

CURRENT LEGAL DEVELOPMENTS

Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo

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Abstract

This study examines the major legal, institutional, operational, and administrative aspects of the international property-related interventions in post-conflict Bosnia and Herzegovina and Kosovo. The establishment of international mass claims proceedings to restore or compensate for property rights lost due to ethnic discrimination and cleansing is a milestone for the protection of the rights of refugees and internally displaced persons. The case studies demonstrate that far-reaching international intervention and law enforcement do indeed effectively function if the international community engages in a sustainable and co-ordinated manner and provides sufficient funding.

Key words

Bosnia and Herzegovina; Kosovo; property; restitution; rule of law

Recent writing on post-conflict peace-building stresses the need for international peace operations to address effectively issues of housing and property rights following a refugee crisis.¹ This view corresponds to developments in UN human rights bodies: in Resolution 1998/26, the Sub-Commission on the Promotion and Protection of Human Rights reaffirms the right of refugees and internally displaced persons (IDPs) to return to their homes and places of habitual residence in their country or place of origin. The resolution led to a discussion on the right of housing and property restitution in the Commission on Human Rights which, in its 2003 session, appointed a Special Rapporteur with the task of preparing a comprehensive study on housing and property restitution in the context of the return of refugees and IDPs.²

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1. Property rights in this context relate to individual residential property and adjacent land but not to commercial property and questions of social justice. Cf. B. S. Chimni, 'Refugees and Post-Conflict Reconstruction: A Critical Perspective', (2002) 9 *International Peacekeeping* 176; S. Morphet, 'Current Civil Administration: The Need for Political Legitimacy', *ibid.*, 158; R. Caplan, *A New Trusteeship? The International Administration of War-Torn Territories*, Adelphi Papers 341 (2002), 36–8.
2. Commission on Human Rights Decision 2003/109.

Property issues are often extremely complex and difficult to tackle. This might explain why they have not been a high priority for most peace missions, although they are recognized as a major source of social unrest and violence before and after a peace settlement. Yet contrary to what some recent high-profile research suggests,³ two major international peace operations have included the settlement of property disputes in their planning and execution. The multifaceted international involvement co-ordinated by the Office of the High Representative (OHR) of the Dayton Peace Agreement (DPA) in Bosnia and Herzegovina and the UN Interim Administration Mission in Kosovo (UNMIK) set up and supported institutions to settle property claims resulting from ethnic discrimination, population displacement, and mass refugee flows: the Commission on Real Property Claims of Refugees and Displaced Persons (CRPC) in Bosnia and Herzegovina and the Housing and Property Directorate and Claims Commission (HPD/CC) in Kosovo.

Mandated to resolve high numbers of property disputes in standardized proceedings, they constitute international mass claims settlement systems comparable to the Iran–United States Claims Tribunal, the UN Compensation Commission or the Nazi Slave Labourers Compensation Fund. The CRPC and the HPD/CC are public international institutions, that is, they are ‘denationalized’ institutions created by an international legal source that provide (quasi-) judicial services to private parties that normally would be carried out by domestic organs.⁴ As such, they are far-reaching international interventions in the domestic legal system, even if they qualify as hybrid institutions in the sense that their staff is both local and international and that they apply in principle both national and international legal norms.

On 31 December 2003 the CRPC terminated its work with nearly all of its claims decided, the remaining cases to be completed by the local authorities. Since 1 July 2003 the HPD/CC has stopped accepting claims and it expects to resolve its mandate by the end of 2005. In this study I seek to examine whether the institutions have addressed housing and property rights effectively. Initially I shall briefly describe the events that led to the establishment of the CRPC and HPD/CC. I shall then outline their mandates and review their operations with special focus on the enforcement of their decisions and the administrative difficulties they encountered. Finally, I shall make some concluding remarks on the performance of the institutions.

1. THE BOSNIAN REFUGEE CRISIS AND THE CRPC

Nearly four years of war followed the declaration of independence by the Republic of Bosnia and Herzegovina (BiH) on 6 March 1992. With it came massive ethnic cleansing by all the primary ethnic groups – the Bosniaks, Croats, and Serbs. Forced

3. King’s College London, Conflict Security and Development Group, *A Review of Peace Operations: A Case for Change* (2003), para.108; O. Korhonen, ‘International Governance in Post-Conflict Situations’, (2001) 14 *LJIL* 523.

4. H. van Houtte, ‘The Property Claims Commission in Bosnia and Herzegovina – A New Path to Restore Real Estate Rights in Post-War Societies’, in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (1998), 552.

evictions, the destruction of houses, and population transfers transformed an ethnically mixed society into a divided country whose ethnic groups live in their own segregated areas. At the end of the war, in December 1995, the result of these policies were approximately 1.3 million refugees and nearly 1.3 million IDPs of a total pre-war population of over 4.3 million.⁵ The DPA built on the ethnic divide by creating within BiH two separate entities exercising most legislative and executive powers – the Federation of Bosnia and Herzegovina (Federation), predominately inhabited by Bosniaks and Croats, and the Serb-dominated Republika Srpska (RS). With much of the housing stock destroyed and ethnic tensions flaring, evicting occupants of the majority ethnicity in favour of returning refugees or IDPs belonging to the minority group was a problem these local administrations were not keen to solve. Not only did the extensive scale of displacement and multiple occupancy aggravate the problem, but legal uncertainty with respect to property rights also complicated the process, since the existing property registration system was largely dysfunctional and title adjudication far from impartial.⁶

