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Getting Back Home
Impact on Property Rights of the
Indian Ocean Earthquake-Tsunami 2004

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ABSTRACT

For many of the survivors of the earthquake-tsunami that smashed into the coastlines of countries bordering the Indian Ocean on 26 December 2004, their property rights were the only assets that survived with them. Even these sometimes tenuous rights to space for shelter, cultivation and trade were imperilled by this terrible disaster and its equally overwhelming aftermath. This paper tries to identify how the property rights of the survivors can be restored, secured and, where possible, enhanced.

This paper is divided into three parts. The first part deals with the regional pre-tsunami property rights framework. The second part focuses on the impact of the tsunami on those property rights and the third part concludes with recommendations. Recommendations to each class of development actor are made on the basis of the categories of threat to reparation of property rights developed in the proceeding analysis; material threats, administrative threats and threats to legal and human rights.

First, material threats to property rights must be urgently addressed by all actors, therefore generation of free, fast replacement identity, property and other records, such as title deeds, death certificates and letters of inheritance, should be given priority. Property that has been lost to its previous user, and the needs of the landless must be carefully examined to explore alternative uses and sources of supply that can be delivered to those who are without access to vital productive assets.

Second, administrative threats to property rights must be countered by deft lobbying and other responses in partnership with national and international groups, local communities and governments. Hasty, unworkable, destructive planning rule changes have to be emphatically rejected by all the parties to the recovery effort. Effective, customer-orientated property administration services should be put in place so that fair, consistent and acceptable compensation arrangements and property right registration systems can be instituted. Capacity strengthening strategies for other public officials, including justice service providers, must be started as soon as possible, as capacity building to match the challenges thrown up by the tsunami's impact on property rights will take time and lingering incapacity will drag out reparation of property rights and weaken the claims of those living in poverty.

Respect for the legal and human rights of the survivors is of paramount importance throughout the response to the earthquake-tsunami. Corruption must be exposed and expunged. Compulsory acquisition of land by the ill-conceived exercise of administrative discretion must be avoided and 'voluntary' variants of this practice have to be treated with suspicion. Involuntary or coercive internment of displaced people must be rejected. Discriminatory practices, including those that are the legacy of past practices, have to be eschewed. Monitoring and enforcement systems have to be established. Peace has to be negotiated, as the ongoing conflicts are killing the chances of investment that could create the jobs to replace the self employment that was generated by now lost property rights.

The paper tries to make the case for the proposition that the property rights of all people who are displaced by natural disasters anywhere must be adequately protected by international law.

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GLOSSARY¹

<i>adat</i> (Bahasa Indonesian)	Rules and practices of social life, a culturally appropriate sense of propriety, tradition and custom ²
affinal	Related by marriage
cadastre (from French)	Public record of the extent, value and ownership of immovable property
compensation	A specific form of reparation. The term “compensation” refers to a legal remedy by which a person receives monetary payment for harm suffered. When appropriate, compensation may be given in lieu of restitution, for example, when it is either in fact impossible or impracticable to restore the person’s property or house. ³
consanguinal	Related by blood
<i>hukum adat</i> (Bahasa Indonesian)	Adat law or sets of rules and procedures pertaining to the social and political life characteristic of a particular geographic area in the Dutch East Indies and subsequently Indonesia, and having legal value. ⁴
monument	A semi permanent marker placed by a surveyor to designate a corner of a land boundary. Used in jurisdictions in which parcel boundaries are described by courses, directions, distances and monuments.
parcel	Contiguous area of land held by a single rightholder
prescription	A method of acquiring rights in immovable property by adverse, peaceful, public possession or user of property belonging to another.
property ⁵	Refers to housing and real (immovable ⁶) property, including land. ⁷

¹ See also United Nations Food and Agriculture Organisation, 2002, pg 43

² Bowen, 2003

³ Monetary compensation should, however, be seen as a last resort, and when used as a measure of restorative justice must be adequate, fair and just. See World Bank OP/BP 4.12 Involuntary Resettlement

⁴ Bowen, op. cit

⁵ The classic distinction in English and Roman-Dutch law, both of which have had pervasive influence on the disparate legal traditions of the region impacted by the earthquake-tsunami, is between immovable property, land houses, fixtures, deeds and titles and every other kind of property in which title can be vested or transferred, which is usually referred to as ‘moveable’ property. This paper deals solely with the impact of the disaster on immovable property-so does not include fishing boats or livestock, the losses of which will also have potentially disastrous impacts on the livelihoods of survivors.

⁶ However, the expression ‘immovable’ has been eschewed here, as the earthquake and the tsunami made a mockery of the notion the earth cannot move. It did. Nevertheless, the importance of the distinction is still very important. Every legal tradition one can think of treats these two kinds of property separately because of the notion of immovable property being inextricably related to place-no two pieces of immovable property are in the same place and are therefore perfectly interchangeable; so each piece of immovable property is unique and therefore does not really have a

reparation	Restitution or compensation in lieu thereof
restitution	A particular form of reparation. The term “restitution” refers to an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position (i.e. <i>status quo ante</i>). Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; and restoration of employment and return of property.
right (in property)	Fee, mortgage or charge, lease, term of years or tenancy, easement, profit, license, occupancy; usufruct, whether obtained by grant or allocation, purchase, gift, inheritance, prescription or adverse possession or abandonment as recognized by statute, religious law, custom, or equity
<i>shari’a</i>	The path or way pointed out by God and his Messengers for all humans; the norms and rules that guide a Muslim on that path; a body of positive laws, putatively reflecting those norms and rules. ⁸
social protection	The public actions taken in response to levels of vulnerability, risk and deprivation which are deemed socially unacceptable in a given polity or society and policies and practices intended to protect and promote the livelihoods and welfare of people who have lost out, or stand to lose out in processes of social and economic change and development. ⁹
tsunami – affected States	Tsunami-affected States include Indonesia, Sri Lanka, India, Thailand, Maldives, Seychelles, Myanmar (Burma), Kenya, Somalia
User	Enjoyment of property, or one who uses it.
usufruct	The right of enjoying all the advantages to be derived from the use of something (property) which belongs to another, so far as is compatible with the substance of the thing not being destroyed or injured

cash equivalent either. This idea has parallels in customary tenures where land is regarded as something much more than just another commodity.

⁷ This definition is used here for two key reasons. First, housing and real property restitution in the context of the right to return of refugees and other displaced persons has deservedly received a great deal of attention by the international community, more so than other types of property restitution. This attention is due in large part to the unique role that housing and real property restitution play in securing the voluntary, safe and dignified return of refugees and other displaced persons to their homes and places of original residence. Second, housing rights are enshrined in international human rights and humanitarian law to a far greater degree and encompass far more under international law, substantively speaking, than do property rights more generally. The right to adequate housing is enshrined in several international human rights instruments. Indeed, housing rights are not a new development within the human rights field, but rather have long been regarded as essential to ensure the well-being and dignity of the human person.

⁸ Bowen, *op. cit*

⁹ United Kingdom Department for International Development - **Social Protection Keysheet 20** [online]

BACKGROUND

In the wake of the devastating earthquake-generated tsunami in Asia, there was a massive outpouring of generous, immediate humanitarian responses. However, even as these massive, initial rescue operations were being mounted, many in the region and some outsiders were identifying and voicing concerns regarding a series of medium and longer-term issues involving property rights, which need to be understood and addressed.

In the aftermath of that fateful day, some respected community based organisations in southern Asia voiced concerns about the weak tenure and political status of many poor coastal fishing communities along the coast devastated by the tsunami and their consequent vulnerability to expropriation.

Property rights in the region affected by this disaster are highly complex and contentious. Tensions derive from increasing populations and fragmentation of holdings of prime land, rising prices of coastal land, jurisdictional ambiguity and official corruption. These tensions cause conflicts within families, between neighbours and amongst local users and non-local interlocutors such as investors.

One consequence of this disaster could be that the balance of power between these various actors may have shifted, for example, in favour of surviving neighbours as against underage heirs, officials and outsiders as against occupants. The earthquake-tsunami swept away witnesses, documents, markers and other evidence of historical rights of possession, which have traditionally provided tenure security for those living in poverty and those who are especially vulnerable.

The disaster also provides both threats and opportunities with respect to the role of States in allocation, administration and management of impacted property. Some in government and the private sector will see this as an opportunity to introduce or enforce safer more sustainable land use practices. However, warnings were sounded early in the aftermath of the disaster that any opportunistic, mass expropriation of the residential and cultivation sites of those who were displaced by the tsunami, has the potential to catastrophically exacerbate the extensive, pre-existing discontent within the region and the social and economic insecurity generated by the disaster. Already there have been reports of villagers complaining of being evicted and clashing with officials.¹⁰

This paper is the result of a rapid scoping review, conducted over two weeks at the end of February 2005, to investigate the impact of the tsunami on the property rights of affected communities and to make advocacy and programme recommendations in the light of its findings.

The purposes of that review were, first, to provide an initial analysis of critical issues, as well as a set of recommendations for use in advocacy initiatives, programme design and implementation throughout the region. The second intention was to allow the development actors working on relief and recovery to make informed decisions on the scale and form of programme and advocacy work on land rights issues in tsunami-affected regions. The output of the review is this paper, which analyses the most critical emerging property rights issues in the earthquake and tsunami-affected regions

¹⁰ Julian Caldecott 20/02/05

from the perspective of past and future livelihoods of the poor. The paper ends with recommendations for future programme and advocacy work.

The research began with the building of a picture from secondary sources of pre-disaster tenures, succession and other acquisition practices and conflicts over land within the different countries of the impact zone. As many survivors as was possible were interviewed, as well as those working with them, to hear what they had to say about threats, and the countervailing opportunities, to property rights that have arisen because of the disaster. Some understanding of the strategies those living in poverty, now and before the tsunami, have adopted to deal with the catastrophic damage it inflicted on them and their livelihoods was drawn from the data. Further understanding was gained by interpreting information collected from interviews and documents and other data. The interviews and literature review were then related to how well the aid community incorporated community coping strategies into their planning. An assessment was then made based on experience and supported by analysis, of the likely effectiveness of the relief effort to protect property rights of those living in poverty.

The paper concludes with use of the previous analysis to frame recommendations about how protection of property rights can be made more effective, and fully integrated into post-emergency relief, second phase recovery programming. Finally, the paper frames the advocacy opportunities and imperatives that present themselves in relation to the protection of the property rights of the hundreds of thousands of households whose livelihoods were washed away and of the future victims of the natural disasters yet to come. What follows is a discussion focused on reparation of pre-tsunami rights in property. The much larger and perhaps more important issue of how access to land throughout the region could be made more equitable and efficient is beyond the scope of this paper.

OUTLINE

This paper is divided into three parts. The first part deals with the regional pre-tsunami property rights framework. The second part focuses on the impact of the tsunami on property rights and the third part concludes with recommendations.

Part 1 describes the regional property rights setting into which the earthquake-tsunami crashed and the threats it posed. To provide a contextual framework for the analysis that follows, pre-disaster rights in property are described in terms of tenure types, how they were recorded, ways their user was regulated and how these rights were transmitted between generations. The pre-disaster impacts on property rights of conflicts and the displacement generated by these conflicts are also elaborated.

In Part 2, the impacts of the tsunami on property rights are examined. The first section of Part 2 lists and illustrates the key threats to the property rights of those living with poverty created by the tsunami. Then the key actors likely to be engaged in conflicts over property rights are identified and their motivations are discussed. In the second section of Part 2, the scale and scope of the impacts of tsunami on these actors, in terms of livelihoods, social protection and culture, are elaborated. Finally, a snapshot of the mitigation strategies that are emerging to deal with these impacts, which, at the time of writing, are being adopted by the various actors identified earlier, is then provided.

In conclusion, specific recommendations are addressed to national governments and their bilateral and multilateral development partners. Finally, programmatic and advocacy recommendations are made for International Non-Government Organisations and their local partners working to reduce the harm this disaster has done to those who were already living in poverty.

PART I: PRE EARTHQUAKE-TSUNAMI PROPERTY RIGHTS FRAMEWORK

Tenure types

The regulation of property rights within the inter-tidal zone everywhere is always a jurisdictional quagmire - as between federal and state/provincial authorities and between various local governments and customary or traditional authorities.

Formal and informal do not accurately describe rights in property that were held along the coast in the region prior to the disaster – there is nothing casual or careless about so called informal rights in property; legal and equitable may be a better distinction, but only makes perfect sense in common law countries. Even in Sri Lanka and India, countries that draw on the common law legacies they inherited from colonisation by the British, contemporary legal frameworks for rights in property are more accurately described as hybrid systems.

Equitable rights are extremely important because they are so common. In most jurisdictions, property bought during any marriage, paid for by joint effort, even if held legally by one spouse, usually the husband, is, in equity, also held by him as trustee for them both. Beneficiaries of bequests, especially those occupying the property that they have been bequeathed, may have no legal title to this property, but they too usually have at least an arguable claim, in equity, to a right in that property.

Broadly throughout the impact zone, three sources of land tenure can be identified; those rights provided by local norms or customs, for example *adat* in Indonesia; religious texts, for example Hindu succession rules in India and Sri Lanka and *shari'a* family and succession laws in Indonesia and Thailand; and State or positive laws.

The first two of these sources of authority for rights in property can be distinguished from the third in that they are not dependent on the State or its institutions for their existence, although states have frequently sought to co-opt both. In a sense similar to the English law notion of equitable rights in property, rights in property derived from *adat* or religious law are not legal rights, which would be given the same weight in civil courts as rights recorded by State-sanctioned tokens of ownership like deeds and titles, but they are, nonetheless, lawful rights.

The last two of these three sources of authority for rights in property, at least with respect to *shari'a* and positive laws can in turn be distinguished from local or customary practices. State land laws and those emanating from Islam are modernistic or individualist in nature, whereas local customary rules relating to property rights tend to be more concerned with the continuum between ancestors and their successors and with non-market means of their allocation, particularly within and between cohorts of affinal and consanguinal legatees.

Dutch' fetishization of *adat* was motivated by anti Islam sentiments, particularly in relation their apprehensions about the fixity and lack of flexibility of *shari'a* law as compared with *adat* law: *adat* law, in contrast, was thought to be spatial, descriptive, and flexible.

Many victims and survivors of the tsunami were subjected to complex layers of changing land tenure systems introduced during feudal, colonial and independence phase of political and economical development.

The tenure situation of families who lived in Baan Nam Khem (village) is very complicated (as in most of the coastal communities hit by the killer waves). Some families have land title papers from the old tin-mining days, many have no papers at all, but have stayed here for decades - or even centuries.¹¹

In social terms, the most important tenures in any society are the weakest, because these are the rights most commonly afforded the poor, who are usually the most numerous. The weakest form of tenure is none, when no one has given an occupant permission of any kind, even what is known as a bare licence, to remain in occupancy. However, even these trespassers have superior rights to latecomers, and, over time, through a process known as prescription, they can even acquire rights against those with superior rights to themselves, such as owners, or tenants.

Some form of prescription operates in almost all property law regimes. It is a necessary part of a complete scheme of property rights because it deals with the problem of abandonment and failure to assert rights over time. However, the specific rules about how prescription works in each jurisdiction vary considerably. In Sri Lanka, for example prescription operates as against public landowners, in US it does not so apply. However, even in Sri Lanka

'There can be no prescriptive rights pertaining to the beach – the beach is available and accessible to all citizens of Sri Lanka equally and irrevocably¹²'

The **Coast Conservation Act No. 57 of 1981** provides a somewhat ambiguous definition of 'beach'.

'Beach' means a gently sloping area of unconsolidated material, typically sand, that extends landward from the mean high water mark to the area where there is a marked change in material or natural physiographic form. In cases where there is no marked change in the material or natural physiographic form, the beach will be deemed to extend to a distance of 20 metres landward from mean high water level, or to a level of 2.5 metres above mean high water level, whichever is less.

However, the legislation also provides for granting of development concessions, which allowed for building of business premise and substantial houses.

In the past, we faced a situation where land use restrictions and regulations were weakly — if at all - enforced, leading to ad hoc, unplanned and illegal settlement patterns. To a large extent this was encouraged or motivated by the expectation of political and personal gains. As we have recently seen, such a short-term development imperative has devastating implications for both our current and future security. These mistakes cannot be allowed to happen again. Proper coastal zone management, involving a clear land use policy and plan, must drive the process of rebuilding¹³.

Some occupancy of the coastal zone pre-dated prohibitive legislation, for instance in Sri Lanka, but was subsequently abandoned. Some of these sites have subsequently been occupied by poor people who have enjoyed long user. These people may, therefore, have acquired by prescription rights in property retained by previous occupants by right of their prior occupation, even though prescription of the beach is barred.

This example is dealt with at some length above to illustrate the need to examine each claim to rights in property on its merits and to challenge blanket assertions about people who were displaced by the earthquake-tsunami having no pre-existing rights

¹¹ Asian Coalition for Housing Rights, **Report from Tom's visit to Phuket and Phang Nga Provinces, with CODI team, January 8 - 9, 2005** [online]

¹² -----2005 **Rebuilding after the Tsunami: How to get it right**, Environmental Foundation Ltd, January

¹³ Ibid

and who must therefore accept, without question, whatever charity (if any) is being offered to them by their respective States.

Quite exotic tenurial arrangements are likely to have developed in some places in the region affected by conflict prior to the tsunami. Sources report that the Liberation Tigers of Tamil Eelam (LTTE) has been purchasing land in their own right and redistributing it to their 'citizens', although on what legal basis is far from clear.

Records

The two critical parameters in relation to records evidencing rights in property are the identities of right holders and the boundaries of their holdings. Interestingly these records are themselves treated as property in some jurisdictions. The pre-tsunami situation with respect to each characteristic of property records is discussed below.

The littoral space is usually highly sought after, both by local users and by investors and the sweeping away of existing symbols and evidence of historically enjoyed rights of possession, the major form of tenure security for the poor, is likely to rekindle old disputes and create new ones.

Throughout the region tax receipts are very important sources of evidence of recognition by States of possession rights, as are, but to lesser extent, documents attesting to residence, utility payment receipts, ID cards, and ration cards.

Deeds and titles are the main tokens of State-sanctioned rights in property, but these are likely to have been rare in most places impacted by the disaster.¹⁴ Approximately 75% of the land affected by the tsunami in Banda Aceh, for example, was unregistered.¹⁵ Where these records exist, common practice is for the right holder to keep a copy and to have backup copies stored centrally. In Banda Aceh, for example, where some cadastral records existed for the 70% of the city and for some outlying areas¹⁶, backup copied were lodged in Jakarta.¹⁷ Village secretaries also kept village registers throughout the region.

The civil war-ravaged condition of both Sumatra and much of Sri Lanka prior to this disaster also meant that some public records had already been either damaged or destroyed.

The conflict has led to the destruction of documents which were kept in the Kachcheries and in the land registries. The loss or destruction of title deeds and the Land Registry folios have caused immense problems in identifying land parcels and land boundaries, encumbrances and the owner of the land. There needs to be improved administration in restoring the damaged documents or reconstructing the same in terms of provisions set out in the Land Registers (Reconstructed Folios) Ordinance. But in Kilinochchi and Mulaithivu the documents kept in the Land registries were completely damaged or lost and the land registry folios cannot therefore be reconstructed. In Jaffna all pre-1940 property documents had been destroyed and about 30% of the post-1940 registers are damaged or lost and some of these could be reconstructed. In the resulting confusion, genuine land owners who have lost their title deeds as well as unlawful occupants and other interested persons

¹⁴ Phuket Island, in Thailand, was subject to comprehensive titling under the World Bank financed Land Titling Project in 1982. There are, however, reports of wide spread finagling of titles on the island since the initial registration, as land prices on the island have subsequently soared. (Peter Swan 27/02/05)

¹⁵ Wael Zakout 15/02/05

¹⁶ Approximately 800,000 files. (Razali Yahya 14/02/05)

¹⁷ Although there is a one month lag between the records held in Banda Aceh and the duplicate arriving in Jakarta. (Ibid)

have written deeds (of varying degrees of legitimacy) declaring that they are the owners of certain properties. It is difficult to identify the real owner of a property without a prolonged inquiry.¹⁸

Exceptionally, Phuket Island, in Thailand, was comprehensively titled in the early stages of the Thailand Land Titling Project, funded by the World Bank, and duplicate records were held centrally.

