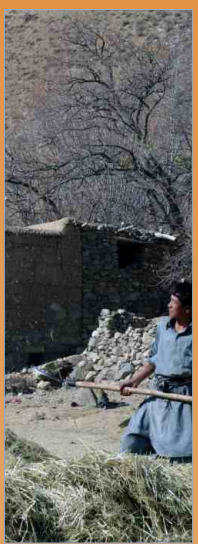
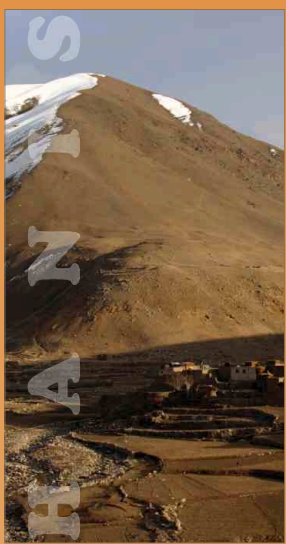


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A Report on:
Afghanistan's Special Property
Disputes Resolution Court



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Norwegian Refugee Council

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Design & Layout By

Shahzad Ahmad

NRC, Pakistan

Title Page Photographs By

Ash Sweeting

asweeting@jabbawoki.com

Printed in Peshawar

By

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A Report on:

Afghanistan's Special Property Disputes Resolution Court¹

The right to housing and property restitution for refugees and internally displaced persons (IDPs) has emerged as a core principle under international human rights law.² What this means is that it has been accepted that refugees and IDPs have “a legally enforceable right to return to, recover, repossess, reassert control over and reside in, the homes and lands they had earlier fled or from which they had been displaced”³. Sadly in Afghanistan, the actual implementation and enforcement of this right is not enjoyed by many returning refugees and IDPs.

The subject of this report is the Special Property Disputes Resolution Court established in November 2003 by Presidential Decree to act as a mechanism for returnees to enforce their property rights. This report presents an analysis of its operations to see whether it is working as it should and whether and how its judgments are being enforced. This report is based on cases registered in Kabul and some of the provinces by the Information and Legal Aid Centres (ILACs) established by the Norwegian Refugee Council (NRC) with support from the United Nations High Commissioner for Refugees (UNHCR), the Norwegian Ministry for Foreign Affairs (MFA) and the European Communities Humanitarian Aid Office (ECHO).⁴ The cases show the practical and

¹ This report, commissioned by the Norwegian Refugee Council (NRC), was authored by Jennifer Escott, and edited by Simon Russell, Jacob Reimers, and Marla Morry. Various NRC legal counselors contributed case studies, along with their insights and knowledge. Farida Sadid and Abdul Qayum Saiel assisted in facilitation of a consultative meeting with judges of the Special Property Dispute Resolutions Court.

² For background please see commentary in NRC's Property Law Manual. A collaborative effort between NRC and the UN High Commissioner for Refugees, the property law manual will be published in the summer of 2005.

³ Returning home: Housing and property restitution rights of refugees and displaced persons, edited by Scott Leckie, Transnational Publishers, Inc., p4

⁴ In 2003 ILACs were opened in Jalalabad, Kabul and Pul-i-khumri and in order to meet the enormous demand the program expanded in 2004 with ILACs opened in Mazar-i-sharif, Maimana, the west side of Kabul and Bamian, and in 2005 in Herat.



procedural problems and provide a basis for making recommendations for reform.⁵

NRC's information and legal aid program is based on a belief that the provision of free legal assistance can make an effective contribution to creating conditions conducive to sustainable return. By following individual's cases through the court process as well as alternative dispute resolution mechanisms, NRC's legal counsellors are also challenging and assisting the development of the legal system in Afghanistan.