1.1. Mandate and operation

The international community addressed this problem during the Dayton peace negotiations by introducing a self-contained ‘Agreement on Refugees and Displaced Persons’. The agreement stipulated the right of refugees and IDPs to return freely to their homes of origin and to have their property restored or otherwise compensated. It also foresaw the establishment of the CRPC as an internationally supervised institution mandated to receive and decide any claims for restitution or compensation for lost real property that was not voluntarily sold or otherwise transferred after 1 April 1992, a date preceding the outbreak of the war.⁷

The CRPC consisted of nine members, four of whom were appointed by the Federation, two by the RS, and the remaining three as internationals by the President of the European Court of Human Rights. The chair was one of the international members.⁸ The CRPC’s powers to arrive at effective decision-making were far-reaching. It had the power to disregard ‘any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing’.⁹ On the other hand, it was required to base its decision-making on domestic property laws applicable at the outbreak of the war.¹⁰ Subsequent (wartime and post-wartime) legislation was taken into account unless it was inconsistent with Annex 7 and relevant human rights standards. The CRPC used its competence to disregard local legislation related to wartime sales or transfers by assuming – without any proven causality between a specific act of

5. L. Hastings, ‘Implementation of Property Legislation in Bosnia Herzegovina’, (2001) 37 *Stanford Journal of International Law* 222.

6. M. Garlick, ‘Protection for Property Rights: A Partial Solution?’, (2000) 19 *Refugee Survey Quarterly* 66–7.

7. Annex 7, Art. XI.

8. *Ibid.*, Art. IX.1.

9. *Ibid.*, Art. XII.3.

10. *Ibid.* Art. XV.

ethnic cleansing and a property transaction – that they were made under duress.¹¹ CRPC decisions are final and binding and prevail over inconsistent findings of local courts and administrations.¹² A reconsideration procedure existed for exceptional circumstances when new evidence became available that could have a substantial influence on the outcome of the original CRPC decision.

The CRPC operated according to its Book of Regulations, which stipulates how claims registration, computerized data processing, evidence collection and verification, and decision-making worked. At the outset it was estimated that the CRPC would have to handle between 600,000 and 1 million claims, the bulk of which were to be settled within five years. So that it could cope, the proceedings were organized as a mass claims process with special emphasis on accurate claims registration and efficient computerized claims processing. To ensure that all potential claimants could file their claim despite the prolonged security-related restrictions of movement within Bosnia and Herzegovina or residence abroad, CRPC claims collection offices were scattered throughout Bosnia and Herzegovina and in several countries hosting large numbers of Bosnian refugees. While the claimant was comprehensively interviewed by a CRPC staff member at the outset of the process, no hearing was held in the later stages of the proceedings. The Commission decided on the basis of a detailed standardized claims form completed during the interview and on documentary evidence on the claimant's property rights, both of which were immediately entered into the database. If the claimants were unable to present written evidence, they needed to submit all relevant information on the claimed property for verification by CRPC staff through onsite inspections and visits to cadastral offices.¹³ Claims were examined and in the first years also prioritized – claims for restitution took precedence over others – by a legal team at CRPC headquarters, which then submitted them for decision-making by the members of the Commission. Despite the fact that the members could sit as panels, decisions were usually rendered in plenary sessions, preferably by consensus, but also by simple majority.

Enforcement responsibility fell on the entities; Article VIII of Annex 7 stipulates that the parties were obliged 'to co-operate with the work of the Commission, and shall respect and implement its decisions in good faith'. As will be further discussed below, reliance on local implementation became the major challenge and pitfall of the CRPC's work.

After the war the CRPC was the only available mechanism by which refugees or IDPs could obtain proof of ownership or occupancy rights. With the adoption of new legislation in 1998, the entities offered alternative routes for the confirmation of property rights. For repossession claims of private ownership, claimants did not have to exhaust all local remedies before coming to the CRPC. Filing a claim with the CRPC in principle suspended or halted any 'parallel' procedure that had been initiated before any other body concerning the same property and claimant.

11. H. Van Houtte, 'Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina', in Permanent Court of Arbitration (ed.), *Institutional and Procedural Aspects of Mass Claims Settlement Systems* (2000), 35–6.

12. Annex 7, Art. XII.7.

13. For more information see Van Houtte, *supra* note 11, at 32–41.

For the confirmation of occupancy rights for socially owned apartments, claimants generally needed to use domestic procedures before coming to the CRPC as a second instance.¹⁴ In practice, a lack of co-ordination among the institutions has led, however, to considerable duplication of work.