Tragically, in many cases where deeds to property had been registered, they are likely to be in the names of people who have passed away. So the identity of the current rights holder can only be established by reference to duly attested (in Indonesia, by notaries, in India by village heads) documentary evidence of death and subsequent inheritance.

Most parcels along the coast affected by the tsunami would have been demarcated by natural features, such as trees and paths. Some monuments (markers) may have been in place, especially in town and cities.

The cadastral record of rights in property in most of the areas impacted by the tsunami would have been weak. In Sri Lanka for instance,

even where documents do exist, they may be of little assistance in identifying boundaries as survey maps or plans have not been automatically included in either private deeds or state permits and grants.¹⁹

Physical planning

Foreshore user everywhere is heavily circumscribed by planning regulations and special laws, mostly derived from centrist planning processes and only spottily enforced. Using this disaster, for whatever motive, to enforce these regimes will spawn local versus central conflict and breed more corruption opportunities for those powerful enough to enforce or circumvent them.

Throughout the region there is evidence of excessive amounts of centralised, unrealistic planning in the form of feasibility studies and master plans, provided mostly by (usually unwelcome) international technical assistance.²⁰ More importantly, the existing frameworks for physical planning are ineffective unless they are both enacted and enforced. Most regimes in place in the region provide for a raft of exceptions from prohibitions, which can facilitate abuses, such as rent seeking for consents.

Sri Lanka has a comprehensive legal, policy and institutional framework relating to coastal zone management and development. In the past, many of the required laws and regulations were not followed or enforced, and there were overlapping and sometimes contradictory institutional jurisdictions. Political interference was widespread, as was the misuse or non-use of discretionary powers leading to a breakdown in the Rule of Law. The weakening of the capacity and authority of institutions contributed greatly to the establishment of unsafe and illegal.²¹

The geography of the region makes it particularly vulnerable to changes in sea levels, particularly the small island states.

¹⁸-----2003 **Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka**, United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May

¹⁹----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre For Policy Alternatives, pg 20-21

²⁰ **Peter Swan** 2802/05

²¹-----2005 **Rebuilding after the Tsunami: How to get it right**, Environmental Foundation Ltd, January

The coastal setting of Maldives makes it highly vulnerable to effects associated with sea level rise and potential increased risk from global climate change such as flooding and storm. Among the priority vulnerabilities of Maldives are land loss and erosion, infrastructure damage, and damage to coral reef.²²

Succession

Property everywhere links past, present and future generations. Typically, all three generations are differentiated on the basis of gender and bloodline. The particular social constructs in each context that are used to make these links will determine to a large extent how the survivors of the earthquake tsunami will be able to cope with the massive challenge of transmitting to the heirs of its victims the many deceased estates arising from the high casualty rate of this disaster.

The situation described in pre tsunami Sri Lanka in relation to succession issues, caused at least in part by the protracted conflict²³, may be indicative of unreported circumstances in other tsunami-affected countries.

The death certificate is a document on which the heirs of a deceased rely in obtaining relief, pension, and compensation or to file testamentary cases to succeed to the properties of the deceased. Death certificates are not available in cases where the death occurred during the conflict period. It is reported that about 20,000 persons are missing and their whereabouts are unknown. In these cases too, the heirs are not in a position to obtain any benefit that accrued from the missing persons. The Registration of Deaths (Temporary Provisions) Act⁷⁸ that provided for the registration of deaths of persons reported missing was enacted to be in operation for two years. The Act was certified on 5 January 1995 and it ceased to be in operation after January 1997. No attempts were made to extend the operational period of this Act. The heirs of persons, who died during the conflict period, do not have any certificates from the doctors or any other documents to prove the death to obtain death certificates. Therefore to resolve this problem the provisions of the Registration of Deaths (Temporary Provisions) Act should be re-enacted.²⁴

The non-availability of birth certificates also causes concern among parents whose children were born while they were displaced. The parents do not have any documents to prove the birth of the child other than the production of the child and the parent's testimony. These children have now attained school going age but cannot get admitted to schools as they do not have birth certificates. In this regard a flexible method should be adopted by accepting affidavits of independent persons in relation to the date of birth and the other details of relationships.²⁵

In Indonesia, the Supreme Court, as recently as 1985, affirmed that the 'living law' of land has changed to accommodate the post revolutionary equal rights of women, so that now daughters have the same rights of inheritance as sons.²⁶ However, this principle can and is modified in practice by residual power imbalances.

Similarly in India, despite constitutional guarantees and legal reforms, gender discrimination in relation to property continues.

²² -----2005 **Republic of the Maldives Tsunami: Impact And Recovery Joint Needs Assessment**, World Bank-Asian Development Bank-UN System, 8 February

²³Over the past 25 years the government of Sri Lanka (GSL) has faced challenges from two sources.¹⁴ First, in 1971 and more seriously in 1988/89, the Sinhalese Jathika Vimukthi Peramuna (JVP) mounted attacks on the state which resulted in bloody armed rebellions. Second, from the early 1970s, and with an increasing degree of ferocity, militant Tamil groups have been fighting for an independent country, 'Tamil Eelam', to be established in the north and east of Sri Lanka. One Tamil group, the Liberation Tigers of Tamil Eelam (LTTE) has come to dominate this battle. (Goodhand, J & Lewer, N. 1999 pg 69-87)

²⁴ -----2003 **Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka**, United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May, pg 21

²⁵ Ibid. pg 79

²⁶ **Makamah Agung** 2662 Perdata (civil)/1984, Varia Peradilan 24:59-71, 1987 cited in Bowen (2003) p. 55

*Despite several legal provisions for gender equality, women still struggle to realize equal rights to property, marriage, divorce, and protection under the law*²⁷

For instance,

*If heirs reach an agreement outside the court (usually with the help of a legal scholar) they usually write down the result and have it witnessed by their village headman. The document attesting to the agreement (a surat penetapan) then has legal standing: it is, for example, recognized by the Office of Land Registration as the basis for a valid claim to own a plot of land.*²⁸

So that a larger share of deceased estates in Indonesia (as is the case in many other places) still goes to sons

*Sons and their families exert greater control over resources than do daughters and their families*²⁹

User

The agriculture systems in place before the tsunami along the West Coast of Aceh, have been described by experts as highly complex, multi product farm management systems, incorporating tidal brackish lagoon aquaculture with flood irrigated paddy production.³⁰

The kinds of activities observed along the coast affected by the tsunami in Sri Lanka included dwelling, gardening, fish drying services, trading and tourism.

A generalised model of the uses land affected by the tsunami includes: shelter, cultivation, trade, recreation, religion and amenity.

Conflict

Conflict throughout the tsunami-affected region had already severely damaged housing stock, creating pervasive homelessness and secondary occupations. The UNHCR country office in Sri Lanka provided the following pre-tsunami estimate of the damage done by the conflict to housing and other property.

*The armed conflict also resulted in the massive damage and destruction of housing and property. In the Vanni area, for instance, almost all the houses have been razed and cement or brick structures are effectively non-existent. In the Jaffna Peninsula, more than 81,000 houses require major repairs or complete reconstruction. In Batticaloa, nearly 30,000 houses have been completely destroyed, and some 29,000 have been partially destroyed. A large number of houses in other parts of the Northern and Eastern provinces are damaged to varying degrees. Most of these houses have no roofs, windows or doors. In some instances, even the foundations of buildings have disappeared. The two decade war and artillery firing have caused the destruction of palmyrah, coconut, mahogany, satin and other trees that are traditionally used as building materials, which has led to a serious scarcity of building materials, thus augmenting reconstruction difficulties. In addition, the lack of transport and other infrastructure facilities made the cost of building materials escalate greatly. Adding to these problems, successive displacements have caused severe shortages of skilled labour for repairs or reconstruction of the houses and properties in the conflict affected areas.*³¹

²⁷ Human Right Watch World Report [online]

²⁸ Bowen, op. cit. pg 120

²⁹ Bowen, op. cit. pg 43

³⁰ David Hitchcock 14/02/05

³¹ -----2003 Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May

The pre-existing humanitarian situation in the earthquake-tsunami affected areas of Indonesia could be described as even worse, particularly for women, than in Sri Lanka.

Cases of the horrific impact of conflict on women in Aceh have been documented in recent reports by Amnesty International, Human Rights Watch, Tapol and Eye on Aceh.

NGO reports reveal that rape is systematically used by members of the Indonesian army and police against the families of GAM (Free Aceh Movement) (Gerakan Aceh Merdeka) suspects.

According to the Indonesia human rights campaign Tapol, the recent round of trials and sentencing includes 52 women from a total of 1,777 of detainees arrested on suspicion of being involved in GAM. The case of an 18 year-old Javanese woman from a transmigrant family, labelled commander of GAM's women's corps by the authorities and sentenced to 18 years, is an indication of how bad things in Aceh are for people who happen to be in the wrong place at the wrong time?

Acehnese detainees include women married to GAM members, and women held as hostages for their husbands who are GAM suspects³².

Displacement

One impact of the prolonged conflict has been to create mass displacement of civilians fleeing the fighting.

Long before the tsunami disaster, the humanitarian crisis in Aceh is already an on going problem. The military operation to tackle the Free Aceh Movement (GAM) (Gerakan Aceh Merdeka) has resulted in quite a high death toll among Acehnese civilians.

The armed conflicts have escalated since 1999 and has caused a systematic decrease in Acehnese population. Lots of Acehnese are in exodus to avoid the conflicts. According to Central Bureau of Statistics in North Aceh in year 2003 has revealed that throughout Aceh conflict, 15,000 out of 467,000 North Aceh population had undertaken exodus to other area. Violence factors enforced by coercive apparatus has contributed to the shrinking Acehnese population. Documentation by the Indonesian Legal Aid Foundation (YLBHI) has counted an average of 5 – 8 civilians deaths due to violence during the conflicts.³³

In Aceh, and possibly in Sri Lanka, this conflict-generated displacement has been compounded by the extensive use of *merantau* (more or less, 'circular migration'), a classic livelihood strategy for men.

³² Down to Earth No. 63, November 2004 **Women, land and natural resources** [online]

³³ ----- 2005 **Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights**, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), translated from Bahasa Indonesian, 16 February

PART II POST EARTHQUAKE-TSUNAMI PROPERTY RIGHTS

Key threats to poor people's land rights created by the tsunami

Key threats to poor people's land rights created by the tsunami are identified below. First material threats are discussed; loss of evidence of property, displacement, expropriation, physical loss and degradation. Then administrative threats are described; physical planning rule changes, defective compensation arrangements and public sector capacity deficiency. Finally threats posed by violations of legal and human rights are laid out; compulsory acquisition of land for resettlement, internment, discrimination and ongoing conflicts.

Loss of evidence of property

An important issue here is what rights are affected by which threats. Primary rights in property (those granted by states to private parties) are most threatened by physical loss and expropriation. Derivative rights (those granted by primary right holders to other private parties) may be vulnerable in different ways.

For example, under Indonesian law the right of land pledge (*hak gadai*) is a way for the land use owners to receive money without having to sell their land.³⁴ They can transfer their right of use to another person who in return pays money to the land owner. The land use owner gets his land back when he has paid back the loan. This is known as a land pledge (*djual gadai*). The pledge arrangement is only rarely conducted before the village head, and is usually unwritten. There is usually no time limit within which the land owner has to pay back the money in order to get back his land.³⁵ The death of the landowner and the degradation of the land for the particular use right for which it was pledged, could see the pledge (the person advancing the loan) lose out and the pledgors' successors receive a windfall for which they are not entitled. In other disasters, this has been an obstacle to getting back homes and continues to prevent people from returning. Six years after the Kobe earthquake some people are still living in temporary accommodation because their pre-disaster tenure claims had not been agreed. Land title and property claims following the earthquake which destroyed another ancient city, Bam in Iran, are continuing to delay reconstruction.³⁶

In this instant disaster, the twin challenges associated with successfully prosecuting claims to property rights, identity of the claimant and location of the property claimed, will both be problematic.

The gravity of this potential threat to reparation of property rights in Indonesia was picked up in the initial assessments undertaken by governments assisted by international experts.

Based upon meetings with various officials, it appears that among those who claim ownership of their homes, before the tsunami, less than 10% were reportedly able to provide valid legal titles to their land. There are reports that this situation may be worse after the disaster since there has been substantial loss of land, many of the existing records have been destroyed, many owners may have perished and the water has washed away many boundary and other reference points. To the degree that land ownership issues are not satisfactorily resolved, this could create delays and higher cost

³⁴ Basic Agrarian Law, Article 16

³⁵ Löffler, U. 1996

³⁶ Firth, J (iResearch Oxford, England) 2005. Email. 20/01/05

in the reconstruction effort. There may be a need to seek some type of intermediate solution to any drawn-out judicial process. In this regard, the mechanism used under the ongoing Community Driven Development projects in Indonesia (e.g., KDP and UPP) may be one potential tool for getting community groups to come together and try to resolve ownership, boundary and similar disputes.³⁷

In Sri Lanka this predicament, regarding evidence of property rights, has been described as follows.

Many IDPs have lost identity and property documents, both as a result of the tsunami and the conflict. With respect to property documents, obtaining copies is not possible in many cases because duplicates kept with Registries and Government Secretariats have been lost due to damage or destruction of these institutions. Also, copies of private deeds and State grants and permits are not kept centrally. Many IDPs will also have lost personal documents, such as National Identity Cards, Birth Certificates, Passports, and Marriage or Death Certificates. These documents are often required to obtain copies of property documents and government assistance, and their loss may also impede legal claims to property inheritance.³⁸

Loss of records relating to charges and bank financing will also have implications for future mortgagors, making future lending more expensive.

Even in Thailand, where damage and loss were not as grave, this problem was identified early on in the relief phase.

Baan Nam Khem was the most badly damaged villages - with the most deaths - in Phang Nga Province, which itself received the brunt of the damage from the tsunami. Nearly a quarter of all those who died in Thailand during the tsunami were killed in Baan Nam Khem. Almost all the houses in the village were completely destroyed, along with most of the fishing boats and fish-processing equipment in the village. In most of the village, all that's left is a pattern of cracked roadways. The government bulldozers have already pushed away a lot of the rubble, and here and there, scavengers load twisted bit of aluminium (sic), or steel, or wood onto carts and trucks to take away to the dozens of salvage yards that have sprung up along the coast.³⁹

The prevailing wisdom, based on lessons learnt from conflict related displacement and other mass displacement situations elsewhere, is that loss of property records presents substantial challenges to agencies seeking to reparate the property of those who have been displaced.

In cases where the documentation of property ownership is a formidable obstacle to return, formal investigations and property ownership verification procedures require that the overseeing institutions have the resources (including professional training, personnel and finances) needed in order to carry out their work effectively in a timely and efficient manner. Without the political will to meet these basic organizational needs, the restitution process is virtually doomed to failure from the outset.⁴⁰

Claims to different types of rights in property are validated by different forms of evidence, each supported by different levels of authority. Those whose claims to legal rights in property rested solely on documentary evidence became insecure if those documents were destroyed by the tsunami.

the destruction of public buildings means the loss of legal records, mortgages and other details⁴¹.

³⁷ ----- 2005 **Indonesia: Preliminary Damage and Loss Assessment**, World Bank, BAPPENAS, 19 January, page 44

³⁸ ----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre For Policy Alternatives, pg 25

³⁹ Asian Coalition for Housing Rghts - **Report from Tom's visit to Phuket and Phang Nga Provinces, with CODI team, January 8 - 9, 2005** [online]

⁴⁰ ----- 2003, **Housing and property restitution in the context of the return of refugees and internally displaced persons**, Preliminary report of the Special Rapporteur, United Nations, Economic and Social Council

⁴¹ -----2005 **After Tsunami: A Rapid Environmental Assessment**, United Nations Environment Program

Equally, those with claims to equitable rights in property, which depended on mostly on the testimony of witnesses for validation, became vulnerable when those witnesses perished and their communities were wiped out. Thus, rights and records have to be mapped in a matrix so that appropriate reparation strategies can be identified.

Displacement

Secondary occupation is not so much of a problem where housing has been completely destroyed.

*The problem of secondary occupation has been a problem in the resettlement of conflict affected IDPs, and may prove to be an obstacle to the return of tsunami IDPs. The problem of secondary occupation arises when properties left vacant by IDPs are occupied upon their return. Occupiers may themselves be IDPs, or the Armed Forces, the Police, the LTTE (Liberation Tigers of Tamil Eelam) or others.*⁴²

Sales made under duress by owners who are still psychologically disturbed by the disaster could be for far less than for market value.

Expropriation

There are considerable numbers of people who are not living on their land, but are in temporary shelter in camps, who are extremely anxious about other people trying to take their land in their absence.

*Across the way from Baan Bangsak are the huge beach-side shrimp farms of the **C.P. Seafood Company** (also in ruins after the tsunami), the biggest seafood and chicken production companies in Thailand. Years ago, a lot of this publicly-owned land, which had been dotted with traditional fishing settlements, was handed over on concession to big tin mining companies, when tin was a big export from Phang Nga Province. After tin prices on the world market fell and the tin mining years ended, there was a brief lull, where nobody seemed much interested in Phang Nga's seaside. Then, the shrimp-farming boom came, and government began concessioning out huge tracks of land occupied by fishing communities to companies like C.P. Seafood, who then pushed the fishermen here or there. The history of these communities being pushed around and robbed of their ancestral land goes way back. First it was tin, then seafood. Now tourism, which is creeping north through Phang Nga province and gobbling up this valuable sea-side real estate, is the latest threat to these perpetually vulnerable communities.*⁴³

Physical loss

Approximately 100 kilometres of the west coast of Sumatra dropped down one metre.⁴⁴ Those whose land disappeared under the water obviously cannot return to it.⁴⁵ What happened to their property rights is too complex a question to be answered here. However, their capacity to return to previous user is gone. Alternative user may be possible e.g. aquaculture on former residential or farm land that has become submerged. Some plots benefited from accretion of top soil from lower lying lands.⁴⁶

Physical damage to fixtures in Aceh has been estimated as follows.

⁴² ----- 2005 **Land Issues Arising From The Ethnic Conflict And The Tsunami Disaster**, Centre For Policy Alternatives , pg 28

⁴³ Asian Coalition for Housing Rights - **Report from Tom's visit to Phuket and Phang Nga Provinces, with CODI team, January 8 - 9, 2005** [online] 2005.

⁴⁴ **David Hitchcock** 14/02/05

⁴⁵ FAO estimates that about 150 kms of coastline in Sumatra has dropped approximately 1 metre as a consequence of the earthquake off Nicobar Islands on 26 December 2004 (**David Hitchcock** 14/02/05)

⁴⁶ *ibid*

Overall, it is estimated that about 19% of the approximately 820,000 building units (about 151,600 units) in the affected districts suffered an average of about 50% damage while about 14% (about 127,300) were completely destroyed.⁴⁷

The Indonesian government has estimated that the value of the damage caused to the social sector (which it describes as composed of education and shelter sub components) as in excess of USD 1.6 billion.⁴⁸

The damage to building units in India (not including the Andaman Islands is estimated to be 157393 units destroyed.⁴⁹

In Sri Lanka approximately 40,000 houses have been destroyed.⁵⁰

Within about 500 metres of the coast, the tsunami destroyed 99,500 houses and damaged another 46,300, a total of 13 per cent of the entire housing stock of the coastal divisions of the affected districts.⁵¹

In Thailand preliminary assessments also reported extensive damage.

extensive damage to the built environment, including individual houses (6,791 damaged and 3,619 destroyed), shops, tourist facilities and public infrastructure.⁵²

In the Maldives the preliminary assessment reports 1847 houses totally destroyed and 3500 partially damaged.⁵³

Degradation

Degradation of land has probably been more extensive than total destruction but it is much harder to generate sensible estimates of salination, loss of topsoil and other forms of degradation of coastal lands.