Context

Afghanistan has had a particularly complicated recent history and today's property disputes arise from many different sources. Successive governments have enforced their own policies on the population, such as the restrictions on private property ownership of the communist regime including President Taraki's famous Decree number 8, which tried to remove the feudal system. Arbitrary applications of the law and discriminatory practices were, and in some areas are still being, carried out by *mujahedin* commanders and local warlords. People have fled from the communists, civil war and ethnic conflict and secondary occupation has taken place in their absence. Indeed due to the long years of troubles there are often a number of legitimate claims to the same property arising from different government administrations giving out or taking back land and the widespread practice of sellers reselling their property when the buyer has fled. More simply, much housing and property has been destroyed or damaged putting more pressure on other properties. Similarly, the expansion of refugee families, as well as a lack of social harmony, which has built up over the last few decades, has led to many family and inheritance

⁵ In April 2005, at the near completion of this report, NRC was verbally informed by the Chief Administrator of the Supreme Court that an impending decree would abolish the Special Court. He noted that cases pending in the Special Court would be redistributed to the ordinary courts. To date, there has been no official confirmation to this effect. At a consultative meeting on 1 May 2005, Special Court judges expressed disapproval over potential abolishment of the Special Court. They believe that the Special Court is best suited for dealing with property cases of returnees and IDPs, mainly due to its specialized nature. The judges recommend that the problems faced by the Special Court be directly addressed through reforms that strengthen the capacity of the court to deal more effectively and efficiently with the cases.



disputes. Additionally, many property documents have been burnt or lost, official records have been tampered with, and there is widespread forgery of documents. Plus the Taliban produced thousands of new title deeds. Lastly, the prevalence of customary documents and the traditional use of informal dispute resolution mechanisms add to the lack of formal records available.

These complications surely provide a particularly compelling need for a sophisticated body that can address all of these issues and provide adequately for the rights of refugees, returnees and IDPs. The Special Court was to be an exemplary court: it was established with great expectations. It had indeed been requested as there were so many refugees, returnees and IDPs needing speedy decisions on their properties so that they could begin to rebuild their lives.

The Special Property Disputes Resolution Court

The Special Property Disputes Resolution Court (“the Special Court”) was established on 30 November 2003 by Decree 89 of the Head of the Transitional Islamic State of Afghanistan.⁶ Its creation was based on the “grave necessity for looking after returned refugees in Afghanistan and addressing their complaints, as well as to hasten the process of resolving property disputes”.

It was in fact replacing a system from 2002 that was deemed to be corrupt and inadequate to meet the many property concerns of refugees. This consisted of a Dispute Resolution Commission (“Special Commission”) and a Special Court.⁷ The former would make investigations on a case and then pass its views to the Special Court for its judgment. The Special Commission consisted of members of the Ministry of Justice, the Ministry of Interior, the Attorney General and the State Affairs Department. Certainly one problem was, not being all judges, they found it difficult to deal with complicated legal disputes.⁸

⁶ Decree 89 of the Head of the Transitional Islamic State of Afghanistan Regarding the Creation of a Special Property Disputes Resolution Court. Date: 1382/9/9 or 30 November 2003

⁷ Presidential Decree 136 on the Establishment of Land and Property Disputes Court, 13.6.1381 Article 2 was amended by Decree 161 of 30.8.1381 which extended the time limitation on the covered disputes.

⁸ The Commission was dissolved by Decree 89.



It should also just be mentioned that there had been precedents to this Court.⁹

The Special Court was created within the framework of the Supreme Court. Decree 89 established a primary and appellate court to address the property disputes of returned refugees, with a final review available at the Supreme Court. Property in this decree is immovable property and includes land, residential areas, apartments, shops and markets.¹⁰ The Court has jurisdiction for the disputes of natural persons and entities arising since 1978.¹¹ Where one side to the dispute is a government administration the Court cannot take the case.¹²

The primary court is divided into two parts, one to deal with disputes arising in Kabul province and one to deal with those in the provinces other than Kabul province i.e. the rest of Afghanistan. Both of these courts are located in Kabul. However, the court focusing on disputes in the provinces (“the Special Provincial Court”) may, with the permission of the Chief Justice of the Supreme Court, travel to the provinces to hear cases. The appellate court (*mahkamae nehayee*) can hear cases from both primary courts.¹³

Revising and rehearing of the decisions or judgments of the appellate court are based on a proposal of the Supreme Court High Council and an order of the President to send the case to a Revision Committee.¹⁴ The judges of both the appellate court and the Revision Committee were to be Supreme Court members.¹⁵

Time periods for the decisions of each level of the Court are provided. The primary courts are obliged to decide on filed cases within two months and the appellate court has one month from the date of the case being filed. The two

⁹The communist government passed Decree 321 in 1986 on the restitution of returnees' property that also established a court to assist refugees on their return.

¹⁰ Article five of Decree 89.