In March 1996 the CRPC began its activities with the appointment of nine commissioners and a small executive office directed by an (international) executive officer. Despite the difficult work conditions in the postwar environment and scarce initial funding, four claims offices had been established and claims registration started after ten months. Within 18 months, six offices were operational and over 40,000 claims collected. In December 1997, decision-making was being carried out at a good pace: claims registration and processing had been optimized and precedents determined how the domestic legal system and available evidence could be applied. By the end of 2002, when the CRPC stopped accepting claims, over 240,000 claims had been collected relating to nearly 320,000 properties, and about 245,000 decisions confirming property rights had been issued at a rate of 5,000 to 7,000 decisions a CRPC session. At the end of the CRPC's mandate, the number of decisions issued had risen to nearly 312,000.¹⁵

1.2. The enforcement problem

Enforcement of the decisions was hindered in both entities by wartime legislation on the use of abandoned property.¹⁶ In the Federation, municipal authorities could declare privately owned housing to be temporarily abandoned and allow its use on a temporary basis by other persons. The authorities were supposed to end the temporary use when the original owners indicated their wish to return. In practice, however, temporary occupants were not evicted in favour of an original owner of another ethnic group. With respect to socially owned apartments, the situation was worse, because the Federation had adopted a law in late 1995 that stated that apartments would be considered to be permanently abandoned if the occupancy right holder did not repossess the apartment within seven days – for refugees 15 days – of the cessation of the state of war. Of course, the large majority of refugees and IDPs either did not learn of this law or did not manage to return within the designated period, so that their occupancy rights were consequently terminated. In the RS, similar legislation passed in 1996 provided that the original owner or occupancy right holder could not return if the temporary occupant had not moved to his original home or received fair compensation. This provision amounted to a de facto indefinite suspension of property rights, since Serbs were generally reluctant to return to their prewar homes in the Federation and no compensation was made available.

The effect of this legislation was, contrary to the rationale of Annex 7, to legitimate the results of ethnic cleansing. Moreover it allowed local authorities not

14. UNHCR Training Material, 'Property and Housing Issues in the Context of Chapter 2 of Annex 7', 1998, 7.

15. CRPC, 'End of Mandate Report', 1996–2003.

16. For a more detailed overview of the domestic legislation and international implementation efforts, see Hastings, *supra* note 5, at 226–49.

only to provide homeless people with housing but also to use vacant apartments for purposes of political patronage. The nationalist authorities of the entities could reward certain individuals with political or familial ties to create loyalty on the basis of personal enrichment.¹⁷ As a result, minority returns were made impossible and many people or families were in possession of not only their own but also additional apartments ('multiple occupancy'), thereby aggravating the housing shortage.

The OHR, the CRPC, and the other Dayton institutions pressured the local authorities to amend this legislation and establish processes for reclaiming and returning to prewar homes. As it became apparent that the entities would not fulfil their promises to amend their property laws, the OHR introduced new draft legislation in spring 1997 that repealed the wartime laws, allowed prewar occupants to reclaim their homes using domestic procedures, and required municipalities to provide alternative accommodation for those under an obligation to vacate reclaimed housing. When the entities continued to delay consideration and adoption of the proposed legislation, the OHR set a deadline for adoption of 1 March 1998, and threatened non-compliance measures in case of continued refusal to comply with Annex 7. After intense negotiations on the new legislation with the OHR and the UN High Commissioner for Refugees (UNHCR), the Federation passed the required legislative package in April and the RS in December 1998. Despite the new property laws, the entities' authorities continued to obstruct the implementation of the decisions in favour of prewar occupants.

In 1999 the international community changed its approach and tackled this problem by introducing a Property Legislation Implementation Plan (PLIP) to be executed in a co-ordinated, coherent, and sustained effort by all the relevant international organizations, namely the OHR, the UNHCR, the Organization for Security and Co-operation in Europe (OSCE), the CRPC, and the UN Mission in Bosnia and Herzegovina (UNMIBH). The PLIP envisaged a number of measures including the establishment of property commissions throughout the country to investigate the prewar accommodation of current occupants; systematic monitoring; sanctioning or prosecuting officials obstructing return; the training of, and allocation of sufficient resources to, housing authorities; and a large-scale information campaign on the options of current occupants. Using its 'Bonn powers' to impose legislation,¹⁸ the OHR amended the property laws in both entities in October 1999 to ensure that the right to reclaim property superseded any right the current occupant might have been granted during the war. After eviction guidelines on the role of the police had been issued, the OHR imposed a further law that expressly obliged the municipal authorities to enforce CRPC decisions following a specified procedure. Moreover, in November 1999, it removed 22 municipal officials from office, 19 of whom were penalized because they refused to implement the property legislation or otherwise blocked minority returns.

17. L. Madsen, 'Homes of Origin: Return and Property Rights in Post-Dayton Bosnia and Herzegovina', (2000) 19(3) *Refugee* 9.

18. At the Peace Implementation Conference meeting in Bonn in Dec. 1997, the OHR was given extended powers to enact interim measures including new legislation in case the local parties are unable to reach agreement.