The numbers provided below for India reflect how difficult this exercise is.

The Tsunami affected a total of 2260 Kms of the coastline besides the entire Nicobar Islands. The tidal waves that struck the mainland were of the height of 3 to 10 meters. The waves penetrated into the mainland from 300 meters to 3 Kms.⁵⁴

In Indonesia, rough preliminary estimates based on aerial surveys, suggest that between 0.5-1.0 kms inland from mean high water will be useable for the foreseeable future. Land from 0.75-1.5 kms has been described as damaged but not irretrievable.⁵⁵

Prior to tsunami land degradation was already recognised as a significant problem in most small island states.

34. Most small island developing States face serious challenges of land degradation as a result, inter alia, of inappropriate land use and poor irrigation management systems. Since the main

⁴⁷ ----- 2005 **Aceh Emergency Response and Transitional Recovery Programme (draft for discussion)**, United Nations Development Programme and Government of Indonesia, 31st January

⁴⁸ Current Predicted (January 2004) Value of Loss & Damage from the Tsunami in Aceh & Northern Sumatra area (Statement by Minister of Development and Planning, cited in----- 2005 **Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights**, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), translated from Bahasa Indonesian, 16 February

⁴⁹ **UNDMT Situation Report – India** [online]

⁵⁰ Almost a million people from 200,000 families have been displaced, according to figures received so far at the Centre for National Operations set-up by President Chandrika Bandaranaike Kumaratunga. Number of houses destroyed is calculated from these figures based on a lower-end estimate of five persons per dwelling.

⁵¹ -----2005 **After Tsunami: A Rapid Environmental Assessment**, United Nations Environment Program

⁵² *ibid*

⁵³ ----- 2005, **Republic of the Maldives Tsunami: Impact And Recovery Joint Needs Assessment**, World Bank-Asian Development Bank–UN System, 8 February

⁵⁴ **UNDMT Situation Report – India** [online]

⁵⁵ **David Hitchcock** 14/02/05

*objective of the United Nations Convention to Combat Desertification is to address land degradation, and considering the designation of GEF as a financial mechanism of the Convention, small island developing States should fully utilize available GEF resources to develop and implement projects to address land degradation through sustainable land management. In this regard, every effort must be made for the full implementation of the Convention.*⁵⁶

However indications suggest that much of land on which people depended for their livelihoods has become unusable or its utility has been reduced.

*Rice crops in the western islands of Indonesia were seen to be yellowing in the fields within three weeks of the disaster. In the Seychelles, soils around Victoria still have a high salt content, which is double the amount most plants in the islands can tolerate. In Sri Lanka, several thousands of fruit and rice farms in areas such as Trincomalee and Batticola Districts have been affected by salt contamination. The agriculture sector in the Maldives was one of the worst hit. Sea water damaged an estimated 1,200 farms and smallholder plots. Over 840,000 timber trees were also damaged on the inhabited islands. More than 20,000 hectares were inundated by sea water in Thailand, with an estimated 1,500 hectares of agricultural land severely impacted.*⁵⁷

The real question is whether and how long it will take for these lands to recover. No one knows the answer to this, but the implications for livelihoods of thousands of households could be dire if much of this degradation is permanent or long periods are required for recovery.

Physical planning rule changes

The declaration of zones, demarcated from mean high water, where reconstruction would not be permitted, was the reflexive response of most of the States impacted by the tsunami. Some States, for example Sri Lanka, already had statutes that expressly prohibited construction within a certain distance from mean high water⁵⁸. These pre-existing statutory regimes contain mechanisms for granting exceptions and for the exercise of discretion by ministers or officials in their application.

Moreover, in Sri Lanka, for instance, where some communities seem to have had reasonably good tenure rights before the tsunami, many may now have to face up to the new laws and regulations to be imposed: communities will have to move one kilometer (later changed to 500 meters and then 300 meters) from the sea shore. This means that it will be very difficult for communities to stay on the same land and will most likely be required to move into higher density housing - which is obviously not suited to the fisher - folk lifestyle.

*In Thailand, there have been similar announcements for new planning directives (i.e. planned from the top). Some indigenous fisherman groups have informed us that they have been given information that they cannot go back to the former sites - sites where they have lived for generations.*⁵⁹

Added uncertainty has been created, in Aceh and in Sri Lanka, by successive vague and sometimes contradictory announcements about the width and criteria that will apply to exclusion zones. Selective use of exclusion zones only in places where this tsunami struck also ignores the possibility that the next tsunami could strike anywhere within the region.

⁵⁶ United Nations, **Draft Mauritius Strategy for the further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States**,

⁵⁷ -----2005 **After Tsunami: A Rapid Environmental Assessment**, United Nations Environment Program

⁵⁸ Fisheries and Aquatic Resources Act No. 2 of 1996

Coast Conservation Act (as amended by No.64/1988)

----- 1990 **Coastal Zone Management Plan**; Coast Conservation Department, Town and Country Planning Ordinance

⁵⁹ Asian Coalition for Housing Rights - **News from ACHR** [online]

Private and public interests are likely to be in collision in relation to changing and implementing spatial planning laws in response to the tsunami. Asking the poor to contribute to the public good by giving up the only assets they retain after a disaster for the benefit of the wider public who are being asked to sacrifice nothing, is not reasonable – especially if the end result is that those assets are grabbed by the powerful and further disadvantage the poor. There will certainly be advocacy issues here.

Modifying land tenures to facilitate development and stimulate production risks displacement, dislocation and dissipation of social capital. This has always been an issue in developing countries and its resolution within the context of the post tsunami region is not likely to be as tidy as some governments expect.

33. Further action is required by small island developing States, with the necessary support of the international community, to: (a) Develop capacity to implement the multilateral environmental agreements and other relevant international agreements in relation to land resources; (b) Develop capacity for sustainable land management and self-generating agroecosystems by building on communal tenure systems and traditional land-use planning and practices for crop, livestock and aquaculture production, taking into account the increasing competition for land resources by tourism, urbanization and other activities; (c) Strengthen land tenure and management systems, move from primary to tertiary agricultural production and diversify agricultural production in a sustainable manner.⁶⁰

Defective Compensation Arrangements

The greatest threat posed in this regard is the absence of an open debate about this and above all the absence of any information to those concerned, not only about their rights, but also in relation to how those rights should be valued.⁶¹

The intended compensation arrangement for withholding permission to re-build within the coast zone in Sri Lanka would appear to be the provision of alternate housing. What the precise terms of that ‘offer’ will be are as yet unclear, as it what is those who will be dispossessed are being sacrificed.⁶²

Human rights law in relation to the right to adequate housing has evolved significantly over the past decade. The right of a refugee to return to her/his country⁶³ is now increasingly coupled with her/his right to adequate housing.⁶⁴ In this context, the right to adequate housing has developed to extend to the right not to be arbitrarily deprived of housing and property in the first place. As corollary to this, refugees have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted (restitution). If this is not possible, then the right to adequate compensation for any loss suffered comes into play.⁶⁵

Some lobby groups are clearly pressing for a highly circumscribed set of rights in property to be offered in exchange for what, in their view, were fairly dubious pre-tsunami rights to reside in dangerous areas.

Before communities are relocated to new housing, due and careful attention must be paid to defining mutual rights and obligations. Most importantly this should include consideration of the

⁶⁰ United Nations, **Draft Mauritius Strategy for the further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States**

⁶¹ Ines Smyth, email. 07/03/05

⁶² Mika Torhonen 19/02/05

⁶³ **Universal Declaration of Human Rights** Art 13(2) (1948)

International Covenant on Civil and Political Rights Art 12 (1966)

⁶⁴ **International Covenant on Economic, Social and Cultural Rights** Art 11(1) (1966)

⁶⁵ **UNHCR Inter-Office Memorandum No. 104/2001**, 28 November 2001, **UNHCR Field Office Memorandum No. 101/2001**, 28 November 2001.

*rights of occupants over property, tenancy and security of tenure, and limitations on the sub-letting and transfer of property by the allocated owner or tenant.*⁶⁶

However, the other important equity issue, in relation to take-it-or-leave-it offers of in-kind compensation, is choice. Cash compensation offers more flexibility to those forced to surrender their rights in property, to make arrangements that will best suit their particular circumstances. There are some dangers in relation to cash; fears that women will be excluded from access to the capital sums, and the insecurity associated with its extreme fungibility. Certain circumstances may also may payment of compensation in cash particularly dangerous for the recipients.

*There may be a particular need for caution about the appropriateness of cash-based approaches in the conflict-affected areas of Sri Lanka and Indonesia.*⁶⁷

However, there is an increasing body of evidence to suggest that assistance, other than cash for work which many organisations are already using, in the form of cash grants is an efficient, but under utilized alternative to other forms of long term assistance.⁶⁸ Some have suggested the establishment of bank accounts as depositories for grants in aid eliminates some the previously identified risks.⁶⁹

Public Sector Capacity Deficiency

Government just does not have the payroll, the people or the equipment to respond even to every-day demand for services.

*There is a considerable delay in processing documents at the land registries. Even when documents are available, the relevant land registries and Divisional Secretaries may not have the capacity to respond to the number of demands for certified copies. Another problem is that there are only few people who are qualified to fill the vacancies.*⁷⁰

Capacity deficit is another of those development imperatives more honoured by admission of defeat than embraced by action. Massive capital and recurrent investments, long lead times, inevitable leakages of qualified talent into more lucrative labour markets, all conspire to reduce capacity strengthening to the next phase of every intervention, to the inevitable detriment of primary objectives.

Effective and competent institutions are the cornerstone of successful restitution programmes. Judicial mechanisms are especially important here and the absence of effective and accessible judicial remedies severely limits the utility of pursuing legally based solutions as a means of protecting rights to housing and property and thereby facilitating their restoration. This is particularly the case in post-conflict situations where internal political divisions render domestic institutions incapable of effectively administering restitution programmes, either due to institutional bias, or due to a lack of capacity and resources.

Internment

The Indonesian Government's recent announcement that it intended to relocate 30,000 of the tsunami victims who currently located in tented camps or staying in public buildings, to 24 purpose built barracks⁷¹ that will be constructed across Aceh Province, was described by the Asian Coalition for Housing Rights as "cause for grave concern" for the following reasons:

⁶⁶ -----2005 **Rebuilding after the Tsunami: How to get it right**, Environmental Foundation Ltd

⁶⁷ Harvey, P. 2005

⁶⁸ ibid

⁶⁹ **Somsook Boonyabancha** 26/02/05

⁷⁰ ----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre for Policy Alternatives , pg 29

⁷¹ Numbers keep changing but are likely to have considerably increased since ACHR's comments were made.

PART II: POST TSUNAMI PROPERTY RIGHTS

- *Locating people in camps undermines community identity, cohesion and leadership structures*
- *Living in camps creates dependency on external support mechanisms and personnel*
- *Camp environments adversely affect community initiatives and entrepreneurship*
- *Living in camps creates insecurity about the future and intensifies potential for trauma*
- *Staying away from original locations jeopardizes and complicates peoples' tenure security in their original locations*
- *Camp life seriously hampers economic recovery of the disaster victims as they have limited employment and business opportunities especially when camps are located far from other settlements*
- *Moving to displaced persons camps postpones final rehabilitation to the permanent sites*
- *Moving families to interim camps duplicates investments in infrastructure and services*
- *Housing and infrastructure provided in camps is more expensive when contracted out*
- *Medium and long term camps for IDPs burdens the Government with heavy recurrent costs for administration and maintenance of the camps*
- *Long term IDP camps inevitably turn into permanent slums⁷²*

Apart from confusion over terminology – Asian Coalition for Housing Rights (ACHR) use the expression ‘camps’, when they mean ‘barracks’ - there are really two distinctive issues here. They are the problems associated with two different circumstances; those arising from people staying in camps (dependency, etc.), which is where large numbers are now (apart from IDPs in host families) and the problems associated with herding people into barracks, such as loss of privacy and increased surveillance and coercion and predation by the military

These two issues really should be separated as they are different, requiring different advocacy and programmatic responses, but both stem from the fact that Government of Indonesia seems to not want people either to stay in camps or to return for reasons that are not related to their need for shelter or the reparation of their property rights.⁷³

There are other serious worries about the effect of camps on internees' long term planning and incentives to return home. However, more socially acceptable alternative private arrangements made immediately after the disaster are also unlikely to provide long term solutions to homelessness.

Many of the internally displaced people (IDP) have been housed in the homes of host families. This arrangement is now leading to increasing uneasiness on both sides, as IDPs feel they have overstayed their welcome.⁷⁴

The best, perhaps only viable solution is to encourage people to help themselves return home as quickly as possible.

⁷² Urban Poor Asia - **A Peoples Perspective on the Tsunami Rehabilitation Effort** [online]

⁷³ *There are many other issues which, again, are relevant to the fact that they are barracks, but also since people have already been moved this has now gone beyond fears, and it is becoming reality; (a) the space allocated to one family is extremely small and should house 5 people (whether they are related or not). Constructions are such that there is no privacy, no public spaces, facilities do not take into consideration the need for men and women to be separated (latrines, bathing facilities etc.); (b) communities are being split up (b) people are being moved without prior knowledge and information on to where, when and how; (c) of course, given the context, these barracks provide a perfect surveillance opportunity. The Indonesian army has used similar surveillance methods before in places such as Timor, with disastrous, repressive consequences. Ines Smyth, email, 07/03/05*

⁷⁴ ----- 2005 **Republic of the Maldives Tsunami: Impact And Recovery Joint Needs Assessment**, World Bank-Asian Development Bank-UN System, 8 February

Compulsory Acquisition of Land for Resettlement

The knock on effect of the declaration or enforcement of no residence zones along coastlines affected by the tsunami and the consequent need for massive resettlement sites both for those whose houses were destroyed by the waves and by those who will be homeless as a result of the new planning edicts, could potentially have greater dispossession impacts than from the tsunami itself.

For example, the relevant Indian legislation relating to powers of compulsory acquisition for public purpose includes the acquisition of 'village sites' within its definition

3 (f) The expression " public purpose" includes the provision of village-sites⁷⁵

One of the most common problems and causes of contention in many jurisdictions is that of calculating the quantum of compensation for compulsory acquisition of land for public purpose.

It is settled law that the burden of proof of market value prevailing as on the date of publication of Section 4(1) notification is always on the claimants. Though this Court has time and again pointed out the apathy and blatant lapse on the part of the acquiring officer to adduce evidence and also improper or ineffective or lack of interest on the part of the counsel for the State to cross-examine the witnesses on material facts, it is the duty of the Court to carefully scrutinise the evidence and determine just and adequate compensation. If the sale deeds are found to be genuine, the market value mentioned therein must be presumed to be correct. If the genuineness is doubted, it cannot be relied upon, Proper tests and principles laid down by this Court must be applied to determine compensation.⁷⁶

Doubts about the genuineness of purchase prices arise because stamp duty and levies on transactions, and sometimes land taxes, are calculated on the basis of the declared sale price. This provided an incentive for the seller and the buyer to conspire to under report the sale price and so distort the accuracy of the sale contract as an indicator of current market value. This is widely acknowledged flaw in many land administrative systems but is in fact easy to fix.⁷⁷

The Special Commissioner for Recovery and Reconstruction in the Indian State of Tamil Nadu as much as acknowledged the existence and the significance of the problem when he described measures for compulsory acquisition the state government was contemplating including in its disaster management plan (forthcoming). The government was planning⁷⁸ to appoint 'compulsory acquisition committees, an acknowledgement of the widespread corruption reported amongst land administration officials exercising their compulsory acquisition powers, and these committees were going to given an upside discretion to pay two hundred percent more than sale price-determined land valuations for the estimated 2000 hectares that will be needed for resettlement sites.⁷⁹

Although governments are insisting that either enough government owned land is available for resettlement, or that private owners are willing sellers, there is some evidence that persuasion is being used to 'encourage' owners to sell.⁸⁰ However it is

⁷⁵ Land Acquisition Act, 1894, Act No.1 Of 1894 [As On 1955]

⁷⁶ **Hookiyar Singh V**, 24/02/05

⁷⁷ By putting the burden of payment of any stamp duty on the purchaser, and providing that the seller may give back the declared purchase price and re claim the property within a fortnight of the transaction.

⁷⁸ The State resettlement plan has not been finalised but was forthcoming at the time of writing. (**C.V. Sankar** 23/02/05)

⁷⁹ **Samthanan** 23/02/05)

⁸⁰ **Annika Sandlund** 20/02/05

obtained, this acquisition drive is likely to drive up land prices and make access to land more difficult for non-beneficiaries of these schemes.

Discrimination

The earthquake-tsunami and its consequence are likely to exacerbate pre-existing discriminatory practices, especially those perpetrated against physically isolated minorities. These people are likely to live in less safe areas, have flimsier houses and more tenuous access to services and will likely therefore suffer more severe impacts than others who experience the same disaster.

They are also likely to be turned away from relief centres, refused access to relief items and 'missed' by disaster enumerators.. Their lands are likely to be expropriated for mass graves and piles of refuse which other low paid labourers will be hired to dig to remove.

Loss of documentation will be particularly hard on minority communities who have scrounged to save enough to educate their children, whose certificates may have been destroyed and are therefore unlikely to be able to get jobs, or who are battling to retain their homes in the face of attempts by officials to remove them and whose identity papers have washed away.

The situation of the Dalits in Tamil Nadu, described below, is probably paralleled by the treatment being given to other minorities in other affected areas.

The NCDHR (National Campaign on Dalit Human Rights⁸¹) described government officials who have a 'caste-oriented' mind set which results in discriminatory and apathetic treatment of Dalits, regardless of the situation. They state that this has resulted in widespread neglect of Dalit victims and even instances of heightened abuse as they are forced to carry out the bulk of the clean up operation. Reports describe workers who have been given no protective clothing or adequate shelter and have not been provided with basic sanitation and health facilities. While loss of life was heavier amongst fisher communities, Dalits have suffered significant loss of life, loss of shelter, property and livestock, and the inundation of their agricultural land.⁸²

Discrimination on the basis of age and gender will thwart attempts by women and children from claiming their entitlements in relation to property rights. Rules that relate to succession are likely to be used to exclude both from their lawful legacies. Children and older people are likely to be vulnerable to having property rights held on their behalf expropriated by their trustees, as are wives in relation to jointly owned property held by their husbands.

Ongoing Conflict

Ongoing conflicts in Sri Lanka and Indonesia will continue to displace and dispossess those living within the conflict zones. The coastal areas impacted by the tsunami have strategic importance because they could be part of supply lines of insurgents, as in Aceh and Sri Lanka, or form part of the forward defensive lines of rebels, as in the Vanni, in Sri Lanka. So some of the realpolitik behind the declaration of exclusion zones, ostensibly purely for safety purposes, could be related to security issues.

There are of course other grave concerns: Has TNI a stake in land settlements as well as in the proposed resettlement solutions? Given that the conflict in Aceh has always

⁸¹ NCDHR, *Overall Situation* [online]

⁸² Minority Rights Group International (MRG) [online]

been about resources, could this be a new stage, where land is added to the other resources over which the conflict has raged?

At another level conflicts are always about hegemony. One of the principle characteristics of States is the capacity to collect taxes. Records are required to do this. Land records are very useful in this regard because they simultaneously identify landowners and locate assets that can be seized in lieu of payment of taxes. So contestation about political legitimacy is frequently expressed in terms of which side of a conflict gets to keep 'authoritative' land records, authorises transactions and levies land taxes. However political and territorial sovereignty can be distinguished, as in the Liberation Tigers of Tamil Eelam (LTTE) controlled Vanni, where the Sri Lankan government has ceded land administration responsibilities to LTTE, without surrendering its political sovereignty.⁸³

At a more fundamental level, the parlous security situation in the conflict zones creates risks both for those living and working amongst the violence.

