. All those who are originally not from their requested place of return, and/or are unable to nominate a specific intended place or address which they have authority to inhabit, should be delivered to a temporary transit housing centre. Of course, such returnees cannot be forced to stay at a transit centre, but arguably agreeing to do so could be made a condition of their return. This may seem draconian but, as has been argued, unless measures are taken to prevent unregulated occupation of intact housing, the process of restoring land administration, facilitating economic reconstruction and preventing housing conflict will be greatly complicated.

This issue of inter-agency co-operation requires far more discussion and elaboration than is possible in this paper.⁴³ As a preliminary point, however, it is suggested that UNHCR policies on refugee return and housing conflict in East Timor were inconsistent with recent efforts by UNHCR to become more involved in sustainable return and reintegration strategies. Macrae has commented that:

As early as 1992 in a report to the Executive Committee, the Office of the UNHCR identified the “gap” existing between return and reintegration (UNHCR, 1992). The reasons for this gap were seen to lie in a failure to involve all the relevant actors – national and international – in long-term planning for reintegration and development, and in the different mandates and modalities of developmental and humanitarian agencies and the lack of participation of communities themselves.⁴⁴

private housing as the experience in East Timor was that such leases were an effective way of providing badly needed capital for repairs.

⁴³ For a more comprehensive discussion, see Cunliffe and Pugh, *supra* note 4.

⁴⁴ Macrae, *supra* note 3, paragraph 2.2.3.

Yet, as has been noted, UNHCR developed no detailed policy as to the place of refugee return in East Timor, and, although there was effective cooperation on other humanitarian matters, UNTAET failed to coordinate effectively with UNHCR on this specific issue. In particular, refugees from West Timor who were returned with the assistance of UNHCR and IOM were asked where they wanted to go, and were simply delivered there without questions as to their place of origin or intended place of shelter. Because, at the time, only Dili had any significant economic activity, the result was that large areas of Dili were occupied – and are still occupied – by persons other than their pre-conflict owners. This, in turn, led to serious overcrowding, some conflict over housing and, eventually, hyper-inflation in the housing market as international personnel rushed to enter into leases with whichever occupiers of habitable houses they could find.

The difficulties that this approach created for the task of re-establishing land administration, and the importance of effective land administration to reintegration and reconstruction, have been detailed elsewhere in this paper. In the result, in terms of ex ante land policy measures to manage the return of refugees in post-conflict circumstances, it is recommended that there be

- Greater discussion and awareness of the general importance of land policy in post-conflict circumstances, particularly in terms of the interrelationship between refugee return processes, housing policies and the task of re-establishing land administration;
- Greater development of template strategies for land and housing policy in UN peace-building missions, particular in terms of diverting returnees and minimising a rush to occupy habitable housing, and avoiding the possibility of hyper-inflation in housing markets caused by an influx of international personnel; and
- Greater planning of institutional structures in UN peace-building missions relating to land and housing policy, particular in terms of establishing a constitutional structure for ordering and supervising cooperative activities with UNHCR, IOM and other relevant bodies.

Ex-post measures to untangle ad hoc housing occupations

While diverting returnees to temporary transit centres is an important ex ante measure, it is likely that many returnees will ignore these diversion efforts and take up residence in whatever habitable housing is available. There is thus the need for certain ex post measures either (1) to untangle ad hoc housing occupations, or (2) regularise them in a formal system of land administration. Generally speaking, it is preferable to regularise housing occupations because the alternative may require forced evictions which could cause social conflict and potentially overwhelm institutional capacity. Yet, of course, in some cases, evictions will be necessary either to allow land to be used for public purposes, or to allow pre-conflict owners to return to that land, or to unravel pre-conflict ownership patterns based on racially discriminatory laws and policies.

Because this paper focuses on land policy in the early months of a UN peace-building mission, it does not analyse the range of measures by which ad hoc housing occupations may eventually be regularised in a formal system of land administration. Nor does it consider the competing issue of property restitution, whether for returnees whose pre-conflict homes are occupied by others, or for those who lost property under racially discriminatory policies of the previous regime. As has been noted, these issues are not considered because they involve longer term questions relating to underlying ownership and title; whereas the proposals highlighted in this paper are focused on the immediate post-conflict period where no special laws or institutions exist to make conclusive property ownership determinations.