These measures proved effective in many ways. Evictions took place and local courts started to recognize CRPC decisions even in hardline nationalist areas. Furthermore, property commissions were established throughout the whole territory and funding provided. As international pressure was sustained and the international strategy refined with respect to property law implementation, the number of repossessions of housing by prewar occupants and of other cases that were closed increased steadily. By July 1999 about 140,000 claims had been filed with the municipal housing authorities and more than 27,000 decisions for enforcement issued, but fewer than 6,000 repossessions recorded.¹⁹ By the end of 2000 almost 250,000 claims had been filed, more than 110,000 decisions issued and nearly 52,000 repossessions recorded. The progress was such that reputable field analysts stated in March 2001 that 'it is simply a matter of persevering until the job is done'.²⁰ At the end of 2002 the International Crisis Group commented that 'the international community's focus on creating a procedure for repossessing property under local law and ensuring its implementation has been both unprecedented and amazingly successful'.²¹ When the CRPC terminated its work at the end of 2003, the local authorities had decided and closed over 200,000 cases of a total of 220,000 claims (92.48 per cent).²² Among the unresolved cases are about 3,000 claims unfinished by the CRPC which will be decided by the competent local authorities in accordance with a transfer agreement concluded between the parties to Annex 7 of the DPA.

1.3. No compensation

The record of the second claims option, that of compensation, is certainly worse. No compensation scheme has yet been set up, nor is it expected to be, although Annex 7 makes such a provision for lost real property and envisages that a Refugees and Displaced Persons Property Fund be established for this purpose.²³ Although the CRPC clearly told its claimants that compensation would possibly never be paid, about 25 per cent of claimants nevertheless opted for compensation.²⁴ In the absence of a compensation fund, the CRPC issued a confirmation of the property right in these cases.

2. ETHNIC DISCRIMINATION IN KOSOVO AND THE HPD/CC

Property issues in Kosovo were as problematic as those in Bosnia and Herzegovina. The 1999 NATO intervention was preceded by a ten-year period of ethnic

19. 'Claims' in this context means either a request for return addressed to the housing authorities under the domestic procedures or a request for the enforcement of a CRPC decision. 'Decision' includes not only a determination of the property right of the prewar occupant but also a decision on its enforceability, taking into account the rights of the temporary occupant. PLIP Statistics Guidelines, 25 Nov. 2002.

20. European Stability Initiative, 'Reshaping International Priorities in Bosnia and Herzegovina: Part III', 22 March 2001, 2.

21. International Crisis Group, 'The Continuing Challenge of Refugee Return in Bosnia and Herzegovina', 13 Dec. 2002, p. 39.

22. PLIP Statistics, 31 Dec. 2003. A case is considered to be closed if the property has been vacated and sealed by the competent authority and the right-holder notified that he or she can repossess. PLIP Statistics Guidelines, *supra* note 19.

23. Annex 7, Arts. I.1, XI, and XIV.

24. Figures from December 1999; Van Houtte, *supra* note 11, at 35.

discrimination by the Serb authorities against Kosovo's ethnic Albanian majority. During the early 1990s the Belgrade government introduced a series of laws and administrative measures to consolidate the dominance of the Serb minority. In this context, the government reassigned socially owned apartments hitherto occupied by Albanians to Serbs. These measures came in retaliation for Albanian mass strikes in protest against the withdrawal of Kosovo's substantial autonomy on 23 March 1989, when the Serb-controlled Kosovo provincial assembly agreed to constitutional changes granting Belgrade control over Kosovo's internal affairs. Moreover, sales of properties in Kosovo needed the approval of the Serb government, which it never granted when Albanians wanted to buy property from Serbs. The vast majority of Kosovars did not accept these measures, which led to multiple property claims and a circumvention of the laws through informal property transactions.

By 1998 ethnic discrimination had ushered in ethnic conflict between the Serb authorities and Albanian separatists. After peace negotiations failed, NATO began its bombing campaign against the Federal Republic of Yugoslavia, arguing for the need to prevent a humanitarian catastrophe caused by a Yugoslav military offensive and mass displacement in Kosovo. On 10 June 1999 the war ended with UN Security Council Resolution 1244, which established UNMIK as a transitional administration with legislative and executive powers mandated *inter alia* to assure the safe and unimpeded return of all refugees and IDPs to their homes in Kosovo.

An estimated 860,000 Kosovo Albanians had fled or were deported to neighbouring states, and many of them returned after NATO's arrival in Kosovo. At the same time, approximately 230,000 Kosovo Serbs and other non-Albanians were fleeing the province in fear of Albanian reprisals. About 50 percent of all available housing had been destroyed during the armed conflict in 1998 and 1999. Tens of thousands of people were homeless, a situation which resulted in a rapid increase in illegal housing occupations and a general threat to safety and security in the province. Large numbers of refugees returned to Kosovo to find that they could not move into their own houses or apartments, and were forced to look for alternative shelter.

Constrained by the situation the Special Representative of the Secretary-General (SRSG) established the HPD/CC by virtue of UNMIK Regulation No. 1999/23 on 15 November 1999. The HPD/CC was mandated to receive and settle property claims in three specific claims categories resulting from the Serb authorities' discrimination against the Albanians in Kosovo's post-autonomy period and as a consequence of the mass flight after the NATO bombardment. The establishment of the HPD/CC, like that of the CRPC, sought to give effect to the right of return of all refugees and IDPs. With ethnic tensions rising high and the court system broken down, there was no independent and impartial mechanism for solving the various disputes in a fair and equitable manner and for generally regularizing housing and property rights. Furthermore, the existing property registration system was in a worse state than in Bosnia and Herzegovina, and many records had either been destroyed or removed by the withdrawing Serb authorities.²⁵

25. L. Von Carlowitz, 'Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo', (2004) 10 *Global Governance* (forthcoming).