Meanwhile, security situation due to armed conflict in Aceh, has been a threat to humanitarian volunteers in Aceh currently posted in Aceh. The Indonesian National Arm(ed) Forces (TNI) has claimed 34 armed contacts in post-disaster Aceh alone (Even though according to KONTRAK this report could not be verified at all). This situation has been a source of worry for the personal safety of local, national and international volunteers.⁸⁴

The spectre of danger and insecurity can be used to great effect by parties seeking to control the recovery effort. In Sri Lanka the exclusion zone imposed on the coastal belt by the Liberation Tigers of Tamil Eelam (LTTE) was reported to be enforced by a statement from them that another tsunami was coming. In Aceh some sources postulate that any if foreign aid workers were harmed by unknown assailants, this would be used by the military to force aid workers to leave Aceh.

Key actors and their motivations

Civil Society

One aspect of the mass outpouring of sympathy that followed the disaster that has almost been forgotten was that thousands of people whose homes were not destroyed by the earthquake or the tsunami provided shelter in the immediate aftermath for those who lost everything. These people in a sense risked their own security of tenure, especially if it was weak in the first place, or reliant on their possession, by doing so. Those who continue to provide shelter for those who lost their homes are accumulatively risking their security of tenure by doing so.

Some analysts have identified the importance of social solidarity for the effectiveness and timeliness of the humanitarian response to the disaster and its potential to contribute to the longer term struggle to recover and rebuild communities.

In the longer term, as the relief phase of the emergency response turns to recovery and reconstruction, villages are being adopted by concerned individuals and small groups who believe that they can rebuild properties quicker, more cost-effectively and with greater sensitivity to beneficiary needs than the state and international agencies. With Sri Lanka's track record of aid absorption standing at only 14%, they may be right. Perhaps, as the Sri Lankan government's Task Force For Rebuilding the Nation and the World Bank considers how to go about building 80,000

⁸³ Scott, J. 1999, **Seeing like a State**, Yale University Press, Boston

⁸⁴ ----- 2005 **Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights**, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), translated from Bahasa Indonesian, 16 February

*new homes, they should reflect on the possibilities of engagement with private individual assistance.*⁸⁵

Local not-for-profit groups have also been crucial in mobilising to provide relief and shelter to victims and for cleaning up the tonnes of debris the tsunami dumped along the coastlines it smashed.

In some countries, like India, where civil society and philanthropy are well developed, local not-for-profits are also going to play extensive roles in recovery and reconstruction. However, in other countries they are already struggling to deal with casualties amongst their staff and their families, the burdens of long hours and additional responsibilities and the legacy of repression and intimidation. INGOs whose modus operandi depends on collaboration with local partners are going to have difficulty finding them in some places.

Women

If, as many people have suggested, fewer women survived than men, and young adults were more likely to have lived through the killer waves than the very young and the very old, what does the future hold for the younger women who did survive? One startling feature of the demography of Indonesia is the very high level of maternal mortality. This has serious implications in relation to the capacity of the surviving population to rebuild itself⁸⁶ and for the circumstances (marriage formation, the right to education, reproductive health) under which this may take place.⁸⁷

Islamic law provides that daughters shall inherit at least one-half of amounts inherited by sons. Nothing is more controversial about *shari'a* law in Indonesia than this provision. Under the Indonesian Compilation of Islamic Law⁸⁸, described as the living law of Muslims in Indonesia, or the positivist codification of consensus of Indonesian jurists, sole surviving daughters can inherit the entire estate of their deceased parents. Other heirs, for example the sisters and the brothers of the deceased, are blocked by her from receiving any share.⁸⁹

*Under customary laws, women are treated differently from men. Under the Tesawalamai Code, a married woman is not a "femme sole", she is subject to the marital powers of her husband. For example, women require their husband's consent for the alienation or mortgage of their immovable property. In certain cases where the husband refuses consent or consent cannot be obtained (the husband is missing or abroad), the woman may obtain court permission to alienate or mortgage her property.*⁹⁰

Some sources observed that this is a disaster that has created vulnerabilities in relation to property rights that are largely determined by age.⁹¹ It is noteworthy that the draft 'Blueprint' for reconstruction of Aceh, which the Government of Indonesia is in the process of finalising, has a strong emphasis on providing funding for the residential care for orphans, against the sense of very recent legislation of care of children.

⁸⁵ Harris, S. 2005 **The role of local solidarity in Sri Lanka's tsunami disaster response**, Peace Studies Programme, Colombo, 3 February

⁸⁶ Ines Smyth 15/02/05

⁸⁷ Ibid

⁸⁸ **Instruksi Presiden, Inpres**, No 1 (1991)

⁸⁹ Bowen, op. cit. pg 195

⁹⁰ ----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre for Policy Alternatives, pg 31

⁹¹ Ines Smyth 15/02/05

Younger people

Some younger people are reported to have already succumbed to boredom and frustration. Students at Syiah Kuala University in Banda Aceh mounted a protest a month and half after the disaster demanding free tuition for one semester and shelter for themselves and their lecturers.⁹²

However, access to education, protection from the rain and jobs may be the least of their worries. The loss of life in some places will create enormous pressures on social, political and legal systems that transfer wealth and status between successive generations.

For example, under *shari'a* law, orphaned grandchildren have no inheritance rights. Neither do adopted children. Although Islamic law (fiqh) books clearly provide that orphaned grandchildren cannot inherit, because inheritance can only be through parents, the Indonesian Compilation of Islamic Law, provides that orphaned grandchildren do inherit.⁹³ The ground cited for this reformist adaptation are humanitarian, orphaned grandchildren are most in need of inheritance and should therefore not be deprived. Classicists, on the other hand, defend the preceding arrangement on the grounds that their needs can be met by gifting. As noted elsewhere there are constraints and checks on both gifting and bequests within Islamic jurisdictions.

Older people

Loss of so many of the elderly and of the graves of ancestors must have a profound impact on ties to land and its access to its fecundity. What will be the impact on the claims of (often the youngest) children still living with their parents at the time of the disaster, to rights in the property retained by their parents?

The promise of a bequest secures the affections of beneficiaries and ensures that older people are cared for, often by their youngest daughters. Strict form for both gifting and bequeathing agreements in *shari'a* law is ensured by the requirement that they are evidenced by the written consent of all the legal heirs.

Investors

Tourism is a critical industry in the lives of those living in poverty around the Indian Ocean. Some would argue that tourism is often driven by foreign private sector interests and contributes little to poverty elimination. Indeed it can disadvantage the poor through displacement, increased local costs, loss of access to natural resources and social disruption.

The counter-argument is the tourism industry is dependent on the cultural, human and natural resources and a functioning local infra-structure of the countries it occurs within. This dependency means the economic development of the industry has great potential to benefit the local community. This dependency is recognised by the industry itself, meaning community development is considered within various competing business priorities.

A critical challenge to the latter view has been a lack of effective institutions where the interests of the industry and the community can come together. When considered

⁹² Jakarta Post, 15/02/05

⁹³ **Instruksi Presiden, Inpres**, No 1 (1991)

in a post-disaster situation, local government or community/industry inter-faces will be stretched beyond their capacity. Hotels have a business imperative to re-open trading, which challenges any meaningful consultation over access to water and land.⁹⁴

***Phuket : Kamala Beach :** This was one of the worst-hit areas of Phuket - a busy, tourist beach once crowded with hotels, restaurants, pizzerias, internet cafes, bungalows and shops, built right up to the beach in a great unplanned and ugly jumble. Our guide tells us that Kamala Beach is all public land, and most of these hundreds of businesses have no papers and no legal rights to be here. So technically, Kamala Beach is a huge squatter settlement, albeit a highly entrepreneurial one. But its clear that everyone is paying something to someone, with all this money being made here. There is already intense re-building going on here, concrete blocks and bags of cement being unloaded from lorries, the sound of hammering - it's clear the wave was a boon for carpenters at least! Many buildings here were badly damaged, but a lot is still standing and seems to be repairable. But what a colossal mess⁹⁵*

There is a sense that Banda Aceh up to this point has been quarried by the FNI. There has been very little value added to the abundant raw materials extracted from Aceh; all that has been done elsewhere, particularly on Java. This means there has been little manufacturing investment in Aceh and therefore not many jobs. That might not have been because of lack of business opportunities in this regard, nor was poor security necessary a cause of low investment, rather this was a means of ensuring that profits were accumulated elsewhere.

Local government

In all countries affected by the earthquake and the tsunami there are obvious signs of intense contestation between local and central governments over who controls the reconstruction agenda, and internal struggles within each level, although less obvious to outsiders, are also likely to be intense.

Ongoing arm(ed) conflicts and political crisis in local and national elites level affect the crisis management process in post-disaster Aceh. Negative reactions towards the arrival of foreign forces and volunteers, have turned to be (sic) unique political commodity among national political elites. As a result crisis management effort in Aceh could not be done optimally.

In Aceh, the Tsunami disaster has revealed the leadership crisis among the bureaucrats. Aceh Deputy of Governor, Azwar Abubakar, seemed to have failed to handle the occurring crisis. As a result, the situation has served as a justification for the central government to overtake the bureaucratic leadership.⁹⁶

In Indonesia, this battle is being fought quite openly. Despite the President giving BAPPENAS, the planning ministry, until the 26 March to come up with a 'master plan', local government agencies have been unable to restrain themselves, and have moved forward with their own dashing, if somewhat bizarre plans.

A 'war' is now going on in Jakarta and Banda Aceh over reconstruction (sic) concept and policy. Some time on the second week of Feb, the Department of Public Works has issued a reconstruction concept for Banda Aceh, the basic idea of which is relocation of communities along the coastal lines; 2 kms from the sea line should be free from settlements; a high wall that costs 600 billion IDR (Indonesian rupiah) is going to be constructed along the sea line; 2 new, modern and futuristic cities and 1 central business district are to be constructed outside Banda Aceh (a rush of land

⁹⁴ David Bright, Oxfam kindly provided this advice to the author.

⁹⁵ ACHR - Report from Tom's visit to Phuket and Phang Nga Provinces, with CODI team, January 8 - 9, 2005 [online]

⁹⁶ ----- 2005 Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), translated from Bahasa Indonesian, 16 February

*buying by local and national govt persons and speculators is now happening already in the planned area).*⁹⁷

Banda Aceh is thought by some sources to be one of the most corrupt polities around. The Governor of the province, who may be leading by example, is currently facing charges of fraudulent expropriation from the provincial fisc. Sources also claim that places in camps provided for those who have been displaced are being 'sold' by local officials.

In many countries, local governments are the provincial bases of parties who are in opposition to central governments, and they are, therefore, easily marginalised by the declaration of national emergencies, as are the niceties of constitutional divisions of responsibilities and powers. Local government is also where civil servants serve out their days, some of whom were chronically ineffectual before the disaster and are now even less able now to cope with the new demands and the new money coming from the outside.⁹⁸

Executive

Power struggles within the Executives of tsunami-affected countries appear to be endemic throughout the region and are predicted to have an impact on recovery coordination. In Indonesia and Sri Lanka, for example public displays of tensions between presidents and their deputies are a matter of general concern.

On 18 January 2005 Government and the Legislative body have agreed to establish Exclusive Authority Body (BOK) to implement the blue print of rebuilding of Aceh and Nias post-Tsunami. BOK will overtake the role of Coordination Body of Disaster and Refugee Management in Aceh and Nias, which was under Vice President Jusuf Kalla (Kompas 19/01/2005).

For the management of Aceh VP Jusuf Kalla explained that there will be two structures to handle Aceh. First, Bakornas to handle aid management and refugees, second BOK to rebuild the damaged infrastructure.

Aceh Reconstruction process is a matter that is prone to conflict of interests among the elites.

The worry of many parties that this will be the business interest of national entrepreneurs, (and this) is not without a reason. Still in the post disaster relief phase, Artha Graha, a business corporation led by Tomy Winata, has signed MoU with the government of Western Aceh Principality to undertake city reconstruction and rehabilitation projects. Artha Graha has even given the blue print Meulaboh town development (www.acehkita.com 23/01/05) . One thing, in a business context it is very common for national entrepreneurs, considering Western Aceh is a principality with economic potential in farming sector and industrial crops forestry.⁹⁹

This jostling for power opens up opportunities for those with connections in political elites to gain patronage and special dispensation. This has serious implications for the possibility that valuable property surrendered in the name of improving disaster preparedness will be diverted to well-connected investors.

Judiciary

Throughout the region, judiciaries are dominated by Executive branches, underfunded, corrupt and widely distrusted. To their credit, many states in the region are

⁹⁷ Urban Poor Coalition, **Letter from Aceh**, [online]

⁹⁸ Ines Smyth (Oxfam Global Policy Advisor) 2005. Email. 07/03/05

⁹⁹ ----- 2005 **Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights**, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation), translated from Bahasa Indonesian, 16 February

tackling this critical governance deficit. In Indonesia the situation was improving but reforms to date have failed to address many of the fundamental problems.

The process of legal and judicial reform, which began in May 1998, has stalled somewhat during the recent period of political upheaval. However, the Constitution has been amended to limit the power of the President and in favour (sic) of greater parliamentary control. The courts are no longer under the administration of the executive, but are now situated under the administration and supervision of the Supreme Court. Nevertheless, corruption in the judiciary remained endemic and popular distrust of judicial institutions persisted.¹⁰⁰

In India problems of discriminatory lack of representativeness and selective impunity persist.

The independence of the judiciary continued generally to be respected in India, but the judicial system remained overburdened and financially dependent on the executive. At the beginning of 2000, protests by lawyers over proposed changes to the rules of practice turned violent, and the Government appointed a commission to investigate the extreme response of the police and security forces. Debate continued regarding the imbalance in representation at the higher courts, particularly with respect to lower castes and indigenous populations.¹⁰¹

In Sri Lanka, parallel systems of justice are not delivering justice to litigants, especially Tamils.

Tamil litigants and lawyers face serious language problems, particularly in Colombo: interpreters are not available, few judges can function in Tamil, publication of legislation and emergency regulations in Tamil is not up to date and law reports and text books are not available in Tamil. In the areas held by the LTTE a court system has been developed by the LTTE which does not function at all as an independent judiciary.¹⁰²

It is not just that courts in the region are flawed, they are also operating in complex heterogeneous environments. For instance, Islamic courts in Aceh are charged with determining how inheritance is split up between heirs. Civil courts can and frequently do get involved in determining what property was owned by the deceased. In a subtle and complex interplay where each court seems to either anticipate or act as some kind of proxy for the others, a great deal of inter-jurisdictional shopping around could be expected to be the norm.

Most of the civil court judges come from outside Aceh and consequently fled during the Javanese pogrom in 2000. Most of the Islamic court judges are Acehnese. This suggests that the Islamic courts are better at interpreting, or are expected to interpret the local *adat* more effectively than the civil courts.

Military

Both the military and the rebels have been praised for the constructive role they played in the initial relief phase in both Indonesia¹⁰³ and Sri Lanka. Some Indonesian sources who do not want to be identified have suggested that the military are hoping that local demand for building materials will compel the central government to lift its moratorium on logging in Sumatra, allowing them to re-enter the business both as producers and providers of ‘security’ for other concessionaires.

Sources stress the importance of disaggregating the military into its diverse components and to realising some elements will be amenable to cooperation with aid

¹⁰⁰ INTERNATIONAL COUNCIL OF JURISTS - **India – Attack on Justice** [online]

¹⁰¹ Ibid

¹⁰² INTERNATIONAL COUNCIL OF JURISTS - **Sri Lanka - Attacks on Justice** [online]

¹⁰³ **Oliver Lacy-Hall** 14/02/05

agencies and some will not. However the necessity of being able to get on with local commanders was stressed by informants in both Indonesia and Sri Lanka.

It is difficult to see how prolonging high concentrations of military personal in tsunami damaged areas that the relief effort required, would be very constructive in relation to recovery phase.

Given the military's poor human rights record in Aceh, its prominent role in the transport of thousands of Acehnese from spontaneous camps to the barracks sites, involvement in camp management, and aid distribution within barracks would invariably create fears among the displaced population. This could prevent displaced persons from making a free and informed choice on relocation, including the option of returning to their place of origin. The participation of the police paramilitary brigade (Brimob) would raise similar fears due to its history of abuses in Aceh.¹⁰⁴

Rebels

Similar remarks were made by informed sources about rebel forces not being totally homogenous in agenda or outlook.

Neither the independence movement, GAM (Gerakan Aceh Merdeka), nor the various associations calling for Acehnese self determination (in particular SIRA, the Sentral Informasi Referendum Aceh) have called for the implementation of shari'a¹⁰⁵

The reason cited by sources that the Liberation Tigers of Tamil Eelam (LTTE) have doubled the residential exclusion zone from that declared in the south by the government of Sri Lanka is strategic. The Sri Lankan army has in recent times changed its tactics (because of serious setbacks and heavy casualties) to dropping special forces patrols behind LTTE lines and carrying assassinations of key LTTE officials and commanders.¹⁰⁶ As they do not have air superiority, they are using the coast to insert these forces by sea. Hence, the LTTE want to remove any civilian cover from these areas.

Similar reasons were cited for the FNI supporting the declarations of no-build areas in Aceh where they have long suspected the legendary smuggling communities of the Sumatra coast have been bringing in arms for *Gerakan Aceh Merdeka* (GAM)

Potential impacts on property rights of tsunami-earthquake

In this section the scale and scope of the impacts of tsunami on these actors in terms of livelihoods, social protection and culture are elaborated. Finally, the mitigation strategies that are emerging to deal with these impacts are described.

The prevailing expert consensus seems to be that national impacts of the earthquake-tsunami will be grave but not crippling, at least in a material sense.

It is fortunate that none of the countries affected, with the exception of Somalia, is among the world's poorest, and that all in the Indian Ocean were experiencing strong growth. Most of the countries affected are middle income or close to it: Thailand, for example, has a per capita income of over \$2000 a year, compared to perhaps \$100 for Somalia. By the same token, most of the food,

¹⁰⁴ Human Rights Watch – **Indonesia After Tsunami, Acehnese Fear Forced Relocation**, [online]

¹⁰⁵ Bowen, op. cit.

¹⁰⁶ INTERNATIONAL COUNCIL OF JURISTS - **Sri Lanka - Senior Tamil Tiger leader killed in Sri Lanka: INTERNATIONAL COUNCIL OF JURISTS calls for investigation**

*water and other relief supplies can and have been purchased locally in these relatively well-developed and well-provisioned economies.*¹⁰⁷

At household level, the specific impact of damage to and loss of property is likely to be much more severe.

*In addition to lost revenue due to displacement, tsunami and conflict affected IDPs as well as non-IDP individuals in tsunami affected areas will have lost the economic assets necessary to restart their livelihood, including livestock and agricultural implements, fishing boats and fishing equipment, commercial stock and business premises, as well as tourism-related premises and equipment. For these individuals, property loss and financial difficulties are compounded by the lack of infrastructure, psychological stress and trauma, and the lack of identity and property documents which make it difficult to prove property ownership and to obtain government assistance, bank loans or insurance.*¹⁰⁸

At an individual level, the larger threat to feelings of self worth and dignity, at least in the short term, could come from chronic un-employment.¹⁰⁹ This could be exacerbated by any delays to business restarting caused by excessive costs or bureaucratic obstacles to restitution of property rights.¹¹⁰

Livelihoods

Some preliminary analysis of the likely livelihood impacts of the earthquake-tsunami in affected areas has already been done.