¹¹ Articles six and ten.

¹² Article eleven.

¹³ Article two.

¹⁴ Article three.

¹⁵ Article four.



month deadline for the primary courts can be extended by up to 10 days in complicated cases. The Revision Committee also has one month to review submitted cases.¹⁶ It should report on the implementation of its decisions to the Office of the President.¹⁷

The Court is tasked to prove the forgery of documents and annul forgeries and refer the matter on to the relevant authorities in order to ensure justice.¹⁸ Compensation is to be provided when property has been illegally occupied.¹⁹ Finally, 'relevant authorities' are obliged to ensure the implementation of the Court's decisions and the Ministry of Interior is specifically obliged to do so.²⁰

This year Decree 112 was passed which allows anyone who is dissatisfied with a judgment issued by the Special Court of Decree 136 to have their case reopened if they get permission from the Supreme Court and the President.

A Note on Civil Procedure

In Afghanistan a case starts at the law department (*huquq*). The law department decides whether the case can be mediated or if it should be sent to court. The officials decide the appropriate court. After a case is received at the Special Court it is registered. If the judges decide that more information is needed on a file they can refer the case back to the law department or to the relevant administration e.g. *IMLAC*²¹, cadastral department²² or municipality.

If a case is received from the provinces it will normally be referred to the Kabul law department from the provincial law department or from the provincial appeal court if proceedings had already started in court before it was recognized that it was a case for the Special Court. Again if more information is

¹⁶ Article seven.

¹⁷ Article thirteen.

¹⁸ Article eight.

¹⁹ Article nine.

²⁰ Articles twelve and fourteen.

²¹ IMLAC is the Property Department where properties are registered.

²² This Department holds maps and surveys land.



needed the case will be referred back to the provincial law department or to the relevant provincial department.

Findings

This section is included to increase understanding and allow recognition of the systemic problems found in the justice system that deals with the property cases of refugees, returnees, and IDPs. The analysis is based on a study of fourteen sample cases from NRC's caseload, insights and knowledge of NRC's legal counsellors, as well as the author's visits to the courts, consultative meetings with judges and talking to other practitioners in this field. The sample case studies are included in the appendix.

Gaps in the Legislation

The author perceives the following gaps in Decree 89:

- The Decree does not mention IDPs and thus the Court has no jurisdiction over IDPs.²³ Before taking a case, Special Court judges ask to see a refugee's Voluntary Repatriation Form (from UNHCR) or other proof that the person is or was a refugee. IDPs are generally facing the same property issues as refugees.
- The Decree does not cover disputes where one side is a government administration (article 11). Such cases go through the ordinary courts. However it is generally more difficult for a claimant to take a government administration to court and there is greater scope for people in authority to intimidate both the claimant and the judges. It seems then that redress when returnees are faced with issues such as abandonment laws is very difficult to obtain whereas if there were a Special Court responsible for such cases the judges would recognize the issues and protect the peoples' rights.²⁴

²³ Decree 136 did mention IDPs. Thus it is not clear whether this was intentional or not in Decree 89.

²⁴ In Kabul there were various government schemes where employees were given apartments. NRC has a number of cases involving a particular government department where their 3 months abandonment rule is being used against the returnees though under international human rights law such rules cannot be used against those who abandoned an apartment as they were fleeing due to war. (see case number 16)



- The Decree creates a court for cases involving property located in provinces other than Kabul that is located in Kabul with the provision to travel to the provinces to hear cases if necessary. The assumption this is based on seems flawed as given the nature of property disputes in Afghanistan judges need to be close to the location of the case. In practice the court does not travel to the provinces²⁵ and defendants do not travel to Kabul even if the claimant can afford to. Thus the Court is a non-entity outside Kabul. And even if the court did spend its time touring the provinces its capacity would never be enough to cover every province adequately.

It is the opinion of the author that the law is therefore fundamentally flawed, effectively leaving out great swathes of the target beneficiaries: IDPs; those with disputes with the government; and the majority of returnees to provinces other than Kabul.