This said, however, there is one important ex post measure to untangle ad hoc housing occupations which does not involve final determinations of land ownership. This measure seeks to “capture” these occupations within an interim system of land administration by creating an effective system for temporary allocation of public and abandoned properties. In other words, if ad hoc occupiers can be encouraged or required to apply for temporary rights to “abandoned” properties, the easier it will be in the longer run either to regularise their occupation or evict them in favour of more suitable occupiers. The advantages for ad hoc occupiers are that they receive the short-term security of a temporary allocation permit, which would allow expenditure of money and effort to make repairs; and the prospect that eventually they may receive formal rights to that land under a programme of tenure reform. Conversely, the advantages for the administration are that it develops a record of housing occupation, puts occupiers on notice that their rights are temporary only and subject to final laws on land ownership and property restitution; and generates a potential source of public revenue through collection of rents and taxes.

In this regard, as has been noted, the public and abandoned property guidelines developed by UNTAET not only ultimately worked well, but contained many features of relevance to other post-conflict circumstances. These included a de-centralised system of administration, provision for calculation and payment of rents, and a set of criteria to balance the interests of applicants for temporary rights with those of returning owners. If a template policy of this kind had been available to UNTAET policy-makers, it would have not only saved considerable time and resources, but would have allowed for quicker administrative “capturing” of occupation of abandoned housing, particularly by requiring occupants to apply for temporary allocation permits in order either to avoid eviction or to gain greater security of tenure.

Re-visiting land policy issue 3: a template strategy for managing a developing informal market in private land?

We have seen that UNTAET has postponed establishment of a land claims commission in East Timor; and, in the result, no mechanisms have been developed to record or regulate transactions in private land. The difficulties that this has created in terms of economic uncertainty, potential exploitation and conflict, and development of a range of other land-related policy measures, were discussed in the section above.

Yet, it is possible to develop a system that enhances certainty in post-conflict land administration, without necessarily resolving the underlying issues of property restitution and land ownership. Such a system focuses on transactions rather than title. It proceeds from two fundamental principles, namely the necessity of calibrating policy responses to institutional capacity, and the importance of quickly extending administrative control over burgeoning informal land markets. The system accordingly proposed is a rudimentary form of a “deeds registration system”. It provides incentives for those taking private interests in land to register their transactions, and, without providing any form of State guarantee, includes the potential for such registration to provide over time a measure of certainty of title. Importantly, it would only apply to transactions in private land, and would thus work in combination with a system for temporary allocation of public and abandoned properties.

This rudimentary deeds registration system begins with registration of businesses. One of UNTAET's first regulations required all businesses in East Timor to register with its business unit. The registration procedure was simple, and administered by East Timorese staff. The response was overwhelming. In an atmosphere of destruction and uncertainty, entrepreneurs – both domestic and foreign – seized on registration as a means of providing some certainty that their operations were lawful. It would not be a surprise if similar responses were experienced in other post-conflict circumstances, simply because of the psychology of entrepreneurial risk reduction.

The deeds registration system could therefore begin by requiring all business registration applicants to give details of their business premises, including the address and nature of their interest; and, if possible, lodged a copy of the transaction that creates their interest in the premises. At this stage, lodging such transactions may not necessarily have any legal consequences because a vital first step to legal regulation will be developing administrative capacity to cross-reference lodged transactions against available mapping or cadastral survey information. This process will require collecting surviving survey and cadastral information, and obtaining relevant new information such as aerial photos and city maps. It may be undertaken by locally engaged staff, particularly those that may have worked in former land offices. Indeed, it is vital not only that local staff be employed as quickly as possible – developing institutional capacity is after all a primary objective of post-conflict UN administrations – but that they be given useful tasks to perform. Cross-referencing lodged transactions with existing survey or mapping information would be such a task.

Only when it was possible for the public to check records relating to prospective premises, in particular to find out whether any existing transaction has been lodged over them, would legal regulation become appropriate. As has been suggested, that regulation would take the form of the well-known deeds registration system, a sophisticated version of which operates in Great Britain and many parts of the United States of America. At its simplest, the deeds registration system grants priority to registered transactions over competing unregistered transactions. It means that an investor can check a location and, should there be no registered dealing over it, register their transaction in the knowledge that it will be protected from any claim by a competing unregistered interest in the land.