The disaster is likely to exacerbate poverty in the more severely affected countries and worst-impacted regions within those countries. The disaster shock has badly disrupted livelihoods: the ILO estimates one million lost livelihoods¹¹¹ and OCHA estimates that more than one million are still displaced, although numbers are falling (for example in the Maldives). The extreme, but localised impacts of the disaster had been most severe for:

- Fisheries, aquaculture and coastal livelihoods - important for the poor in fishing communities, but a relatively small part of GDP (66% of the Sri Lankan fisheries fleet was put out of action)¹¹²

- Tourist sector and linked providers of goods and services to that sector (see ODI Opinions: The Indian Ocean Tsunami and Tourism).

- Agricultural impacts are very localised - only around 10% of rice production has been lost in Aceh. The tsunami poses no shock to food security. All the affected countries that import commercially, excepting the Maldives and Sri Lanka, are self-sufficient in staple foods or in exporting. After the first relief phase of the crisis - in which the priority has been to provide the essential needs for survival and minimise disease amongst those affected and displaced - it will be possible to meet food needs within country or in the region, provided the funds are available.¹¹³

*The priority for regenerating livelihoods in the affected areas and the wider economy of these countries suggests cash rather than commodity support to those needing continuing assistance.*¹¹⁴

¹⁰⁷ Overseas Development Institute, **The Asian Tsunami: Economic impacts and implications for aid and aid architecture** [online]

¹⁰⁸ ----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre For Policy Alternatives, pg 32

¹⁰⁹ Mawardy Nurdin, Mayor of Banda Aceh, Rusli Muhammad, Regent Aceh Besar, quoted in the Jakarta Post, 15/02/05

¹¹⁰ More than 60% of the businesses in Banda Aceh were owned by some of the estimated 200,000 Chinese-Indonesians who lived there, many of whom fled the looting and rioting, which dominated the first week of the aftermath, returning to Metal Street in Medan, where they had taken shelter in the 1960s, amidst the anti-Communist/anti-Chinese fervor that swept across Indonesia after an alleged coup attempt by Indonesia's Communist party, the PKI. Christian Monitor, 18/02/05

¹¹¹ <http://www.ilo.org/public/english/bureau/inf/pr/2005/3.htm>

¹¹² ftp://ftp.fao.org/FI/DOCUMENT/tsunamis_05/jan_10_2005/tsunami_10_1_05.htm

¹¹³ <http://www.fao.org/giews/english/shortnews/asiatsunami050114.htm>

¹¹⁴ Clay, E 2005, **Overseas Development Institute**, [online]

A less sanguine estimate of the impact of the tsunami on production may follow a more considered analysis that included disaggregating impacts not just by livelihoods, but also by gender and by accounting for the impact on production of loss of property rights. For example, see the following testimony explaining the connection between residential proximity to fish landing sites and the effectiveness of labour input by women to adding value to the catch.

In the longer term when we were discussing livelihood issues with the women- they were worried about alternatives - as much of their work was tied in with fishing but also integrated with domestic work and that worked as they lived close to the beach - where the fish was landed etc. If their homes were going to be further away, they felt that they would not be able to integrate into the fishing operations as they would be tied up at home.

It appeared to a major concern-and I have a feeling that maintaining rights to those original plots is crucial to their way of life.¹¹⁵

It is hard to see how cash-based assistance would help compensate for the need for women involved in fishing based production to be able to multitask to make their particular livelihoods viable.

This point brings us back to the distinction drawn in the glossary between immovable and movable property. The importance of the 'place' quality of land and its implications for livelihoods and social protection and cultural identity cannot be overstated.

Some sources pointed to the destruction of communally managed infrastructure such as fish markets as being examples of important loss of common property rights that will have important impacts on livelihoods.

The clearest impact on livelihood throughout the region is the loss of one complete fishing and cropping season. This points to the likelihood of temporary food insecurity, short term ill-health and duress sales of remaining assets, mostly land.

Most livelihood strategies of rain dependent rural cultivators are, wherever possible, based on multiple holdings by households of small plots, preferably within different microclimates. This strategy has also been observed in Aceh and could have provided a form of indigenous mitigation against households being completely wiped out by this and other natural disasters.¹¹⁶

For Aceh there is another aspect to this: what perhaps can be called sequencing, i.e. people are saying they need to return before they can start their livelihood activities again, but they cannot return until they have homes, and they cannot have homes partly because GOI wants them in barracks and partly because that is such a huge task.¹¹⁷

Social protection

The progressive destruction of vital elements of social protection arising from loss of property rights illustrates the various impacts of the different stages or degrees of loss. These phases of dispossession have differing scope and scale.

The indignities and dangers of displacement are most keenly felt in camps. There is a sense amongst survivors that life in camps is dangerous and unhealthy.

¹¹⁵ Metta, M. email. 12/02/05

¹¹⁶ Jonathan Brass 15/02/05

¹¹⁷ Ines Smyth email. 07/03/05

Some refugees interviewed at temporary campsites on the outskirts of the provincial capital, Banda Aceh, said they would not object to living in relocation centers guarded by soldiers. But they said they hoped the soldiers' role would be minimal.

"I don't have a problem with the soldiers as long as they don't disturb us and they keep their distance," said Salahudin, 35, a tall, muscular carpenter from Ajun village as he sat in a long green tent at a chaotic refugee camp. "But if we could choose, I'd prefer not be guarded by the soldiers because, based on my experience, they limit our movement."

But others, like a homeless shop owner from Banda Aceh named Mulyadi, said they opposed any role for the military.

"With the military, you can't move around easily," said Mulyadi, 35, as he collected building debris to expand the tent where he has lived for the last month. "I've had enough bad experiences with the military during martial law when they treated me inhumanely."

He said he feared the soldiers would interfere with his ability to look for work outside the center, stopping him if he returned after nightfall and interrogating him about his activities. He suggested the refugees guard themselves.

"There's really no security threat to us," Mulyadi added. "I really don't need to be guarded by the military."

The presence of soldiers might actually invite rebel attacks, warned Nursiah, 55, of Lhoknga village. She said she had no quarrel with the military but was afraid of getting caught up in a skirmish.¹¹⁸

Barracks may hold some attraction for people who become exasperated by the lack of any privacy afforded where 12 families are living in one tent in makeshift camps. However, dissipation of villagers into different barracks can lead to dilution of the social capital needed to validate each others' property claims. Loss of village records can also weaken claims and make claimants more vulnerable to official predation.

However, it is the breakdown of social relations, due to the massive death toll, which poses the greatest threat to social protection. For example, if it is true that so many women have died, the survivors have lost the social protection afforded by formal and informal women's groups.¹¹⁹

Two of the principle rationales for supporting the practice of polygamy in Islam play out against each other in the post tsunami context. After the battle of Uhud in which large numbers of Muslim soldiers died and as a consequence many widows and orphans were left without social protection, polygamy was 'revealed' as a viable social solution in that specific context. In Aceh it has been suggested that more women than men were killed, but that there are also many orphans who have been left behind. This may mean that now is not the right time for local advocacy around the issue of the abolition of polygamy as it may be turned to again as a strategy for providing surviving orphans with social protection.

An alternative, advanced in Aceh, to providing social protection to those whose parents were killed in the disaster, is to place orphans for a time in Islamic 'orphanages', at least until the situation has become more settled, and longer term solutions like adoption programmes can be put in place.

In developing those longer term programmes to provide social protection for orphans, providing assistance to them to allow them to secure the rights in property to which

¹¹⁸ Washington Post, 31 January 2005 - **Indonesians Wary of Relocation Centers**, [online]

¹¹⁹ Ines Smyth, email. 07/03/05

they are entitled will be crucial. Securing this legacy for them will be the best way to ensure that they are able, on reaching maturity, to look after themselves.

Cultural identity

The key central provision of contemporary Indonesian law is the cultural model of bilateral kinship. This model is likely to be severely challenged by the severity of the disaster and its aftermath. For example, the processing of the quarter of a million deceased estates that will be required in Aceh will be more difficult to do equitably than if a discriminatory rule privileging of male heirs was applied.

The cultural diversity of the impacted region needs special attention. This cultural pluralism will affect how different peoples cope with the loss of and transmission of property rights consequent upon the tsunami.

It is likely that sea going minority groups have been disproportionately adversely affected by the tsunami. In Thailand some villages, predominately occupied by Moken peoples, so-called New Thais, were swept away.¹²⁰ However, because of their animism-based, early warning systems, human casualties amongst the Moken were slight, as villages were ordered by their elders to take higher ground before the tsunami hit.¹²¹ The remnant populations of Portuguese-Acehnese living in Lamno were virtually wiped out. As very few of this group lived outside this one devastated village they may have almost disappeared.¹²²

Aceh has a large ethnic Chinese population, who prior to the disaster dominated the formal economy of Aceh, especially where the commercial centers was close to the sea, as indeed was the case for Meulaboh.¹²³ As a consequence, they copped the brunt of most of the damage to stock caused by the mountainous influx of salt water and of the looting that followed. However there are signs that the cultural traditions that helped these people survive the pogrom against them in the 1960's and which has been allowed to flourish since then, will again provided the social capital to help them return and restart their lives.

*After having lost all of their physical possessions in the recent tsunami, the ethnic Chinese of Banda Aceh are **rebuilding**:*

Textile trader Shie Hok Lai lost everything when the tsunami destroyed his shop and home in Indonesia's Aceh province on Dec. 26, but the ethnic Chinese businessman is getting ready to start over again -- in the same place

In a bustling refugee camp in this Sumatra city, Mr. Shie, 28 years old, has signed a formal contract with an Indonesian-Chinese self-help organization, Tolong Menolong, promising to return to the provincial capital, Banda Aceh, in exchange for food, transportation and 500,000 rupiah, or about \$55, in cash.

"By signing this, I'm volunteering to rebuild our community," says Mr. Shie between puffs on a clove cigarette. "But I also agreed not to come back to [the refugee camp in] Medan.

"The relief effort that is helping Mr. Shie return to Aceh provides one clear example of how life has changed for Indonesia's minority Chinese community. It has been openly and actively organizing assistance for Chinese victims of the tsunami. During the 32-year rule of former Indonesian strongman Suharto, which ended in 1998, Chinese were banned from organizing politically and

¹²⁰ **Khun Ravadee** 26/02/05

¹²¹ CBS News **Sea Gypsies' Tsunami Rebuild Curse**, South Surin Island, Thailand, Jan. 14, 2005 [online]

¹²² **The Last Portuguese-Acehnese of Lamno**, Jakarta Post, 17 February 2005

¹²³ Ines Smyth, email. 07/03/05

*faced severe restrictions on communal or community activity. Promotion of Chinese language or identity weren't allowed.*¹²⁴

Mitigation strategies

This section attempts to identify the strategies the actors identified above are beginning to use to mitigate the impact of earthquake-tsunami on property rights. The purpose of this section is to acknowledge the fact that no one is sitting around waiting for this paper or any other development artefact to be finalised before they begin to recover their property. People started dealing with these problems as soon as they realised what had happened to them. Those who want to help first have to understand how survivors are trying to help themselves. Only then can we work out what else can be done and in what ways external assistance can be really useful.

Households

Staking and clearing land are two crucial, *adat* law - based strategies for laying claim to land.¹²⁵ In Banda Aceh markers have been placed around plots that have been abandoned because of damage and debris generated by the earthquake and the tsunami. The act of clearing away the rubble from plots, the first concrete step towards going home, could also be understood by those doing this work as making a claim to ownership (or user) in an *adat* - law sense, in the same way as clearing forest does.

*Many communities occupied their settlements on customary, hereditary or other non-statutory forms of tenure. They are extremely vulnerable to being prevented from returning to their settlements by government edicts preventing settlement within an arbitrarily specified distance from the coast, or by land grabbers with power to disinherit them. All communities or households wishing to return to their previous locations should be entitled to do so. Well intentioned but arbitrary bans on settlement within specified distances from high water levels should be strongly discouraged. Satellite imagery can be used to demonstrate occupation of land before the tsunami. This will enable communities to re-establish themselves socially and economically. It will also reduce the pressure on other areas in cases where households wish to relocate away from the coast. Appropriate communal forms of tenure can be provided to such communities until a more formal status can be agreed.*¹²⁶

Enthusiasm for return, qualified by fears about a repeat tsunami, cannot be doubted.

*One of the urgent activities that is going on back in the Bang Muang camp right now is mapping the old settlement. Architects and CODI staff are working with the people to map the old city, section by section, so there is some record of who lived where, next to whom, and who occupied how much land. Since every bit of the real town was wiped clean by the tidal wave, this rough settlement map will be a crucial base-map for developing a reconstruction plan.*¹²⁷

An important issue, which can only be resolved by close collaboration between the survivors themselves and those working with them, is how to care properly for those who have been displaced without providing incentives which discourage spontaneous return.

The Bhupathi family knew they were lucky: only those who had lived in the first row of houses on the beach had been given this first lot of shelters. At least two more rows of houses before the

¹²⁴ Timur-I-Leng [online]

¹²⁵ Bowen, op. cit.

¹²⁶ Geoffrey Payne, email. 13/01/05

¹²⁷ ACHR - **Report from Tom's visit to Phuket and Phang Nga Provinces, with CODI team, January 8 - 9, 2005** [online]

village road and houses beyond it were damaged. The evening the Bhupathis moved in, masses of people stood in lines along the beach, waiting to be registered in shelters of their own.

"One lady told me, I don't want to go back. This is the best house I have ever had," said CARE's Mohanty, speaking of the new shelters.¹²⁸

This has been widely recognized as contentious, but how support for those in camps can be tailored to avoid dependency, and the proportions of assistance that should go to those who 'choose' to stay in camps, as opposed to those who are voting with their feet, is harder to resolve. Fine words abound. Principles proposed by UNDP around which livelihoods based activities could be coordinated include the following.

***Spontaneous Return:** Considering the sheer numbers of displaced following the Tsunami, not all can be accommodated in resettlement centers. We seek to support those that can and will return home quickly, following a "pull" strategy to areas that we deem capable of sustaining resettlement with a reasonable amount of support.¹²⁹*

Prohibitions by army and civilian authorities against returning before a 'master plan' has been finalised, or before legislation has been enacted, pits those providing aid and those receiving it for spontaneous return against powerful forces with the propensity and the power to use violence to enforce their will. Motives for this kind of diktat warrant close scrutiny.

Resolution 1998/26¹³⁰ also reaffirms the right of all refugees and internally displaced persons to 'return to their homes and places of habitual residence in their country and/or place of origin, should they so wish'. Consequently, if the dispossession suffered by any refugee or displaced person who was forced to flee their homes and lands is deemed to be a human rights issue (as the UN and international law clearly stipulate it to be), it is inherent that the remedy for redressing this violation must also be based on and grounded in relevant law. Given the often-diverse ways by which restitution rights can be obstructed, many housing and property disputes may require remedies developed on a case-by-case basis. Each affected person, including returning refugees, returning IDPs and secondary occupants of housing in which tenancy or ownership rights are in dispute must have the right to effective legal remedies, including the right to a hearing by an independent and impartial tribunal. This accords well with Article 8 of the Universal Declaration on Human Rights that ensures that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".¹³¹

Women

Marriages in Aceh involve husbands going to live in the villages of their wives and wives moving out their villages and going to live with their husbands' kin. Women who moved into their husbands' villages after marriage and who became widowed because of the tsunami are particularly vulnerable to missing out on being able to get their property rights back, as village *adat* and local power structures favour retention of property within the bloodline.

Women interviewed in camps did not publicly admit to being nervous about being able to retain their property rights or claim their inheritance, but in two cases, widows from the same village in exactly these circumstances had both been joined by their

¹²⁸ CARE [online]

¹²⁹ Muench, S. 2005 **Potential Aceh Livelihoods and Recovery Principles**, Mercy Corps, 8 February

¹³⁰ UN Sub-Commission on the Protection and Promotion of Human Rights, Para. 4, Resolution 1998/26, August 1998

¹³¹ -----2003 **Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka** United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May, pg 27

respective mothers who were supporting their campaigns to get back to their matrimonial homes.¹³²

There are problems being caused by lack of any good data about both the victims and the survivors. One particularly quirky variant of this is we cannot be sure that the traditional tactic of biasing development assistance towards women to ensure that it gets to children, will work or not. We cannot yet be sure that more women died in this disaster than did men. Therefore we do not know whether or not most of the child care will have to be provided by men.

However, in Sri Lanka, at least, and maybe in Indonesia, where a pattern of male cyclical economic migration may have also generated imbalanced sex ratios, the pre-existing conflicts had already created a preponderance of female-headed households as more male fighters were killed or incarcerated.

*The number of female headed households has increased both as a result of the conflict and it can be expected that there will be a further increase as a result of the tsunami. The difficulties faced by all IDPs are compounded for women by inadequate assistance, personal security concerns, obstacles to gaining legal title to land and property, the practical challenges of clearing land and rebuilding houses, competing for limited employment opportunities, poverty, and access to affordable child care and primary health care.*¹³³

Principle 4(2) of the *Guiding Principles* provides that certain IDPs, including female heads of household, expectant mothers, mothers with young children are entitled to protection and assistance required by their condition and which should take into account their special needs.

*Establishing and maintaining de facto rights has been critical at least in south Asia struggles for land rights.*¹³⁴

Men

The Indian fishermen who had been displaced by the tsunami, to whom I spoke to during the fieldwork for this paper, reacted to announcements from officials about having to rebuild back from the beach with some scepticism. They pointed out four-story apartment blocks, which had been constructed by the Madras public housing authorities, well inside the line declared as a future no-building zone. These fishermen claimed that their negotiating position would be that they would move as far back as the government desired 'as long as there was nobody allowed to build between them and the sea, so they could tell by looking out from their houses if they were able to go to work. Everyone else, they claimed, had only a vicarious interest in being closer than them to the sea.'¹³⁵

Indigenous not-for-profit groups

In some countries affected by the tsunami, the best and most sustainable policy advice seems to be emanating from NGOs rather than from governments.

¹³² **Two women from Sueleu Village** 15/02/05

¹³³ ----- 2005 **Land Issues Arising From The Ethnic Conflict And The Tsunami Disaster**, Centre For Policy Alternatives, pg 31

¹³⁴ Metta, M. email. 12/02/05

¹³⁵ **C. Kasinthan** 23/02/05

*Wherever possible, affected households should be permitted to return to the site of their original dwellings to minimize dislocation and stress.*¹³⁶

In other places NGOs are focusing on helping people help themselves

In the wake of the tsunami, groups like Tolong Menolong -- whose name is Indonesian for "mutual assistance"(sic) -- have also taken a central role getting Chinese in Aceh back on their feet. The group has tapped Indonesia's affluent Chinese merchant class to raise large sums of cash for relief operations, though Tolong Menolong declines to give the figure. Overseas Chinese groups from Malaysia, Singapore and Taiwan have sent doctors and counselors to Tolong Menolong's refugee camp in Medan, 600 kilometers southeast of Banda Aceh.

*The return of Aceh's Chinese business people is seen as essential to the province's recovery, say relief organizations and local officials. Although they make up less than 5% of the population of northern Sumatra, ethnic Chinese form the backbone of the entire region's distribution and trading networks. In Banda Aceh, Chinese merchants are estimated to own 50% to 70% of the private-sector businesses, and their companies direct the trade of essential goods like cooking oil, rice and coffee.*¹³⁷

The perennial problem, everywhere, as the response by not-for-profit organisations again demonstrates, seems to be coordination.¹³⁸

*When a major crisis like the tsunami happens, NGOs, support groups and relief agencies with much expertise to offer often end up plunging into the crisis in an erratic and scattered way, without coordination and without links between their efforts. It is therefore important to link support groups, NGOs, aid agencies, community networks and relief agencies together as soon as possible, so that all these groups can combine their diverse expertise, develop a common objective and work together to make a more effective, well-coordinated relief and rehabilitation process, in which each group does what it does best. Some of this linking and coordinating task is currently being done by the Urban Poor Consortium, an NGO working in Aceh, by the Abhiyan an NGO working in Tamil Nadu, and by the Community Organizations Development Institute (CODI) in southern Thailand.*¹³⁹

However coordination problems are easier to resolve than those created by divergent agendas of the proliferation of not-for-profit groups who have responded to the disaster in droves.

