

FORUM ON MINORITY ISSUES

Presentation by Leopold von Carlowitz

PROTECTION OF PROPERTY RIGHTS OF REFUGEES AND DISPLACED PERSONS IN EASTERN EUROPE AND IN AFRICA

Mme Chairperson,

Mme Independent Expert,

Distinguished delegates and colleagues,

Ladies and Gentlemen,

In my name and on behalf of the Berlin-based Center for International Peace Operations (ZIF) which is the German Government agency to support international peace operations, I would like to thank the organizers of the forum for inviting me to speak at this important event.

You might want to ask what international peacekeeping has to do with the protection of property rights for minorities. The promotion and protection of human and minority rights is one essential component of post-conflict peacebuilding, a concept directed at consolidating peace by addressing the root causes of conflict. Property and land issues, in particular the unjust or discriminatory distribution of resources – often at the cost of minorities, lie at the heart of many violent conflicts. Property restitution or compensation is not just an important part of transitional justice activities in the aftermath of ethnic cleansing campaigns, it is also a pre-condition for the return or resettlement of refugees and displaced persons – most of them tend to belong to minority groups in their given context. Finally, the regularization of and equal access to property rights is seen as a central element to the rule of law as such and therefore as a basis for a stable and peaceful society.

In this presentation, I would like to focus on the protection of property rights of refugees and displaced persons in post-conflict settlements. In this area, there has been amazing progress in the last two decades, in particular in comparison with the situation after the Second World War. One might argue that the post-1945 stability in Central and Eastern Europe, but also in the Near East, was grounded on the notion of ethnically homogenous nation states that did without much of their minorities who were regarded as a threat (fifth column). You may also argue that the newly

established or reconfigured States in these regions were to a significant extent built with and on the property of its minority populations, which had become a refugee or IDP population without any protection of their property rights.

What a difference this is compared to the post-conflict settlements in the former Yugoslavia at the end of the 20th Century, a country in which prolonged ethnic fighting took place along majority minority lines. In 1995, the Dayton Peace Agreement for Bosnia and Herzegovina granted refugees and IDPs an individual right to freely return to their homes of origin. The international community established a mixed national and international (hybrid) dispute settlement body, the Commission for Real Property Claims (CRPC), to settle thousands of restitution and compensation claims for lost real property that was not voluntarily sold or otherwise transferred since the outbreak of the war in 1992.

In line with the general distribution of local and international responsibilities prescribed by the Peace Accords, enforcement responsibility for CRPC decisions fell on the Bosnian entities, the Federation of BiH (dominated by Croats and Muslims) and the Republika Srpska. The reliance on local implementation became, however, the major challenge and pitfall of the CRPC's work, as the entities were governed by nationalistic administrations who did not want to give back the housing and land to the fled minority population. Local authorities simply refused to implement the decisions for a long time. It took the Chapter VII-backed enforcement legislation of the High Representative of the Dayton Peace Agreement (OHR), as well as a concerted monitoring and coordination effort by all relevant international organizations operating in BiH, to bring about an enforcement policy nearly 5 years after the CRPC's establishment. To effect this change in local attitude and policy, it was important for the entities to adopt their own "parallel" procedures for the confirmation of property rights that did not involve any CRPC decision-making (local ownership). On the one hand, this led to considerable duplication of work, but on the other hand, it allowed the enforcement of CRPC decision-making as well.

Something similar happened around the same time in Kosovo. After the NATO bombardment in spring 1999, the UN interim administration UNMIK undertook enforcement measures to protect and to promote human rights and to ensure the safe and unimpeded return of refugees and IDPs to their homes in Kosovo. UNMIK established a Housing and Property Directorate and Claims

Commission (HPD) – again based on Chapter VII of the UN Charter – to protect property rights of refugees and displaced persons, the vast majority of which belong to Kosovo's minorities.

Institutionally modelled on the Bosnian Commission, the HPD was also a mixed local and international claims collection and decision-making body. But, in contrast to Bosnia, the HPD was also responsible for the execution of its decisions – through eviction of illegal occupants with the support of the law enforcement authorities.