2.1. Mandate and operation

UNMIK Regulation No. 1999/23 mandates the HPD/CC to settle property claims in three specific claims categories relating to ethnic discrimination and mass flight.²⁶ The first two claims categories aim to undo property-related wrongs that had been committed by the Belgrade authorities to repress Kosovo's Albanian majority in the preceding decade. The first claims category concerns restitution of lost occupancy rights of socially owned apartments that had been revoked on the basis of discriminatory legislation subsequent to 23 March 1989, the day that the Serbian government had unilaterally ended Kosovo's status as an autonomous province.²⁷ The second claims category covers claims for legalization of property transactions that had only been invalid because of discriminatory laws trying to stop Serb migration from Kosovo. This procedure is considered necessary to regularize Kosovo's property sector, much of which had become informal as a consequence of the discriminatory legislation. The third claims category resembles the CRPC's objective of facilitating refugee return by restoring property lost in the course of armed conflict and/or mass expulsion. While the first two claims categories primarily served Albanian interests, this last claims category mainly safeguarded the rights of Serb refugees and IDPs. Given the lack of an effective and impartial judiciary in Kosovo as well as the tendency among Albanian extremists to direct ethnic cleansing tactics at the Kosovo Serbs, Serb refugees and IDPs required international protection much more than their Albanian counterparts. In addition to its dispute settlement functions, the HPD/CC was also to provide UNMIK with guidance on specific property issues, to conduct an inventory of abandoned housing, and to supervise housing allocation by the responsible municipal bodies.²⁸

The HPD/CC consists of two distinct organs, the Directorate (HPD), responsible for administrative matters and legal support, and the Claims Commission (HPCC), an independent quasi-judicial organ. The HPCC consists of two international and one local member appointed by the SRSG; the chairman is one of the international members.²⁹ The HPD/CC's powers are similar to those of the CRPC. It has exclusive jurisdiction to settle the above-listed categories of claims and may, pending investigation or resolution of a claim, issue provisional measures of protection.³⁰ HPCC decisions are binding, final, and enforceable, and prevail over the domestic applicable laws.³¹ As with the CRPC, a reconsideration procedure exists for cases where new evidence emerges, a material error occurred, or an interested person was prevented from participating as a party to a claim.³²

UNMIK Regulation No. 2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the HPD/CC sets out the rules determining the institution's decision-making process. Its main substantive principles of law can be

26. Section 1.2 of UNMIK Regulation No. 1999/23 on the Establishment of the HPD/CC.

27. N. Malcolm, *Kosovo: A Short History* (1998), 344.

28. UNMIK Regulation No. 1999/23, section 1.1.

29. *Ibid.*, section 2.2.

30. *Ibid.*, section 2.5.

31. *Ibid.*, sections 2.7 and 4.

32. UNMIK Regulation No. 2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the HPD/CC, 31 Oct. 2000, section 14.

summarized as follows. First, any property right that was validly acquired according to the law applicable at the time of its acquisition remains valid (unless otherwise determined in the regulation). This clarification was necessary since major uncertainty had arisen concerning the validity of property transactions based on post-1989 legislation, because UNMIK had re-installed the laws in force on 22 March 1989 as a reaction to the pressure of the Kosovo-Albanian judges who refused to apply post-1989 legislation on the grounds of ethnic repression.³³ The second principle stipulates that any person who lost property after 23 March 1989 as a result of ethnic discrimination has a right to restitution or, in the case of a third-party bona fide acquisition, a right to compensation. In the case of a socially owned apartment, the situation is more complicated if the new (most probably Serb) employee had bought the apartment during the privatization process in the 1990s (often as part of the political strategy to increase the percentage of Serbs in Kosovo by relocating Serb refugees from Croatia or Bosnia and Herzegovina). In this case the claimant must either buy the apartment from the purchaser under the same favourable conditions or is entitled to compensation. Third, any transaction after 23 March 1989 that was illegal under discriminatory law, but would otherwise have been legal, is valid. Fourth, any refugee or displaced person who has lost possession has a right to return to the property or to dispose of it in accordance with the law.³⁴

The mass claims proceedings of the CRPC served as a model for HPD/CC claims registration, data processing, evidence collection and verification, and decision-making. It was estimated that the HPD/CC would have to settle between 60,000 and 100,000 claims. To be able to cope with the massive caseload, HPD/CC procedure is, like that of the CRPC, in principle a written procedure. Hearings are only held in exceptional circumstances determined by the HPCC.³⁵ Careful claims registration, interviewing of the claimant, and standardized claims processing characterize the proceedings. The HPD also tries to settle the claim amicably through agreement between the parties.³⁶ If an amicable settlement cannot be reached, the claim is submitted to the HPCC, which makes decisions in plenary session every two months. A particular problem in HPCC decision-making is how to identify ethnic discrimination, since the companies that dismissed Albanian workers and seized the corresponding apartments after the 1989 mass strike did not issue any documentation providing the reasons for their actions. Thus the HPCC has developed certain presumptions, taking into account the circumstances prevailing during specific periods and with respect to particular companies.³⁷

Unlike in Bosnia and Herzegovina, where primary executive responsibility lay with the local entities, UNMIK Regulation No. 2000/60 also provides the legal basis for the execution of HPD/CC decisions through the eviction of illegal occupants by HPD eviction officers with the support of the law enforcement authorities.³⁸

33. UNMIK Regulation No. 1999/24 on the Applicable Law in Kosovo, 12 Dec. 1999.

34. Cf. UNMIK Regulation No. 2000/60, sections 2 and 4.

35. *Ibid.*, section 19.