Each country context provides a different amount of space for indigenous not-for-profits groups to operate. In Thailand, Sri Lanka and Indonesia issues relating to land reform have been very contentious and almost out of bounds for local activists. Many of those who have tried to engage in struggles over land in their own countries in this region have been martyred. Even in India, where indigenous not-for-profit organizations have been extremely active in relation to land reform for a long time, such activism is extremely risky.

This history means that few local organizations in Thailand and Sri Lanka have had much experience in advocacy and even less in terms of programme-based activities, in relation to reparation of property rights. Much of the emphasis in their past engagements, for security and ideological reasons has been to do with trying to help groups assert communal land rights as against their States. In Indonesia, land reform advocacy has had to be packaged in the form of environmental advocacy for any work on land issues to be possible. In Aceh legal aid groups have mostly been working on human rights issues, and have suffered from the repressive response from the military as a consequence. In India issues relating to land reform have become part of the

¹³⁶ ----- 2005 **Land Issues Arising from the Ethnic Conflict and the Tsunami Disaster**, Centre for Policy Alternatives

¹³⁷ Timur-I-Leng [online]

¹³⁸ **Khun Ravadee** 26/02/05

¹³⁹ Asian Coalition for Housing Rights, 2005, **Recommendations from affected communities, professionals and NGOs in Asia** [online]

fabric of social discord, parties are deeply entrenched and the issues that have come to the fore are at the heart of India's reinvention of itself.

The obvious implications of all this is that working solely with local partners will present multiple difficulties and each country context will require a carefully nuanced strategy for whatever engagement is possible. However, the more elusive and perhaps important point to be made here is that the possibility of collaboration with internationally-based charities has the potential to considerably enlarge the space in which indigenous not-for-profits can work, thereby providing a boost to local civil societies in term of experience and clout that may have long term positive political benefits.

International non government organisations

The International Land Coalition (ILC) has identified a useful check list of crucial land issues to be incorporated into recovery phase programming by INGO. ILC, an umbrella INGO parented by IFAD provides a ready to wear partnership platform for international diplomacy

- *If people are resettled away from the shore will they loose the usufructuary rights of shore access for fishing and fish processing?*
- *What incentives can be provided to protect fragile common areas such as mangroves and shorelines, which need to be restored and stabilized in the wider environmental and economic interest?*
- *Having lost citizenship and other documents, how will people claim or provide proof of their user or ownership rights?*
- *Where women have survived and are now heads of households, will they be granted land rights or tenure security in cases where rights formerly rested with their husbands?*
- *How will the potential for abuse through land grabbing by powerful persons or extended family members be avoided?*
- *How can the future inheritance rights of children, now too young to claim their rights, be protected?*
- *Where there are no family survivors, can these lands be identified and used to improve the livelihoods of landless families?*
- *Where people are able to return to their former lands, can security of tenure be improved so that re-development will provide a more sustainable future than in the pre-Tsunami period, where many suffered from insecure rights?¹⁴⁰*

Nevertheless, International Non Government Organisations may have serious problems in adopting best practice in relation to finding the development space within which they can operate. Two sources of 'crowding out' of International Non Government Organisations present. First, governments may be anxious about allowing International Non Government Organisations to intervene in areas like land administration, which are seen as essential to the State project.

Immediately after the tsunami, the Indian government announced that, as a donor nation itself, it had no need of international donors to commit funds to relief efforts in southern India, though it later amended this to welcome aid aimed at longer-term projects.

This, in a sense, gave the bulk of International Non Government Organisations the freedom to bypass immediate relief and focus on planning a longer-term response, while filling in delivery gaps from the government operation.

¹⁴⁰ ----- 2005 ILC Newsletter: **Advancing Together**, International Land Coalition, 5 February

Some agencies, for instance, supplemented government rations of food, equipment and clothing. Others focused specifically on delivering child-focused relief.

But identifying and filling gaps in a coordinated fashion was difficult when working alongside a government that wanted to control and run the relief process but was not setting up the information-sharing mechanisms that are key to making this work.¹⁴¹

Second, well-resourced, national civil societies, such as exist in India, may make much of what International Non Government Organisations have to offer appear redundant.

Meanwhile, International Non Government Organisations have struggled to identify their role amidst the powerful network of civil society organisations – from volunteer groups to established unions – that are uniting to shape the relief and rehabilitation process.

At the last civil society coordination meeting that I attended - a meeting set up by civil society representatives to challenge the Tamil Nadu government's shelter rehabilitation policy - there were over 300 participants.

They included representatives from the fishermen and agriculturist unions, human rights and child rights groups, numerous national and local NGOs, engineers, architects, land-reform lawyers, software specialists and scores of volunteers from all over the country.¹⁴²

Even in India, replete with a burgeoning civil society, there has been what has been described as 'a desperate scramble for local partners'¹⁴³

In some places, despite the obstacles, some International Non Government Organisations have jumped straight in. In Nagapattinam; after one month, the Jesuits in Social Action (JESA) had developed the Nagercoil Plan to acquire land for housing and the Churches' Auxiliary for Social Action (CASA) was providing equipment to fishing cooperatives for desalinating 4,800 acres of agricultural land.¹⁴⁴

Local government

UNDP seems to be using its position as international aid funding coordinator to pursue its decentralisation strategy. This policy approach subverts suspect national government by providing funding direct to provincial level administrations.

This strategy is not without its supporters. The Centre for Policy Alternatives (CPA) organised a workshop entitled "Post-Tsunami Reconstruction of Sri Lanka: Structures and Processes" on 20th January 2005. The workshop was organised with the objective of engaging members of government, civil society, and the international multilateral community in a discussion of issues related to the reconstruction of Sri Lanka after the tsunami.¹⁴⁵

Devolution and decentralisation were key focus points of the discussion. The need for the involvement of local authorities in the design and implementation of the relief and reconstruction processes at the provincial, district and divisional levels was emphasised by both participants and participants. Participants endorsed the need for a bottom-up approach as suggested in the CPA Memorandum, whereby Provincial Councils, Pradeshiya Sabhas and Municipal Councils would be directly involved in the reconstruction efforts. Participants stated that promoting a decentralized approach would ensure greater accountability, by enabling local communities to know what they

¹⁴¹ Jefferys, A., **Viewpoint: India tsunami response tests international NGOs** quoted by AlertNet, [online]

¹⁴² Ibid

¹⁴³ Thekaekara, S. (Oxfam Trustee). **Tsunami Briefing**. unpublished speech. Oxford University, 10/02/05

¹⁴⁴ UNDMT - **Situation Report – India** [online]

¹⁴⁵ ----- 2005 **Memorandum to the Task Force to Rebuild the Nation (TAFREN) on the Formulation of a Comprehensive Development and Infrastructure Rebuilding Action Plan (CDIRAP) and the Preparation of Draft Legislation to set up an Authority for Rebuilding the Nation (ARN) (served as the basis for the discussion)**. Centre for Policy Alternatives

*were receiving and verify Government statements. This would also increase understanding and inform local authorities as to how the overall relief and reconstruction process would impact their specific area. Given that the ARN would be involved in physical spatial planning, a participant noted that it was important for the central government structure responsible for planning to link up with local government and local authorities.*¹⁴⁶

However, unless this leveraging is handled carefully, States are likely to perceive this approach as a direct attack against their hegemony and will consequently use their general foreign affairs powers and their specific controls over visas and inflows of foreign currency to thwart both the supervision and execution of projects delivered in this way.

The critical principle which should determine which is the most appropriate level of government to effectively deliver a specific kind of public service is whether their intervention synchs rather than suppresses complementary private and civil activity in the sector. In relation to land delivery and land administration services, the lowest level of government is not invariably the most participatory, effective or appropriate actor.

Central and regional governments have important responsibilities in relation to the protection of minority land rights, ensuring local land management is resourced so as to be able comply with national and international norms. Regional governments have important fiscal equalisation responsibilities in relation to delivery of land based services. One formula for the intra-government arrangements for reparation of property rights for the whole region will not work. Each context will have to be carefully assessed and international assistance ordered accordingly.

Central governments

Executives

The Executive branches of tsunami-affected States will have to deal with the specific capacity challenges thrown up by the need to provide restitution of property rights to survivors and their descendents where property records have been destroyed.

*54. One interim solution to this impediment is the establishment of adhoc independent housing and property commissions designed to promote and protect the right to housing and property restitution. Yet, these institutions must also have external support in order to meet their heavy caseloads and to overcome the many formidable challenges encountered during the restitution process.*¹⁴⁷

In Thailand, despite the rejection by the Thai Government of the need for international financial assistance, the Deputy Prime Minister, who Chairs a Task Force on Cooperation between Government Civil Society and NGOs has made a commitment on behalf of the government not to block Thai NGOs from accessing funds for tsunami response from foreign NGOs. Despite this assurance, the Thai government has made it clear that it wants to take charge of all resettlement and indications are it will be involuntary and without compensation.¹⁴⁸

There are signs that Executive branches of government in the region are using the disaster to further concentrate power in their own hands, and by so doing, are compromising constitutional guarantees of property rights.

¹⁴⁶ Centre for Policy Alternatives 2005. email. 08/02/05

¹⁴⁷ ----- 2003, **Housing and property restitution in the context of the return of refugees and internally displaced persons**, Preliminary report of the Special Rapporteur, United Nations, Economic and Social Council

¹⁴⁸ **Khun Ravadee** 26/02/05

Legislatures

Legislatures within the region must become engaged in supervising the administration of relief and recovery activities and related expenditures. Those executing recovery programmes, which will inevitably involve exercise of discretion in relation to restitution of property and resettlement, must be made accountable to national and local constituencies. The high reported levels of pre-tsunami corruption throughout the region, particularly in relation to land administration, can only be addressed by democratically enforced transparency mechanisms.

The problems associated with lack of accountability in Sri Lanka were directly addressed at a government/civil society workshop organized by Centre for Policy Alternatives three weeks after the disaster.

*Panellist J.C. Weliamuna of Transparency International suggested that existing mechanisms were not in a position to be effective in combating corruption. The problems with existing mechanisms include: the Committee on Public Enterprise (COPE) and the Public Services Commission (PSC) are over-burdened; the Auditor General's office lacks capacity and powers; the key anti-corruption body is no longer active and is a non-entity; the political will to fight corruption is lacking; and a parliamentary budget committee does not exist.*¹⁴⁹

The following recommendations, which could well have application throughout the region, were made to overcome these deficiencies.

- *full time officers in the new body created by the Government (the ARN);*
- *a public information officer to make information available to the public and the media;*
- *a parliamentary committee that would have powers going beyond those of COPE and PSC (potentially a standing order for a parliamentary committee), would issue reports at least once every six months, and would have supervisory powers to visit affected areas;*
- *strengthening the capacity of the Auditor General's office; moving to a value-for-money auditing system as opposed to the current compliance auditing practices;*
- *increased physical verification of projects;*
- *integrity pacts, and the involvement of neutral and qualified persons in the monitoring of major contracting processes; and*
- *public disclosure by all actors, including political parties, religious bodies and NGOs, in accordance with best practices.*¹⁵⁰

Judiciary

Lowering the standard of proof required to have rights re-registered would be a helpful, although somewhat risky way of dealing with the inevitable avalanche of claims that are likely to be made to have undocumented rights in property recognised.

*Owners of private property, where no copies of the deed exist, should be allowed to submit an affidavit to the District Land Registry claiming ownership. Such affidavit should be supported by testimonies by competent witnesses such as neighbours or grama sevakas.*¹⁵¹

The likelihood is that if these kinds of arrangements are put in place by administrators, it is probable that at some point, they will be subject to judicial challenge. In most jurisdictions, these challenges will be heard in the civil courts. Consistency will be the key to avoiding endless litigation and help claimants know

¹⁴⁹----- 2005 **Report on the Workshop on Post-Tsunami Reconstruction of Sri Lanka**, Centre for Policy Alternatives, 20th January

¹⁵⁰ Ibid

¹⁵¹ ----- 2005 **Land Issues Arising From The Ethnic Conflict And The Tsunami Disaster**, Centre For Policy Alternatives , pg 24

where they stand. These courts would greatly benefit from the development of some suitable standards they could apply to questions of evidence of property rights and some training in their use.

In Sri Lanka, at least, existing rules about what constitutes valid proof of property ownership are broad enough to allow most bona fide claimants to be able to verify their rights. This framework could provide a template for use in other jurisdictions.

*A variety of types of evidence, in addition to formal property records, are admissible in many of the existing restitution procedures, including: verified sale contracts, verified gift contract, inheritance decision with legal validity, court decision on ownership, valid decision made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, utility bills, construction license or building permits, usage permits, contract on use of apartment, excerpt from official records, decision on allocation of apartment, decision on apartment rent or rent levels, apartment rent slip, decision by which the apartment is declared abandoned, certificate of place of residence at claimed apartment, utility, phone, gas, bills, eyewitnesses, personal identity cards, car registration, census records, personal contracts, dismissal records and others.*¹⁵²

Equally encouraging some jurisdictional flexibility within the court hierarchies of tsunami - impacted States to allow for swift resolution of property disputes would be a cheap and easy way to enhance the delivery of justice for survivors. Under Thai Law, for example, where an issue relating to immovable property is involved in a case, the plaintiff has to bring a lawsuit to the court where such property is situated, or where the defendant is domiciled. For disputes on civil matters occurring outside the territorial jurisdiction, the Civil Court has discretion either to try and adjudicate those cases or to transfer them to the court having territorial jurisdiction.¹⁵³

Military

The disaster has already been used both as a bridge to peace and a cover for continuing hostilities. How recovery is handled in the contexts of ongoing conflicts within Indonesia and Sri Lanka will significantly impact how reparation of property rights in both countries can be effected.

The voices of local civil society need to be carefully listened to by the other actors in relation to how these delicate situations can be best managed.

*The government steps to resume peace negotiation with GAM (Gerakan Aceh Merdeka) is the right step to start Aceh reconstruction process. But what needs to be taken into consideration is how to keep (sustain) and manage negotiation flows with GAM. In this context, it is better for the government and GAM not to start negotiation directly about substantial political matters, but to agree on creating a conducive atmosphere temporarily to accommodate the reconstruction process and to ensure that Aceh rehabilitation could be done optimally (emphasis added in original).*¹⁵⁴

Bilateral and multilateral aid organisations

Whilst there is evident gratitude for the overwhelmingly generous response of the international community to this disaster within elites of affected countries there is, not surprisingly, some hard headed scepticism at work as well and some cautionary advice for those whose naivety might outrun their philanthropic generosity.

¹⁵² -----2003 **Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka** United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May, pg 33

¹⁵³ Helplinelaw - **Courts and Judiciary in Thailand** [online]

¹⁵⁴ ----- 2005 **Ensuring Legal Certainty for People of Aceh to Obtain Property and Basic Rights**, Yayasan Lembaga Bantuan Hukum Indonesia (Indonesian Legal Aid Foundation)

The spontaneity of international solidarity towards Indonesia as the worst hit area of the Tsunami disaster is relatively vast. Under the request of the Chief of Indonesian National Armed Forces (TNI), General TNI Endiartono, foreign countries has started sending supplies 3 days after the disaster. Even though they play an effective role on the field, their presence has been seen as an impediment for the existence of local political authority (TNI). There are at least 15 countries sending supplies through the government or NGOs, notably Malaysia, United Arab Emirates, Taiwan, United States, Australia, Singapore, The Netherlands, Czech, Dubai, United Kingdom, Spain, Japan, France, Poland, and China.

Nevertheless the problem remains until now, the uncertainty of whether these help is in the form of aid or loan to the Indonesian government? The government has rejected the offer of debt write off from the Paris Club, for fear of the worsening of creditworthiness in international financial market (Kompas, 14/01/05). According to Azwar Azis, help in the form of aid only consist of 30 %, while the rest are in the form of soft loans.

Another side that needs to be tackled if the problem of aid management and the monitoring of the use of the aid given to Aceh. In this case, Azwar Aziz, a member of Monitoring Team of Aceh Nias Disaster (People Legislation Forum-DPR) emphasized the need to monitor and ensure the accountability and usage of aid according to its purpose (Media Indonesia, 19/01/05). There are 3 flows of aid to the victims of Tsunami disaster that is through the government budget, international help and NGOs.

Within the context of monitoring and evaluation, it is advisable for the government to form an independent body involving all components of the population, which have full authority in running its affairs.¹⁵⁵

Multilateral assistance for tsunami victims is being mobilized around a UNDP led coalition of UN family's agencies and is to be financed out of a fund managed by UNDP, which will hold contributions from donors. Output 3 of the joint UNDP/Government of Indonesia Aceh Emergency Response and Transitional Recovery (ERTR) Programme contains the following sub project, "Recovery of housing, settlements and associated infrastructure".

UNICEF in Sri Lanka have placed staff in all Government Agent offices of provinces where they are providing assistance, bypassing central government completely and effectively dominating planning and delivery.

Support to local authorities and communities in dealing with housing, land and property rights (HLPRs) resolution: *It is widely recognized that many residents in both urban and rural areas did not possess legal title to lands, or such titles were lost during the tsunami. It is anticipated that returning survivors or the kin of victims may encounter competing claims for title to houses or land or to property. This is likely to be more of an urban than rural problem as in the case of the latter such disputes are normally resolved through traditional mechanisms. This sub-project aims at building a dedicated capacity within local authorities that can address HLPRs issues and establish effective restitution mechanisms, as well as at strengthening community-level capacities for dispute resolution. Technical support will be provided together with the necessary training and infrastructure inputs.¹⁵⁶*

The analysis provided above is somewhat insouciant. Disputes around property rights in urban land are also likely to be more intense than in rural areas because the land is more valuable. Access to courts and official favour are also likely to exacerbate the cost and frequency of these conflicts.

This very apposite work is to be undertaken in collaboration with a range of partners, including notably UN Habitat, with whom UNDP is developing a partnership

¹⁵⁵ ibid

¹⁵⁶----- 2005 Aceh Emergency Response and Transitional Recovery (ERTR) Programme (draft for discussion), United Nations Development Programme and Government of Indonesia, 31st January

agreement with inputs from *local, national and international NGOs and TA providers.*

PART III: RECOMMENDATIONS

Recommendations to national governments, bilateral development partners, UN and international agencies

Recommendations to each class of development actor are made on the basis of the categories of threat to reparation of property rights identified in the proceeding analysis; material threats, administrative threats and threats to legal and human rights.

It is important to acknowledge that many important medium-term decisions about reparation of property rights have already been made, often on the basis of much pressure and insufficient information. Therefore the imperative requirement is for some immediate, doable responses to the need for protection of the property rights of the vulnerable.

Action is needed urgently to protect the tenure rights of all residents irrespective of their tenure status, at least on a temporary basis until longer term options can be formulated AND agreed by the residents. Local communities should have a paramount role in this issue.¹⁵⁷

National governments

It is almost impossible to over-emphasize the depth of pessimism, even cynicism, amongst experts within the diasporas of affected countries and the expatriates who know these countries well about how national governments will be able to respond to the challenges posed by post-tsunami recovery.

Where has all the learning gone? Need to keep an eye on extent to which the occasion is used as an opportunity to clear slums and people you don't like (cf. in past informal settlements formalised, clearing out ethnic groups in Western cities, etc). The planning phase becomes an instrument of politics. Also keep an eye on the extent to which tsunami has been used to tap into international funds to do things governments always wanted to do but couldn't afford (e.g. Sri Lanka). Opportunities for new forms of land tenure to emerge as communities rebuilt. 'How little do we need to do to help people help themselves?' a better question than 'how much can we do to help?' Top officials not interested in community based engagement.¹⁵⁸

A group of UK based professionals, academics and activists with vast experience of reconstruction around the world has recommended a somewhat circumscribed, but still central role, for government in recovery rebuilding.¹⁵⁹

Government efforts should concentrate on rebuilding major infrastructure systems such as roads, bridges, railways, harbours and public services. Since the next monsoon season is only three months away, it is imperative that such works are given high priority.¹⁶⁰

Focusing on this crucial agenda may increase the effectiveness of national governments and be of central importance to allowing people to get back to their homes.