Despite many administration and implementation problems into which I do not want to go right now, both property restitution systems can be deemed a success, certainly in comparison to the lack of hardly any property rights protection after the Second World War. It is true that not all refugees and IDPs returned to their homes of origin. But with an undisputed internationally recognized title, they could return to their property or sell or rent it out and use that money as capital to build an existence somewhere else. Seen from a historical and also international perspective, this is real progress and sets standards in protecting minority rights after violent ethno-political conflict.

But how does it look in the Global South, for example in African countries with big refugee numbers like in Burundi, Congo or Sudan? How about property-related legal remedies in post-war countries without an international intervention that can impose structures to protect minority rights? How about property restitution or compensation in post-colonial states whose laws and institutions cover only 10 or 20 per cent of the territory? Would property-related mass claims processes work in countries in which the majority of the population, irrespective of whether belonging to a majority or minority group, neither has access to the courts nor to the police? Where there are neither roads, nor means of transport to bring potential claimants to the next provincial capital where they could file their claims? Where claimants are either illiterate or do not understand a minimum of legal language required to fill out claims forms?

There also many problems with proving legal title for those property rights that have not been registered. These rights can either belong to individuals or qualify as collective rights of local communities. In many cases, national land administration legislation does not protect collective ownership or land use rights, for example over pastoral lands. This is because the land laws of many African states are based on Western legal traditions that do not recognize such category of rights.

It is clear that property rights protection in African countries with pluralistic legal traditions, inefficient or failing public administrations, low education levels and a weak infrastructure cannot be easily modelled on the mass claims processes in the Balkans. In the last years, the peacekeeping and human rights community has increasingly recognized that its approaches to peacebuilding and rights protection have been too state-centric and have neglected informal, traditional and/or indigenous forms of organization. Moreover, it is obvious that the international community was willing to back up its protection programmes in the former Yugoslavia with sufficient force and resources, whereas it often fails to do so in the Global South.

In reality, African refugees and IDPs who have lost their homes and/or property in ethno-political conflict are usually left without much protection of their property rights. In most post-conflict scenarios, there are no functioning judicial institutions anymore which claimants could turn to. And even if they existed and claimants found their way to their locations, court proceedings in many African countries tend to be inefficient and slow, costly and at times corrupt. The vast majority of the population prefers to settle their property disputes at the local level in customary justice systems, such as councils of elders or Chiefs courts. Many Africans, in particular those living in rural communities, favour the community-oriented and consensual approaches of customary or traditional dispute settlement over the formal judiciary with its focus on individual parties and adversarial process. However, not just the courts, but also traditional structures might have been destroyed in a violent conflict. There are also several human rights-related problems in connection with customary governance structures, in particular in relation to minority rights and gender justice.

For all of these reasons, legal aid programmes have become very popular among international organizations and NGOs intending to protect property rights in sub-saharan refugee crises and displacement scenarios. Legal aid can be provided by legal aid clinics in which paralegals explain claimants their rights and provide legal advice or even free counsel to enforce rights before court. Another trend is to establish or to support mediation services – free of charge – between refugees and IDPs on the one hand and receiving communities on the other. Quite a large number of cases can be settled this way, which is partly due to a serious backlog of pending court cases. But of course, mediation is not feasible in all cases, for example when housing or land was expropriated for public purposes or is occupied by organized criminal structures. In these cases, a resort to judicial proceedings is necessary. Lastly, I would like to mention the Rwandan case, where post-conflict

justice, also in relation to property cases, is promoted by reconstituted traditional courts, the Gacaca tribunals, which are referred to as “hybrid tribunals” mixing both community reconciliation techniques with accelerated judicial proceedings.

To conclude, I would like to re-emphasize the general lack of capacities, resources and infrastructure as regards justice programmes in most African States. Rights protection in the property sector must be accessible and understood by the target populations. What is required to improve the situation of those concerned is an integrated approach that combines justice programmes not only with education and infrastructure projects but also with land registration and possibly land redistribution programmes.

Thank you for your attention.