Practical Problems

From the cases and according to NRC's legal counsellors, Special Court judges and others the following points can be observed, however many of these are interdependent and listing them separately is somewhat artificial:

- Corruption is rife and seems to be an accepted part of doing business in Afghanistan.²⁶ The Qala-e-Fatullah House Case (Case 3) shows that this is something that is done by any party in a case to advance their position. Bribes are asked for and accepted in the forms of money and land. Those unwilling or unable to pay bribes find judges may refuse to take/progress cases because of some regulation or another, which is clearly an excuse, as can be seen in the Dashti Barchi House Case (Case 12). If a defendant has paid bribes or is connected with the 'right people' judges may send the case

²⁵ When the author visited the Court in August 2004 the judges had made two visits outside Kabul, one to Mazar-i-sharif and one to Kandahar, each for a few days.

²⁶ At a consultative meeting on 1 May 2005, a judge of the Special Provincial Court told NRC officials that Special Court judges "could not be expected to make judicial decisions with salaries as low as they are." The judge pointed out that they have never been provided with the financial privileges as envisaged by Decree 89 and that "this problem" (apparently referring to corruption) would not occur if the salaries were increased.



back to the law department with some pretext or refer it to another court or department, which tends to decrease the level of study on it. The Ali Chopan Land Case (Case 11) is an example of how a case can be thrown around in the system under various pretexts. Or simply take no action and delay the case. On the other hand cases can bypass the normal procedures whether the claims are valid or not but again because of bribery or helpful connections, be it family or friends, as illustrated by the Sub-District 5 House Case (Case 2). Transparency in the procedure can alleviate some effects of corruption as evidenced by the Bagرامي Land Case (Case 5)

Forgery documents are generally not referred on to the relevant authorities as envisaged in the decree. Criminal aspects of cases, in particular the forgery of documents, should be referred to the criminal court/attorney general for prosecution/punishment. In practice this does not happen and forged documents are accepted and cases remain in the Special Court. The Special Court judges confirm that they lack sufficient training on modern techniques for detection of forged documents.²⁷ In the Karte Char House (Case 1) the NRC client was arrested for forgery when it was the defendant that had forged the documents. But through undue influence and corruption he was able to twist the facts.

- Political influence and the influence/ intimidation of powerful men and commanders are strong. Generally courts are politicised and are not independent, and especially in the provinces and in the Supreme Court political factionalism dominates. The Karga House Case (Case 6) shows how political influence can distort the progress of a case. Both the provincial courts' and the Supreme Court's senior members affect the operations of the Special Court.

The Special Court judges are often threatened or pressurised by armed or powerful defendants. Decisions are sometimes questioned by the Chief Justice, (*cazil cazote*), or his deputy when they have connections with the

²⁷ 1 May 2005 Consultative Meeting.



Defendant, as seen in the Jamiat Islami Case (Case 9). The judges feel they receive no support from the government in this difficult environment and feel that they would be risking their lives to ignore these powerful people.²⁸ Alternatively, the judges use the same tactics as seen above to avoid dealing with such cases, and even resort to closing cases that are too dangerous to deal with. See the Sharora House Case (Case 7) for an example of how even otherwise powerful figures bow away from a case.

- Enforcement by the police and Ministry of Interior and other relevant authorities is also subject to political influence and the influence of powerful men and commanders, different influences predominating in different areas. And where the rule of the gun prevails the authorities tend not to operate or are powerless. According to Special Court judges, the police often do not cooperate in bringing defendants to court or in implementation of judicial decisions.²⁹ In the Tahea-e-Maskan House Case (Case 10) NRC counsellors successfully solved a case despite the obstruction of a powerful defendant. The Wazir Akbar Khan House Case (Case 8) is an example of how a powerful commander can ignore almost all authorities until at last the defendant gives up his claim.
- The judges competence/motivation is often not of the standard required for such work:
- Judges have not all completed the required education and have little practical training.³⁰
- Judges are often not present.³¹

²⁸ In one instance, a request by the court for a governor to arrange security for a judge's visit was not attended to, and the judge was forced to visit the district without adequate security (1 May 2005 Consultative Meeting.)

²⁹ 1 May 2005 Consultative Meeting.

³⁰ According to Special Court judges, Decree 89 provides for the establishment of a Special Commission to facilitate training for Special Court judges, to take place outside Afghanistan. Apparently, none of these judges have received such training. (1 May 2005 Consultative Meeting)

³¹ When the author visited the Special Court in mid-August only one judge was present.