Best Practice Example

¹⁵⁷ Payne, G. email. 15/03/05

¹⁵⁸ Prof. Hamdi, N. **Panel Discussion Global Responses To The Tsunami**. Unpublished Speech. Brookes University. 24/02/05

¹⁵⁹ Following the initiative of a small and very hard-working group of people (among them, several members of the International Development Network), a new organisation, the Tsunami Recovery Network has been set up. It has a website, which is now "live" and welcomes the exchange of ideas and information. The site address is: www.tsunami-recovery.net

¹⁶⁰ International Development Network Bulletins – **Tsunami Recovery Professionals Network Statement** [online]

National governments in the region have all been challenged by the magnitude and form of this disaster. Some have obviously done better than others in responding. One of the smallest affected States, Republic of the Maldives has received an inordinate amount of praise for how it has handled the crisis. The key feature of their response that seems to have been the determinate of their success so far seems to have been a hands-on, participatory approach. Transparency backed up by rigorous accounting, good cooperation between both the armed forces and civilian wings of government, the establishment of a single fund for both externally and locally sourced relief and recovery finance administered by Ministry of Finance and Treasury overseen by a mixed private public sector board, all seems to have helped to smooth the transition from relief to recovery.¹⁶¹

Additionally, it seems as though the Maldives government's pre-tsunami development strategy, to encourage voluntary migration to safer, higher atolls, could be adapted and even accelerated as a strategic response to the recovery phase of the tsunami. By using a heads up approach to global warming, Republic of the Maldives already had a governance culture that had prepared it for responding to this natural disaster.

All this would not have been enough on its own, however, without a flourishing civil society to provide the social and human capital to do the work necessary to begin rebuilding.

Although traumatized, island communities have demonstrated a strong sense of independence, resilience and cohesion in mobilizing themselves into groups to remove rubble, initiate small scale reconstruction activities on mosques and houses, distribute relief supplies, and sheltering those made homeless. In a country of many small islands, community organizations have traditionally played an important role in providing public and collective services as in many other areas of local life. The capacity of communities to mobilize themselves represents one of the most important assets for the reconstruction work ahead. Community mobilization and self-help needs to form a cornerstone and a key organizing principle for demand-driven local recovery programs, and strengthening of community capacity is important to assist them play their role effectively.¹⁶²

Other countries, where, for whatever reason, little space has been provided civil society to operate in, might find that when they are needed the most, in times of crisis, there is no one to mobilize communities, insufficient trust to allow people to help themselves with any confidence they would be able to retain the benefits. As a consequence of failure to cultivate a vibrant civil society, inefficient, but emphatically repressive governments would have to face passive sullen populations of survivors sitting around waiting to be fed and housed.

Best Practice Guide to Restitution

The following code, a modified version of one developed by UNHCR for inclusion in a peace agreement between the parties in conflict in Sri Lanka could be used a basis for memoranda of understanding between receiving States and donors.

1: Equitable, transparent and non-discriminatory institutions, procedures and mechanisms to assess land, housing and property claims should be established directly within peace settlements and voluntary repatriation agreements

2: A human rights-based approach to return and the recovery of refugee and IDP land, housing and property will yield the best, fairest and most sustainable result

¹⁶¹ ----- 2005 **Republic of the Maldives Tsunami: Impact and Recovery Joint Needs Assessment**, World Bank-Asian Development Bank-UN System, 8 February

¹⁶² Ibid

PART III: RECOMMENDATIONS

3: *A consistent legislative and administrative framework is indispensable for resolving land, housing and property issues*

4: *Consistency between domestic law and relevant international standards should be ensured*

5: *Flexible and effective remedies based on IDP and refugee choice should be established*

6: *Restitution claims processes should be free, simple and equitable*

7: *A commitment to strenuously enforce decisions on land, housing and property rights by the parties will be vital to its success*

8: *Reversing the application of unjust or arbitrary applications of law relating to refugee or IDP land, housing or property will ensure that the rights of returnees are fully respected*

9: *Land, housing and property issues can only be adequately redressed if the rights of secondary occupants are fully respected*

10: *The repair and reconstruction of damaged housing should be seen as an indispensable element of any return and restitution claims process*

11: *Housing and property registration systems are central components in the redress of land, housing and property claims*

12: *Ensure that appropriate compensation systems are in place*

13: *Privatisation can seriously complicate restitution efforts*

14: *Restitution claims are not rendered void due to the passage of time*

15: *Restitution rights must extend to heirs of property*

16: *Land, housing and property issues are best addressed with effective institutional co-ordination*

17: *Claims processes can be used to provide permanent land, housing or property solutions for all returnees – owners, tenants and the landless*

18: *Financial support for restitution institutions needs to be secure and sustained¹⁶³*

These principles obviously need to be adapted to specific contexts of each country. However every country as is already developing plans and blueprints, which in some instances seem to sacrifice principle for expedience, is important to encourage them to start from an agreed statement of principle such as this to which they agree to be held accountable.

How national governments can respond to material threats to reparation of property rights

The two principle material threats to the reparation of property rights of those displaced by the earthquake – tsunami that were identified in Part I of this paper, relate to loss of documents and physical loss and damage to property.

Records

The only cadastral records which were destroyed by the tsunami have been the subject of much attention. The current response on the ground is Aceh by BPN, the federal government's land administration agency, of issuing emergency duplicate titles, is likely to cause problems in future, because of the existence of parallel but not necessary consistent records, as has happened in the Philippines. The World Bank has proposed that BPN adapt the mass titling techniques it has developed under the

¹⁶³ -----2003 **Land, Housing And Property - Proposals to the Parties for Comprehensively Addressing Land, Housing And Property Rights in the Context Of Refugee and IDP Return Within and To Sri Lanka** United Nations High Commissioner For Refugees (Colombo), Human Rights Commission Of Sri Lanka, 28 May, pg 24-37

Indonesian Land Titling to re-title and then extend titling to affected communities. This is a much better and more sustainable way to go.

The generation of other vital documents, such as death certificates and replacement identity documents should be given urgent priority over all other reconstruction activities. Staff may have to be seconded from other places and equipment moved into the affected areas to expedite this work.

Physical loss and damage

The physical loss of land which has been submerged or degraded should be the subject of assessment, valuation and compensation. Mechanisms for doing this equitably and efficiently will demand the deployment of significant technical resources. Investment in incentives and infrastructure will be required to encourage those with the necessary skills to take up these opportunities.

The increase in landlessness that this disaster has caused has to be tackled before the addition of newly landless swells and compounds the problems of those who were previously landless. Investigations should begin to locate sources of supply of land that can be quickly delivered to those who are without access to productive assets. It is vital to the success of this project that suitable land be identified by the intended beneficiaries and not just by 'disinterested' officials.

The loss of land from slippage and contamination will cause local land markets to heat up and thus more land will become unaffordable to those living in poverty. This problem can be partly solved by redistributing the State's own surplus lands to the landless and by releasing some it onto the market to dampen demand. Inventories of State land may not exist, but will be required to identify surpluses.

Land that has been lost to its previous user will have to be carefully assessed to explore potential alternative uses and strategies to deal with land degradation should be urgently developed, in close consultation with landowners.

How national governments should deal with administrative threats to reparation of property rights

The administrative threats to reparation of the property rights of those living in poverty who were displaced by the earthquake – tsunami identified above were destructive planning rule changes, inequitable compensation arrangements and public sector incapacity.

Planning plans

Existing planning laws are likely to be good enough to allow reconstruction to begin without too much more delay. This is not the time for legislative adventurism.

Governments should not try to do everything. Dictating how survivors go about recovering their own property is highly unlikely to succeed because governments in the region do not have the credibility to persuade people that what the government tells them to do is in their best interest. Instead, survivors must be encouraged to help themselves. Localised planning stands a much better chance of being implemented, is likely to be cheaper and more sustainable.

Compensation arrangements

Blanket compensation schemes are both unlikely to be equitable and are viable to abuse. Short-cutting to avoid proper assessments of losses, using dubious valuation

practices and offering survivors take-it or leave-it compensation-in-kind packages are all attractive quick fixes that will come back to haunt government who are seduced into embracing them.

The best compensation arrangements are as few as possible. Administrative and planning actions that generate large numbers of compensation claims should be avoided.

Public sector incapacity

Public sector capacity strengthening strategies must be developed as soon as possible, as capacity building to match the challenges thrown up by the tsunami's impact on property rights, will take time and lingering incapacity will drag out reparation of property rights and weaken the claims of those living in poverty. Two areas of public service are vital in relation to reparation of property rights, land administration services and the justice sector.

States will have to mobilise **land administration** technicians from unaffected areas. Large numbers of surveyors, valuers, notaries and adjudicators working in teams will have to be deployed in tsunami affected areas. This will be costly in terms of the provision of land services in other areas. Some of those costs can be recouped by using the placement of technicians in tsunami affected areas to upgrade and update their skills.

In the **justice sector**, delays in obtaining judgements that are likely to result in increases in claims relating to property rights arising from tsunami have already been predicted and their impact is likely to lead to further erosion of rule of law in affected countries.

None of the country's present problems will ever be resolved without achieving a reasonable degree of success in the speeding up of the judicial process. The Sri Lankan model of governance is a law-based one. However, when the law cannot enforce itself due to its own inner contradictions - such as the extreme delays that exist in Sri Lanka - then the entire social system cannot function. A dysfunctional legal system means a dysfunctional society as a whole. At the core of this dilemma is the issue of the law's delays.

Such dysfunction within one aspect of Sri Lanka's administrative system transcends into other areas as well. The issue of tsunami relief work is attracting global criticism. The world is at a loss as to why aid and available funds are not reaching those who most require it. Such confusion, however, ignores the dysfunctional element that exists within all of Sri Lanka's administrative mechanisms; be it aid, the law, or any other area in question.¹⁶⁴

One approach to dealing with the very high probability that justice for tsunami survivors with unsatisfied claims to property rights will be delayed and therefore denied, would be to introduce case management techniques for cases of this kind. Using this widely accepted set of techniques, work flows can be improved and existing resources better utilised, because the quantum of issues in dispute can be reduced and therefore so can the amount of evidence that has to be led, thus reducing unnecessary workloads. The management skills developed as a result of such approaches can have long term, wide scale benefits in terms of local land and settlement management.¹⁶⁵

¹⁶⁴ Asian Human Rights Commission - **An awakening to the delays in Sri Lanka's adjudication process** [online]

¹⁶⁵ Payne. G., email. 23/03/05

Allocating court cases between fast and regular tracks can also be an important factor in speeding up judgement delivery times. Global experience suggests that in any jurisdiction, 70-80% of all court cases are relatively simple cases which can be tried and adjudicated within one day. If these cases are not separated from regular cases, many of them will be ranked behind regular cases, which take much longer time to finish. Under a case management system, straight -forward cases can be fast tracked and thereby be tried and adjudicated much sooner.

Bilateral development partners

On January 12, 2005, the Asian Coalition for Housing Rights (ACHR) made this recommendation (inter alia) to British donors, but is apposite for all development partners with substantial amounts of aid to offer for post tsunami recovery.

2. It is important that relief be linked to rehabilitation for ALL affected communities : It is likely that in many coastline areas affected by the tsunami, there will be efforts to prevent those communities which do not have formal tenure status to return to the land they occupied before the tsunami. In all of the affected countries, the coastlines are dotted with poor fishing communities and indigenous settlements whose land tenure status is unclear. Many of these communities are considered squatters on public land, even though they have occupied their land for decades - or centuries - and there may be efforts to deny these people the right to rehabilitation. This is especially a danger given the skyrocketing market values of much of the coastal property they inhabit and political pressure to grab that land being exerted by powerful forces in the tourism and seafood-production sectors. It is therefore imperative that relief aid be linked to rehabilitation for ALL the affected communities, regardless of their legal tenure status, not only for that minority of community members with legal land status.¹⁶⁶

This call has to be supported by all those who want to help those living in poverty get over this disaster, but the way in which this linkage, between assistance and rehabilitation for all, is framed has to be handled with care and skill. Creating conditions around the provision of assistance (like suggesting there should not be any, for anyone, until it is available to everyone) is likely to slow down the disbursement of aid funds and may provide a rationale for withholding them all together.

Despite the massive scale of commitments made so far, their source remains dispersed, implying that many agenda are being applied to negotiations over dispersal of funds, potentially involving many forms of conditionalities.

As overall funding now stands according to a list compiled by OCHA, Germany is the largest contributor of humanitarian assistance with \$683 million, followed by the Asian Development Bank (\$600 million), private donations (\$576 million), Japan (about \$500 million), European Commission (\$494 million), France (\$443 million), Australia (\$431 million), United States (\$354 million) and Canada (\$351 million).¹⁶⁷

The other issue that arises from this diversity of sources of funding is monitoring and evaluation of expenditure. Who will do this and how and how can we ensure that there is sufficient consistency in relation to methodology to allow for horizontal comparisons?

This raises the key issue of a monitoring role for an independent group or group involving bi-laterals agencies, NGOs and governments. Such a role could help recognize and reward good practice and blow the whistle on recalcitrant authorities, adversely affecting their image and access to other sources of funding until they improve. Such a partnership arrangement could also form a productive basis for reducing misunderstanding between agencies with legitimately different

¹⁶⁶ Urban Poor Asia - **A Peoples Perspective on the Tsunami Rehabilitation Effort** [online]

¹⁶⁷ United Nations News Service - **Two Months after tsunami only some UN agencies have received full funding 25 Feb 2005** [online]

*objectives, perspectives and roles, which could have a longer and wider term potential impact on increasing pro-poor development.*¹⁶⁸

How national government can prevent violations of legal and human rights

Maintaining respect for the legal and human rights of the survivors is of paramount importance throughout the response to the tsunami. The following violations were identified above as posing the gravest threats to the reparation of the property rights of those who were displaced by the earthquake-tsunami; corruption, compulsory acquisition, involuntary or coercive internment, discrimination, conflict and expropriation.

Battling corruption

Corruption must be exposed and expunged. The governance, administration and audit arrangements in place in the Republic of the Maldives could serve as model for other governments in this regard.

Bringing in outsiders to bolster local land agency staff could help to break old patterns of behaviour and lead to less rent seeking behaviour in relation to the generation of cadastral records. . In this way, tsunami recover can provide a basis for more accountable and transparent governance systems to the benefit of society in general. This could also encourage international support for less dramatic, but equally urgent assistance to developing country development programmes.¹⁶⁹

Alignment of centrally held registry records with damaged records shipped in from Aceh will reveal whether local records are being doctored or not. Prosecutions should follow any revelations of abuses in this regards.

Survivors with complaints about tinkering with land records or rent collecting by land administration officials need somewhere to take their cases in the first instance. In many places, Land Commissions, comprising community leaders and respected retired officials have been empanelled to create additional oversight of land administration officials.

Compulsory acquisition

Compulsory acquisition of land because of ill-conceived exercise of administrative discretion must not become government policy and 'voluntary' variants of this practice have to be treated with suspicion.

Internment

Involuntary or coercive internment of displaced people must be rejected.

Discrimination

Discriminatory practices, including those that are the legacy of past practices, have to be eschewed by all. Monitoring and enforcement systems, however, are yet to be established.

Conflict

¹⁶⁸ Payne, G. Email. 15/03/05

¹⁶⁹ Ibid

Peace has to be negotiated, as the ongoing conflicts are killing the chances of investment that could create the jobs to replace the self employment generated by lost property rights.

Expropriation

The property rights of all people who are displaced by natural disasters anywhere must be assured by international law. Adoption through national legislation of the *Guiding Principles for Internal Displacement* should be a requirement for access to soft loans for reconstruction.

UN and international agencies

Coordination still seems to be as elusive as ever. OCHA have a clear **relief response** coordination-mandate based on a common sense rationale.

*Humanitarian coordination is based on the belief that a coherent approach to emergency response will maximize its benefits and minimize its potential pitfalls - in short, that the whole will be greater than the sum of its parts.*¹⁷⁰

However, as mass reparation of property rights is most likely to be part of the second, post relief phase of the international response to a natural disaster, when OCHA's mandate has faded away, it is not clear which UN agency should then have oversight or host country partnership responsibilities. A strong argument can and has been made for extending the OCHA's mandate, so as to prevent the baton being dropped on the changeover.

*.....some important lessons have been learned about the inescapable role of the UN, but also about the need for reform. Concern(s) about the UN's capacity to deliver were widespread before the tsunami. The US responded by setting up its own core group, but retreated rapidly to shelter under the UN umbrella. However, if the UN is to be able to fulfil its mandate, the Office for the Coordination of Humanitarian Affairs needs to be strengthened. Hilary Benn has suggested giving OCHA authority over all UN agencies in the field and backing this up with a new \$US 1bn fund to give OCHA the financial muscle it needs to do this job.*¹⁷¹

Equally the argument can be made that subordination of the treaty based arms of the UN, could compromise the vital prominence of the protection of human rights, including property rights, in disaster recovery assistance.

*62. The international community, and the United Nations in particular, has an important role to play in overseeing the successful implementation of restitution programmes. This question should be seen as part of human rights monitoring more generally, an essential function of multiple United Nations bodies. 63. The international community also has a responsibility to act in ways which protect and promote the right to housing and property restitution as well as the right to return. Normative development and the strengthening of international standards in this regard could significantly improve the living situation of countless refugees and other displaced and vulnerable persons throughout the world.*¹⁷²

UNDP stakes a claim to taking over the OCHA's overall coordination responsibilities for recovery phase international aid, however when this change over should happens is far from clear. UNDP recognises that it does not have the technical or financial capability to do this kind of work on its own and looks for joint-venturers from within the UN family. Some in UNDP would favour UNHCR as the lead UN technical

¹⁷⁰ OCHA – **Coordination of Humanitarian Response** [online]

¹⁷¹ Maxwell, s. and Clay, E. 2005, ODI, **The Asian Tsunami: Economic impact and implication for aid and aid architecture** [online]

¹⁷² ----- 2003, **Housing and property restitution in the context of the return of refugees and internally displaced persons**, Preliminary report of the Special Rapporteur, United Nations, Economic and Social Council

agency in relation to reparation of property because of its long experience working with refugees. However, the World Bank and FAO clearly have superior technical and financial resources especially in relation to land administration. UNHabitat would also want to stake a claim, especially in relation to housing, to dominant expertise.

The lack of a clearly defined mandate for a lead agency in regard to reparation is a function of lack of specific legal basis on which any of the contenders can act.

Recommendations for relief and reconstruction programmes.

It is important to understand that the programmatic interventions based around reparation of property rights, recommended below, will be complementary to and in some ways a pre-condition for other forms of intervention. As a recent assessment of best practice derived from responses to other disasters suggests, reparation of property fits with other effective strategies.

Lesson 4 Recovery and Reconstruction Assistance Strategies

*The tsunami has deprived over a million people living in coastal areas not only of sources of income but also of household and productive assets. Sources note **complementarity between action to restore people's productive capacity and action to revive market demand for their output and labour**. This briefing considers four key assistance strategies crucial to sustainable recovery:*

- a) Buying locally;*
- b) Providing 'cash and vouchers' in conjunction with/instead of direct hand outs;*
- c) Livelihood support, including land titling and insurance;*
- d) Community participation.¹⁷³*

We need to be concerned about maintaining a sensible sequencing of assistance and about maintaining momentum towards re-empowerment of communities.