36. *Ibid.*, section 10.1.

37. Interview with HPD official, 30 Sept. 2003.

38. UNMIK Regulation, *supra* note 34, sections 12.6 and 13.4.

Initially, these were UNMIK police and the NATO-led military presence, KFOR. Enforcement support was then gradually taken over by the local police supervised by UNMIK police. Besides international reconstruction assistance and temporary shelter programmes, the problem of alternative accommodation is countered by a scheme to place abandoned properties under HPD administration. The HPD may grant temporary permits for the occupation of property under its administration following certain humanitarian criteria for the allocation of property established in co-operation with UNMIK and UNHCR. Housing can be placed under HPD administration mainly by agreement of the parties, or at the request of the claimant, or where the property is vacant and the current occupant does not assert any property right. It is apparent that this scheme, which is implemented by the municipalities, can be used to meet the housing needs of evicted occupants. The provision of alternative housing through the HPD is, however, subject to the availability of suitable properties and eligibility under the humanitarian criteria.

2.2. The administration and funding problem

The HPD/CC was established as an independent institution but nevertheless as part of the overall UNMIK structure. In addition to the SRSG's office, this structure consisted of four 'pillars': a UN-led pillar for civil administration and three pillars established by implementing partners – the UNHCR for humanitarian affairs, the OSCE for democratization and institution-building, and the EU for reconstruction and development.³⁹ Because of the specialized nature of property issues, the Secretary-General had given the UN Centre for Human Settlements (Habitat) the task of providing UNMIK with the required technical and legal assistance in this field. With respect to the HPD/CC, Habitat agreed to act as the implementing agency responsible for its management, staffing, and co-ordination. UNMIK, on the other hand, was to provide policy orientation, to supervise and monitor the HPD/CC's activities, and, subject to its operational constraints, to provide logistical support and engage in joint fund-raising with Habitat.

Although the HPD/CC was supposed to operate independently, it did not have its own administrative capacity. How its funding was administered depended on whether in particular instances it was to cover the international or the local aspects of its activities. With a few exceptions funds intended to pay for international staff and local experts were administered by Habitat. Most of the local staff, however, were not categorized as local experts but as local government staff paid according to Kosovo's domestic budget, the Kosovo Consolidated Budget, administered by the EU pillar for reconstruction and development. Moreover, all procurement was provided by Habitat, HPD/CC requests from its Kosovo office being processed by its headquarters in Nairobi and the UN office there. HPD/CC requests for UNMIK support needed to be channelled through several offices within the civil administration pillar and, with respect to essential logistical support such as the provision of office space

39. The UNHCR-led pillar I was dissolved in December 1999; a new UN-led Pillar I for police and justice was created in May 2001.

or vehicles, further through the SRSG's own administrative support division. This complex structure was very time-consuming and inefficient, and diverted much of the international core staff's attention from its substantive tasks.

The difficulty in obtaining sufficient funding worsened the situation. Although it had been recognized that the HPD/CC was fulfilling core peace-keeping functions, it nevertheless needed to rely on voluntary donor contributions apart from the comparatively small percentage coming from Kosovo's domestic budget. Habitat and UNMIK's civil administration were jointly engaged in fund-raising activities, but funding remained scarce. This was partly due to the fact that donors preferred to contribute their funding through the regular UNMIK budget and the organizations heading UNMIK pillars. That Habitat did not have a 'constitutional role' in the UNMIK structure was a disadvantage for attracting its own Kosovo funding, since donors felt that they were already contributing so much to all the UNMIK institutions. Moreover, the UNMIK budget was administered by the EU pillar, which made it difficult for UN projects such as the HPD/CC, which *de facto* was not one of UNMIK's priority projects as were civil registration and elections, the establishment of the self-governing institutions, and the judiciary. Finally, obtaining funding for the HPD/CC was more difficult than for the CRPC, since the United States – the CRPC's main donor – did not support the HPD/CC at all in the first years. Instead of a few large and steady donor contributions, the HPD/CC in 2001 had 11 modest funding sources, all with different reporting requirements and spending rules. Not only did this make sound planning and personnel management difficult, but it was also a waste of energy for the mostly legal staff of the HPD/CC.

A further factor hampering the HPD/CC's work has been the fact that the prescribed salary scale for local professional 'government employees' is extremely low in comparison with the private sector or the salaries paid by international organizations for the general service category. Consequently, sufficiently qualified staff are very hard to attract and there is a prevailing tendency for local staff once having joined to leave after the training.