Importantly, this process does not grant a valid interest to the registered holder where there is no underlying title to that interest, for example where the “owner” purportedly granting the interest is not actually the true owner, or the transaction is otherwise invalid due to fraud, forgery or mistake. In other words, unlike a system of title by registration, the title under a deeds registration system arises from transactions rather than the fact of registration itself.⁴⁵

Of course, greater formal certainty in land administration would be provided by a system of title by registration. Under “positive” forms of this system, sometimes known as the “Torrens” system after its Australian developer, the registered interest-holder acquires title from the fact of registration itself, and, subject to certain limited exceptions, that title is valid even though the underlying transaction may not have been effective, as for example where the grantor of the interest itself may not have held a valid title. But this type of system is simply not feasible in post-conflict circumstances, not only because it requires significant institutional capacity, but because it requires relatively settled laws and institutions to determine underlying issues of property restitution and land ownership. In the interim, as we have seen, there is an urgent need to establish some form of land administration, particularly so as to manage issues of refugee return and reconstruction, which would operate until a final system for determining ownership and restitution issues can be developed.

In its rudimentary form, therefore, the proposed deeds registration system would only inject partial certainty into a system of land administration; but it would allow a form of administration to be re-established while the more long-term task of formulating laws and institutions to determine property ownership is undertaken. Indeed, deeds registration may even form part of the final system for administering land transactions. As noted, the system works well in Great Britain and many parts of the U.S.A. In these jurisdictions, sufficient certainty of title is provided by professional conveyancing practices, in particular the process of tracing the chain of title through the history of registered deeds, and, second, by the provision of title insurance. Broadly speaking, this insurance indemnifies purchasers and lenders in situations where title is defective, and thus provides sufficient underlying certainty for an efficient land market to operate.

Conclusion

The Brahimi Report on UN Peace Operations has called for development of “peace-building strategies” to assist future UN peacekeeping missions. Taking up this call in relation to land policy, this paper has sought to draw lessons from the post-conflict experience of the UN peace-building mission in East Timor. It has focused on three issues:

⁴⁵ For a general account of the utility of the deeds registration system in developing country environments, see Knetsch, J., and Trebilcock, M., *Land Policy and Economic Development in Papua New Guinea*, Institute of National Affairs, Discussion Paper No. 6, Port Moresby, pp. 62-65.

- Ad hoc housing occupation and conflict caused by population displacement and property destruction;
- Allocation of public and abandoned properties for humanitarian, security and commercial purposes; and
- Establishing an interim form of land administration, particularly so as to minimise the risks of a developing informal market in private land.

The paper has not considered a related but more long-term issue, namely that of property restitution in post-conflict circumstances, primarily because this topic deserves its own separate and extended treatment.

These three issues arise for discussion not only because they are likely to arise in the immediate aftermath of most conflicts, but because the way in which they are managed will greatly affect the broader objectives of reconstruction and development. Indeed, a general aim of this paper has been to highlight the importance of land and housing policy to a range of other post-conflict issues, from short term tasks such as refugee reintegration and provision of shelter, to more long-term issues of encouraging investment and re-establishing civil administration.

Aside from this general aim, the specific suggestions made in this paper for land policy in post-conflict circumstances are founded upon the author's experience with UNTAET in East Timor, and are offered, as the basis for further discussion and development, in the belief that template land strategies can be developed to facilitate future UN peace-building missions. In summary, these suggestions include:

- In relation to the first issue of population flight and return, managing ad hoc housing occupations through a system of temporary allocation permits and developing better cooperation with UNHCR on housing conflicts caused by the process of refugee return, particularly by diverting returnees to temporary transit centres;
- In relation to the second issue of public and abandoned property allocation, adopting the main features of UNTAET's allocation policy, especially its graduated set of criteria to balance the interests of applicants for temporary rights with those of returning owners.; and
- In relation to the third issue of managing a developing informal market in private land, adopting a rudimentary "deeds registration system" to inject partial certainty into land administration until a final system for determining and recording property ownership can be established.