Potential programme interventions

This has to be a tentative list of actions that could help people get back home. This study was not a design mission, rather it was a scoping study to identify possibilities that programme planners should investigate within the specific country contexts in which their teams have to operate. Here they are.

Physical and financial

Dealing with physical loss of property essentially involves provision of compensation to the owners of those lost rights. For compensation schemes to work equitable and efficiently, losses have to be assessed on the basis of accurate valuations of lost rights in property. For accurate, consistent valuations to be possible, rights in property have to be adjudicated, for which evidence will be required. So the key to compensation schemes is evidence of rights in property, which also the key to restitution, the other form of reparation.

International aid organisations could target its interventions anywhere along this chain of interlinked steps – it could contribute to capitalising compensation schemes, or provide technical assistance in the form of loss assessors or valuers, or it could assist claimants to assemble the evidence needed to press their claims. As many States have already set up compensation schemes and have already started to distribute benefits, perhaps the most important assistance that INGO could provide is direct to claimants.

¹⁷³ Houghton, R. 2005, **Tsunami Emergency Lessons from Previous Natural Disasters**, ALNAP, [online]

The schemes that have been established by others will also have to be independently monitored for corrupt and inefficient administration and for elite capture.

Establishing, training and funding paralegal services in tsunami-affected area, or, were they already exist, helping them to expand their operation to meet new demands, to support both compensation and restitution claims seems to be the practical and most immediately useful intervention. The immediate needs for replacement documents and the need to collect testimonials from survivors to witness claims should be the main mission of this service. The advocacy challenge in relation to using these resources to press contested claims is discussed in the following section.

In relation to damaged property, the scope for interventions is somewhat broader. Some compensation claims could be made, and should be honoured, but alternative user should also be examined. The critical principle underpinning this work has to be highly participatory, farm-to-market planning. Oxfam livelihood advisers have been doing this kind of work for a very long time and have considerable expertise in this regard, but some real out-of-the-square thinking by a combination of local and outside experts will be required to deal with both the extent and the nature of the physical impacts of the tsunami.

Those that manage to reclaim some of their property rights will also need assistance. There is a very real risk that the economic shock of the disaster and the inflationary pressures of the response will further imperil the livelihoods survivors. Capitalising a savings and mortgage bank to prevent duress sales of land at less than real value could prevent victims of this backwash from being sucked into poverty.

Administrative interventions

Administrative threats to property rights will require both swift and sustained lobbying and other interventions in partnership with local groups, communities and governments. Governments can sometimes be part of the problem, but will invariably have to be part of the solution. Planning rule changes, poor public land administration service delivery and weakened public sector capacity all pose threats to people living in poverty being able to reclaim their rights in property after the tsunami.

Top down **planning** is so prevalent in this region, not because it works, it does not, but because of the sharply hierarchical power structures within the societies that populate this region. So participatory land use planning is a radical, highly political intervention with vast potential for advancing equity and empowerment. Therefore INGO should invest heavily in participatory spatial planning to challenge the repressive and coercive use of centrist planning and enlarge the political space in which civil society can operate. This can also proved the basis for better governance in the long term.¹⁷⁴

One practical way in which this can be done is by the financing the circulation of spatial data in a form that can be used for participatory planning. Relatively cheap and accessible technology, such as satellite imagery, global positioning devices, tape measures and monuments can be used effectively by small groups, often with minimal assistance, to get themselves back home. Possibly also training workshops involving international professionals to help strengthen local professional capability and provide useful skill development and reorientation.¹⁷⁵

¹⁷⁴ Payne, G., email. 23/03/05

¹⁷⁵ Ibid

As an industry that trades on the natural beauty and ease of access to the locations they operate, there is the potential for investors in tourism to become involved in 'land grabbing'. Ensuring the local community has 'a voice' in how the tourism industry reconstructs, should be a consideration for future INGO programming.¹⁷⁶

Effective, customer - orientation **property administration services** must be put in place so that fair, consistent and acceptable compensation arrangements can be instituted. As pointed out above, state agencies, supported by financial and technical assistance from donors are best placed to do this. However international charities also have a role here too. In Cambodia, for example, Oxfam supports local not for profit groups to provide land adjudication teams and land dispute resolution mechanisms that provide checks and balances in relation the mass registration programmes undertaken by state agencies.

States, supported by donors, must start strengthening **judicial capacity** in tsunami - affected areas immediately. Investment in alternative dispute resolution mechanisms by INGO will take some of the pressure of the courts and, if handled adroitly, could make a significant contribution to the healing of the tsunami - damaged communities. In countries where notaries and village heads play an important role in generating the paper trail required to establish claims to property rights, investing in their training and qualifications would be strategically very useful in overcoming potential bottlenecks and reducing the opportunities for rent seeking.

Protection of legal and human rights

Succession issues could provoke nasty conflicts. Therefore there is a need to generate consensus about fair ways of helping people get their legacies, for example by mobilising civil society to work with religious leaders and by providing paralegal support to people. This could be a strategic support to survivors, especially in 'mixed' areas such as Trincamalee.

Management of **expectations** and trying to prevent almost inevitable conflicts will be vitally important responsibilities that national governments will have to accept and shoulder.

Whilst the UN agencies, World Bank and UN-FAO are providing good technical advice, INGO and others could usefully complement this on the social side support for **social protection** measures, such as dispute resolution, legal aid, rebuilding social capital. You need to witness in order to validate claims to land.

Conflicts are going to dominate future reconstruction work in Indonesia and Sri Lanka, unless ways can be found to ensure that monies go differentially into GAM and pro-GOI communities and into LTTE and pro-government areas affected by the tsunami. Pooled community bank accounts to be used for compensation payment, duress sale insurance and investment, managed by representative and accountable committees might be one way of achieving this differentiation obliquely without offending either the Indonesian or Sri Lankan governments' political sovereignty. At the same time, such an arrangement would acknowledge the reality that control over land allocation and management in these areas, some sort of territorial sovereignty, is vested in GAM and LTTE.

¹⁷⁶ David Bright 01/03/05

Internment is both a quick fix and a slow fuse and is no substitute for helping survivors to get back home. Despite the scale of this challenge, swift action to facilitate return will be a very important determinate of success, not just because memories dim over time, or that, as we all know, prolonged stays in camps or barracks make for festering malcontent. Delaying return allows powerful economic and political forces to arraign themselves so as to be able to appropriate local derived property rights. Mass expropriation of the residential and cultivation sites of the poor along the coast affected by the tsunami has the potential to catastrophically contribute to the prior discontent within the area and to the social and economic insecurity generated by the disaster.

True, longer term needs such as environment rehabilitation and other defensive and risk reduction challenges will also have to be tackled. Critical here is the establishment and empowerment of localized participatory land use planning processes, rather than the introduction of sophisticated land administration systems. However, planning has to be seen for what it is - essentially a political process providing a site for social and economic competition. What is critical in this struggle is where everybody starts from. So, return and resettlement have to be the first priorities, and proper planning processes have to be intertwined into these activities - not the other way around.

Opportunities for advocacy

The important point to be made here is that **both** short-term, local advocacy around critical reparation of property rights of individuals, households and communities **and** longer term, regional, national and globally significant advocacy, informed by actions taken in respect of short term, demand driven local advocacy, are linked and interdependent, not disparate and mutually exclusive.

Shorter-term, local advocacy opportunities

Throughout tsunami-affected region, clear advocacy opportunities in relation to rights in property present. For example, as some recent research on the implementation of the Convention on Elimination of all forms of Discrimination Against Women¹⁷⁷ shows some relatively straightforward administrative advocacy could have a powerful positive affect on the empowerment of women.¹⁷⁸

*Most land-use certificates are issued in husbands' names only. This restricts women's access to not only land, but also to credit and support services. It is important to ensure that land is registered in the names of both spouses, and that attention is given to inheritance rights for women and girls.*¹⁷⁹

Linking reparation of property rights with enhancing security of tenure, through registration of those rights, and empowering women, by registering those rights in their own names if they are the sole owners, or in the names of both spouses, could make a major contribution to the recovery and development of tsunami-affected areas.

This tactic has been successfully used elsewhere.

Good practice is noted in response to the Mozambique flood when agencies took a long-term approach to recovery that included joint titling of land, joint housing registration in a couple's

¹⁷⁷ ILO, FAO, IFAD - **Rural Women's Access to Land and Property in Selected Countries** [online]

¹⁷⁸ This is exactly what is currently happening in Cambodia, where an Oxfam-inspired, World Bank funded land administration project (CLAMP) is providing first time, joint spouse registration of a million parcels.

¹⁷⁹ ----- 2005, **ILC Newsletter: Advancing Together**, International Land Coalition, 5 February

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name or the woman's name in female headed households, and women's obligatory participation in construction committees (ProVention Consortium 2003:86; forthcoming).¹⁸⁰

There is also an obvious and urgent need for advocacy on the ground to protect the rights of heirs. They will require support and assistance to be able to secure rights in property that they should be able to inherit after the deaths of their relatives. This is linked to the programming recommendation above that relates to providing assistance to those who will need death certificates, identity cards and letters of inheritance.

There are also other advocacy challenges present. Civil society pressure, to ensure that non-discriminatory inheritance laws are upheld, must be supported. Many of the legatees will be young or possibly remote relatives and will struggle to fend off opportunistic competitors. Ease of availability of information about how these laws should be applied, where to take claims, what is needed to prove them and how to find out which deceased estates are being executed when and where, will be a crucial indicators of accessibility.

Particular difficulties face orphaned children trying to secure their patrimony or matrimony. The programming recommendations made above will go some way to assisting them to overcome these difficulties. However, advocacy support will also be required. In most jurisdictions, children cannot hold rights in property in their own right. Trusts will have to be established to hold their legacies on their behalf. Setting up schemes to facilitate the establishment of these trusts and to monitor trustees to ensure they discharge their fiduciary responsibilities correctly will require mobilising legal, religious, and childcare activists to lobby government to enact an appropriate legislative framework.

Hasty, unworkable, destructive planning rule changes have to be emphatically rejected by all the parties to the recovery effort. Private and public interests will inevitably clash over changes or implementation of spatial planning laws. Asking the poor to contribute to public good by giving up the only assets they retain after a disaster for the benefit of a wider public who are being asked to sacrifice nothing is not reasonable – especially if the end result is that those assets are grabbed by the powerful and further disadvantage those living in poverty.

Two lines of engagement in relation to this issue seem feasible, which are neither mutually exclusive, nor contradictory. First, INGO could focus on provision of compensation for those who were displaced because of the implementation of sensible, enhanced disaster protection planning rules, as suggested above in relation to loss of land and degradation.

Laws and regulations specifying minimum distances from the shoreline for housing development are important means of protecting against tsunamis, storm surges and sea level rise. Governments, donors and other concerned stakeholders should be encouraged to implement community-based integrated coastal zone planning and management, enact tougher setback provisions in domestic legislation and enforce the law. Those who lose the rights to use their land as a result of changes in the law may need to be compensated, and donor assistance may be essential for this purpose.¹⁸¹

Second, international agencies could work with local partners to develop a LandWatch network, which would use the name-and-shame technique, combined with other forms of advocacy, including legal action, and international networks, to ensure that land that has been surrendered to enhance disaster protection is not

¹⁸⁰ Houghton, R. 2005, **Tsunami Emergency Lessons from Previous Natural Disasters**, ALNAP, [online]

¹⁸¹ -----2005 **After Tsunami: A Rapid Environmental Assessment**, United Nations Environment Program

subsequently expropriated by developers. Once established this network could seek to engage locally and internationally with credible organisations seeking to promote ethical tourism, with a specific emphasis on the need to consult with local communities when planning the reconstruction of tourist facilities.

International agencies should stand firmly and publicly on the side of the survivors in this debate; other powerful forces will argue on behalf of the wider public good.

Longer - term global advocacy opportunities

There is also the much longer term possibility of class action in tort for damages to property caused by removal of natural protection by responsible agencies authorizing developments like prawn farms. If an action of this order worked, its success could spill over into broader damages claims for global warming.

A recent article by the senior advisor to the Secretary General's Special Representative on Displaced Persons on the political, economic, and environmental lessons to be learnt from the tsunami reaffirms the observation made here and by many others, that the destruction of personal documents belonging to the victims has implications, *inter alia*, for their capacity to affirm their property rights.¹⁸²

However the potentially disastrous impact of loss of documents in relation to property rights also extends to the descendants of those who tragically perished in the disaster and to the loss of public records, both at village, district and in the case of Aceh, provincial levels where backup copies of personal documents were sometimes kept. The implications of this loss of documentary proof of property rights is also exacerbated by high mortality rates within some villages, which destroyed the other main source of supportive evidence of property rights, the testimony of neighbours and community leaders.

I would also suggest that this issue has implications other than just in relation to recovery of particular personal property rights. Based on the constitutional provisions of the tsunami affected states¹⁸³ and on the Guiding Principles on Internal Displacement¹⁸⁴, proof of those rights, and their valuation should determine the quantum of any compensation or payment in kind that may arise as a consequence of any requirement by States that, in the aftermath of the disaster, property rights must be surrendered in the interests of public safety.

However, in many of the States within the region, the right to hold property is no longer, or has never been a constitutional right. The right to property ceased to be a fundamental right in India, for example from 1979 onwards the Constitution merely provides that no person shall be deprived of his property save by authority of law.

¹⁸² Cohen, R. 2005, The Brookings Institution, Georgetown University School of Foreign Service, **The tsunami tragedy: political, economic, and environmental lessons** [online]

¹⁸³ For example, the **Basic Agrarian Law (Undang-Undang Pokok Agraria Nomor 5 Tahun) 1960 (UUPA)**, Art 18 refers to the requirement for compensation for compulsory acquisition. The BAL is based on Article 33 of the **1945 Constitution (Undang-Undang Dasar 1945) of the Republic of Indonesia**, and on Principle 5 of the **State Philosophy of Pancasila**, and Art. 31A of the **India-Constitution, [1950]**, consolidated up to the Constitution (Seventy-eighth Amendment) Act, 1995 [30 Aug 1995], which specifically applies to "(i) any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right."

Ramakrishnan, V. 2001, **Guide to Indian Law** [online]

¹⁸⁴ ----- 1998 **Guiding Principles on Internal Displacement**, United Nations Office of the High Commissioner for Human Rights, Geneva, Switzerland

Throughout the region affected by the tsunami, I would suggest, States are fudging their obligations and responsibilities to protect the property rights of the victims. Sometimes this is occurring in the name of expediting the provision of permanent replacement shelter (India); sometimes because of security concerns (in LTTE controlled areas in the North of Sri Lanka), but, in other instances, just because they can be sidestepped with impunity.

So the question that needs to be asked is whether the time might be right for an intensification of effort to harden up international legal protection for property rights for internally displaced people, at least in relation to those property rights of the victims of natural disasters. This is an initiative I recommend that international aid organisations champion, as they are in the unique position of both having a credible international profiles and member organisations in a large number of potential treaty signatory states. Which of these states would be most sympathetic to a campaign to beef up international legal protection for the property rights of the victims of natural disasters, and why, should be carefully assessed and the location where obstacles to its success lurk should be identified.

Subject to a feasibility study along these lines, a global campaign, connected to the programmatic actions outlined above, should be mounted, initially at least one of the major international aid organisations, but by quickly building support for its objective and then by initiating joint national campaigns in sympathetic member states and then by tackling the doubters once they have been isolated.

A campaign could take several forms. The objective should be to encourage states to sign on to a hardened version of the principles, re-crafted in treaty form, that clearly marks out property rights a fundamental, and therefore sacrosanct, human rights. Getting states to agree would be difficult, partly because of the breadth of the current definition of to whom the principles applies.

*2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*¹⁸⁵

The central problem here is that actions by states themselves are often the cause of displacement. Therefore the edicts contained within the principles bind states to be accountable in very specific ways to people who they have displaced in the name of national security or some other higher objective. For this reason, states may have some difficulty with making commitments of this order. One potential solution is to narrow the application of the ‘treatified’ principles just to victims of natural disasters, for which even omniscient, evil-empire-type states cannot be blamed.

The obvious disadvantage of this approach is that it would leave others who are displaced by conflict and man - made disasters with lesser legal protection.¹⁸⁶ But that is no worse than the situation they now find themselves in with respect to the *Guiding Principles on Internal Displacement*.

The core of the *Guiding Principles on Internal Displacement* relevant to property rights comes very close to making the rights to hold property a basic human right.

¹⁸⁵ Ibid

¹⁸⁶ ----- 1997 **General Recommendation No. 22 (1997) (Article 5 on refugees and displaced persons)**, UN Committee on the Elimination of Racial Discrimination

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Principle 21

1. No one shall be arbitrarily deprived of property and possessions. 2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts: (a) Pillage; (b) Direct or indiscriminate attacks or other acts of violence; (c) Being used to shield military operations or objectives; (d) Being made the object of reprisal; and (e) Being destroyed or appropriated as a form of collective punishment. 3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.¹⁸⁷

Nowhere else in international law is this principle made more explicit. The *Internal Displacement Guidelines* similarly make restitution of property and possession a basic right applicable to all Internally Displaced People.

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons. 2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

Principle 29

1. Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services. 2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.¹⁸⁸

However, these general principles urgently require further elaboration and specificity in relation to restitution of property rights. The recently compiled *Principles on Housing and Property Restitution for Refugees and Displaced Persons*¹⁸⁹ was the culmination of a four-year long study by the Sub-Commission on the Promotion and Protection of Human Rights, led by its Special Rapporteur Mr Paulo Sergio Pinheiro. The Principles provide important guidance to all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence. The Principles were developed in collaboration with international organisations including the UN Office of the High Commissioner for Human Rights, the UN Office of the High Commissioner for Refugees, as well as non-governmental organisations such as the Norwegian Refugee Council and the Centre on Housing Rights and Evictions (COHRE).¹⁹⁰

¹⁸⁷ ----- 1998 **Guiding Principles on Internal Displacement**, United Nations Office of the High Commissioner for Human Rights, Geneva, Switzerland

¹⁸⁸ *ibid*

¹⁸⁹ -----2005 **Principles on Housing and Property Restitution for Refugees and Displaced Persons and explanatory notes on the Principles**, Final report of the Special Rapporteur, United Nations, Economic and Social Council

¹⁹⁰ COHRE, **Media Release**, 11 August 2005 [online]

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The Special Rapporteur's Final Report¹⁹¹ and the appended Principles and explanatory memorandum were endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights at its last meeting¹⁹² and recommended by that body to the Economic and Social Council and to the Commission on Human Rights.¹⁹³ Unfortunately at the subsequent meeting of the Commission on Human Rights, consideration of this recommendation was overtaken by debate about wider issues to do with the future role of both the Sub Commission and the Commission itself¹⁹⁴ within the reformed UN as proposed by the Secretary General, some relevant elements of which were subsequently adopted by the General Assembly at the World Summit.¹⁹⁵ Hopefully the new forum for the protection of Human Rights created at the Summit¹⁹⁶ will take up the work of the Sub-Commission so as to provide the legal protection for the property rights of persons displaced by natural disaster so as to ensure that they can get back home.

¹⁹¹ -----2005 **Housing and property restitution in the context of the return of refugees and internally displaced persons**, Final report of the Special Rapporteur, United Nations, Economic and Social Council

¹⁹² 57th session Geneva, 25 July - 12 August 2005

¹⁹³ -----2005 **Recommendations to the Commission on Human Rights regarding housing and property restitution in the context of the return of refugees and internally displaced persons**, United Nations, Economic and Social Council

¹⁹⁴ United Nations - Press Release, HR/CN/1109

¹⁹⁵ These comments are based on Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session, 2005 World Summit Outcome, 15 September 2005, A/60/L.1, which formed the text of the adopted resolution after some amendments to paragraphs 60(a), 163(a), (b) and (c) and 164 (c), none of which are particularly relevant to these remarks.

¹⁹⁶ Op. cit. Art. 157-60

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