These administrative difficulties and funding shortages made the full implementation of the HPD/CC's mandate much slower than expected. Seven months after its establishment the HPD in June 2000 started claims registration in its Pristina office. Shortly afterwards the SRSG appointed the members of the HPCC and adopted the Rules of Procedure and Evidence (UNMIK Regulation No. 2000/60). The HPCC issued its first decisions in January 2001. Other important matters took much longer. In particular, the recruitment by Habitat of the HPD's executive director was delayed until July 2001, more than a year and a half after the institution's establishment. Although the deadline for filing claims was 1 December 2001,⁴⁰ claims registration offices opened in only four of Kosovo's five regions in 2001, and their administrative and logistical support remained weak. Further, the highly important operations in the FRY only started with mobile teams in December 2001 and in Montenegro in spring 2002 on the basis of a memorandum of understanding between Habitat and

40. UNMIK Regulation No. 2000/60, section 3.2. The deadline for filing claims was later extended to 1 June 2003.

the FRY. Operations in the former Yugoslav republic of Macedonia (FYROM) finally began early in 2003.

By November 2001 the HPD had collected only about 6,000 claims, of which nearly 350 were resolved, about 150 through amicable settlement and 200 through a decision by the HPCC.⁴¹ This slow pace dissatisfied the local population. As the HPD/CC continued not to be fully operational, many claimants tried to protect their property rights through the local civil courts, which in 2001 had begun dealing with their residuary jurisdiction in property matters and started to encroach on the HPD/CC's jurisdiction. The SRSG reacted by providing guidance on the relationship between the HPD/CC and the local courts and established a consultation mechanism between UNMIK's justice department and the HPD/CC for the resolution of jurisdictional and other issues.

Nor did the HPD/CC performance please donors, who delayed funding with the argument that the rate of decision-making would need to increase significantly and its administrative support structure changed. On 10 December 2001 Kosovo's Constitutional Framework for Self-Government came into effect and stipulated UNMIK's responsibility for the HPD/CC as a reserved power.⁴² Under pressure, UNMIK stepped up its administrative support and waived certain procurement restrictions to allow a computerized database to be at last developed. Meanwhile Habitat delegated its decision-making authority from its Nairobi headquarters to its Kosovo office. Moreover, UNMIK and Habitat entered into formal negotiations clarifying their responsibilities vis-à-vis the HPD/CC.

While the negotiations between UNMIK and Habitat were going on, the HPD/CC ran out of money and was forced to lay off half its international legal staff and to reduce its activities considerably. Meanwhile donor evaluation reports found that the HPD/CC was well designed, that HPD/CC staff were highly qualified and dedicated to their work, and that decision-making, as was normal at that stage of mass claims proceedings, would need to change from individual case processing and system-building to large-scale and standardized claims processing. Their main criticism addressed the lack of institutional and administrative support and funding.⁴³ In July 2002 UNMIK and Habitat finally signed a memorandum of understanding making the HPD/CC an independent legal entity with its own legal, administrative, and financial capacity. It was also agreed that UNMIK support was to be significantly stepped up and that Habitat would transfer its implementation responsibility to the HPD/CC except with regard to the operations in the FRY.

With these changes in place, donor support continued and HPD/CC efficiency increased. By the time of Habitat's handover in November 2002 the HPD/CC had received nearly 22,000 claims and decided more than 1,400 cases, with the electronic database set up and a processing rate of 650 decisions a month.⁴⁴ At the deadline for filing claims on 1 July 2003, nearly 29,000 claims, 94 per cent of them belonging to

41. HPD/CC statistics, 26 Oct. 2001.

42. UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, sections 8.1(t) and 11.1(g).

43. E.g. Swiss Agency for Development and Cooperation, Evaluation Report on the HPD/CC, 20–4 March 2002.

44. Habitat brochure, 'The Kosovo Experience', Feb. 2003.

the third claims category, had been filed and by February 2004 about 16,000 resolved. With a pace of about 1,500 cases per session, the HPD/CC estimates that it will have decided the bulk of its claims by the end of 2004.⁴⁵

2.3. Enforcement but still no compensation

The first evictions took place with KFOR support in June 2001. However, the number was very limited since the HPD/CC lacked funds to employ eviction officers. Moreover the required support from the law enforcement agencies was initially precarious. KFOR stepped in on occasion, but contended that evicting illegal occupants was the task of UNMIK police. While the latter's senior management promised support, the commitment at the operational level of the UNMIK police varied from region to region and with different contingents arriving. These irregularities were ended with the conclusion of a memorandum of understanding between the HPD/CC and UNMIK police in late 2001.

By November 2002, 412 evictions had taken place at an average rate of three a day. By March 2003 the pace had increased to about 60 evictions a week and 574 in total.⁴⁶ When it became known that HPD enforcement was actually happening, many illegal occupants voluntarily moved out after receiving notification, or engaged in inter-party settlement often leading to the sale of the property. To avoid the looting of property where the claimant did not immediately repossess after the eviction, many claimants requested that their property be placed under HPD administration to be temporarily used for humanitarian purposes. This scheme is proving very useful to the implementation of HPCC decisions, since the HPD may grant apartments under its administration to evicted occupants as temporary accommodation. The scheme is also expedient for designated return sites, as it allows for a smooth co-ordination of refugee return, evictions, and temporary accommodation for people in need.⁴⁷ In September 2003 more than 3,000 apartments were under HPD administration and a further 7,000 were under investigation for potential inclusion in the scheme.⁴⁸ This housing stock appears to cover existing (strictly) humanitarian needs, since minority returns remain small and many illegal occupants in urban areas are found to possess alternative accommodation in rural areas. By April 2004 nearly 1,600 claims had been implemented, with the implementation rate increasing, leading the HPD to estimate that all cases will be resolved by the end of 2005.⁴⁹

While claims adjudication and enforcement seems to be an issue of capacity that is being successfully managed, the issue of compensation is, as in Bosnia and Herzegovina, far from being solved. Neither a method of calculation and payment nor the origin of the compensation payments has been thoroughly discussed. It is hoped that the issue will be addressed when it appears in the HPD/CC's casework. Given that only 1,059 claims have been filed under the relevant first claims category, it may be assumed that the costs of a compensation fund will be manageable.

45. Interview with HPD/CC official, 16 April 2004.

46. *Ibid.*

47. Telephone interview with UNHCR Returns Officer, 6 Jan. 2003.

48. Interview with HPD official, 30 Sept. 2003.

49. Interview with HPD official, 20 April 2004.

3. CONCLUSION

Did the CRPC and the HPD/CC address the post-conflict housing and property crisis effectively? On the one hand, low figures for minority returns and continued ethnic segregation might suggest a negative answer, given that the institutions were established to safeguard the right to return and to support the reconciliation process between the opposed ethnicities. In fact, many members of minority groups have only returned to sell their property with the help of a CRPC or HPD/CC decision and subsequently relocate in an area where they belong to the majority group.⁵⁰ On the other hand, property restitution is only one of many elements to promote the return process and ethnic reconciliation. Safety and security considerations, non-discriminatory treatment, and freedom of movement, as well as economic and political developments, are other crucial factors in this context. For example, the recent eruption of violence in Kosovo, which included the burning of houses, was not attributed to unresolved property issues but to Kosovo Albanian frustration about Kosovo's unclear future and lack of economic prospects.⁵¹

Instead of focusing on the broad range of socioeconomic factors of the peace-building process – such analysis would exceed the scope of this study – the institutions' performance should be assessed on the basis of their mandates to settle property disputes. Both institutions completed their main duties in a reasonable amount of time: the CRPC resolved nearly all of its claims within eight years and the HPD/CC will probably do so within five or six years of its establishment. This is not to say, however, that setting up the institutions, particularly the HPD/CC, and enforcing their decisions have been without considerable delays that could have been avoided. Yet it should be taken into account that both institutions are precedents that lie at the heart of two very complex peace operations that themselves serve as precedents for a new era of international post-conflict governance.⁵² Tackling the institutions' main problems meant addressing the difficulties the operations themselves were facing with only limited previous experience. For example, the need to push local authorities to enforce CRPC decisions led to a completely altered governance approach by the OHR, away from monitoring and oversight to substantial law-making and disciplinary measures against local officials. Further, addressing the HPD/CC's funding and administrative problems highlighted the structural difficulties of inter-agency co-ordination and sustainable donor support, both of which are subject to international review. Thus issues of this more general nature should not necessarily be attributed to the institutions themselves.

While the overall performance of the CRPC and the HPD/CC can be judged positively in the light of all the circumstances, it needs to be emphasized that the institutions' mandate will only be completed if the compensation requirements are also implemented. Moreover, it is recommended that similar operations in the future

50. International Crisis Group, *supra* note 21, at 11; HPD/CC, Quarterly Report Jan.-March 2003, para. 11.

51. E.g. J. Pettifer, 'Kosovo March 2004: The Endgame Begins', *Balkan Series 04/04*, Defence Academy of the United Kingdom, April 2004.

52. For the different concepts of peace operations, see L. Von Carlowitz, 'UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination', (2003) 41 *Archiv des Völkerrechts* 449–62.

entail an official support mechanism for property rights regularization through property exchanges or sales, as this was de facto one of the main outcomes of the CRPC's and HPD/CC's work. Finally, sufficient attention needs to be paid to avoid any duplication of work that might be created in the process of transferring responsibility from international into local hands or in case of concurring jurisdiction, as happened in Bosnia and Herzegovina after the adoption of new legislation.

To conclude, the CRPC and the HPD/CC have shown in principle that international mass property claims resolution can work efficiently, provided that the international community engages in a sustainable and co-ordinated manner and offers sufficient funding. Both the unified effort of all involved international organizations to enforce CRPC decisions and the PLIP in Bosnia and Herzegovina as well as the inter-agency problems in setting up the HPD/CC demonstrate that international intervention in property issues requires improved administrative and financial management by the international actors involved. What might suffice for traditional technical assistance projects certainly does not work when dealing with international governance and enforcement such as the resolution of property issues in a protracted ethnic conflict. Longer-term financing, decentralized planning, delegated spending authority, and advanced inter-agency co-ordination and co-operation are prerequisites for the functioning of those programmes.⁵³ In observing these lessons when dealing with housing and property issues in a post-conflict situation, the international community will have gained a powerful tool with which to support the peace-building process.

53. See also Hastings, *supra* note 5, at 250–4.