- Judges meet only once a week to hold case discussion meetings and only one case is discussed per meeting.³²
- Cases are not resolved within the required two-month timeframe.³³
- The procedural law is complicated and unclear. It seems unnecessarily convoluted, especially with regard to the Special Provincial Court. In the general confusion about court procedure, the judges can and do make pretexts for delaying/diverting cases, for example, cases are incorrectly referred to other courts. However this also happens as the judges do not seem to know the procedural law properly.³⁴ At the same time, rules that are clear are not followed e.g. time limits provided for in the Decree are honoured in their breach. Additionally, judges seem to take a restrictive approach as to what cases they can take and refer cases on to other courts when the problem is fundamentally a refugee's property dispute.
- One particular procedural problem that NRC's counsellors have faced is that the judges cannot or do not decide a case if the defendant has not turned up so that a guilty party can and often does just stay away. The judges often complain that the police do not cooperate in bringing in the defendants (even when they know where they are located) and thus they are hamstrung.³⁵ It was supposed to be the case that in this situation an advocate from the Supreme Court would take the place of the Defendant but this does not seem to work in practice. Under *shariat* law, a defendant must appear in court at least once, whereas under civil law if a defendant does not show up three times, an advocate can be appointed by the court to speak for

³² As stated by Head of the Special Court. (1 May 2005 Consultative Meeting)

³³ The judges confirm that they have never adhered to the two-month deadline in Decree 89, but fault the police and law department for the delays due to their lack of cooperation. (1 May 2005 Consultative Meeting)

³⁴ Special Court judges expressed that they have not had sufficient training on procedural laws. (1 May 2005 Consultative Meeting)

³⁵ Special Court judges explained that the President of Afghanistan issued a Special Order for the establishment of a specialized police unit to work with the Special Court in its proceedings and enforcement of decisions. However, the Ministry of Interior has never established this police unit. (1 May 2005 Consultative Meeting)



the defendant.³⁶ Because they allow for a prolonged or indefinite delay of cases, these procedural laws are both in conflict with Decree 89 which provides that cases must be adjudicated within a two-month timeframe.

- Indeed, because of the inefficient/ineffective system claimants often end up going round many different authorities in order to get some redress including petitioning the Supreme Court and the office of the President which further burdens the whole system, and wastes the time of people who should be dealing with bigger/other matters.
- Claimants occasionally mistakenly register their cases with the Attorney General's office, instead of the Law Department, and the case often takes many months before it reaches the Special Court. Special Court judges suggested that these cases are held back by the Attorney General or other government departments for reasons of partiality or merely to make work for themselves.³⁷
- Cases involving a government administration as one party tend to get lost in the system, as seen in the Sub-District 10 House Case (Case 4).
- The law can be very complicated. Though the civil code, based on *shariat* law, is the basis, numerous decrees and regulations from various governments are relevant as well as customary law. Though generally there is a lot of good law, there are gaps and not all refugee issues are covered, for example abandonment laws. The client in the Tahea-e-Maskan Case (Case 10) faced problems because he had to leave his apartment before paying the final instalments.

Additionally, what stands out from the cases is that the courts are following a strictly legal approach and what seems to be missing at the moment are principles upon which rulings can be made. For example, in cases of

³⁶ 1 May 2005 Consultative Meeting. In this case, there is also a clear a procedural conflict between *shariat* law and civil law.

³⁷ 1 May 2005 Consultative Meeting.



multiple claims of ownership/possession, the judges would benefit from principles/policies in order to decide what is just and equitable, and practical i.e. how Afghanistan should be dealing with its severe shortage of housing and landlessness.

- Capacity: the Special Court for Kabul has nine judges plus the Head of the Court. These judges simply do not have the capacity to deal with their caseload.³⁸ Judges of the Special Court for Kabul are concerned with the inefficiency of having each judge deal with cases all over the Kabul region, rather than dividing the court into departments that deal with specific regions of the city.³⁹ The Special Provincial Court has six judges plus the Head of the Court to deal with the whole of the country. There is one room for each Court, in which all of the judges have their office and court proceedings take place, and there is an office each for the Heads of the Court. There are no computers. The library is inadequate.
- Funding is provided via the Supreme Court, the channels and bureaucracy of which has made it difficult for the Special Court to obtain funding and the Special Provincial Court to obtain permission and budgets for travelling to the provinces.⁴⁰
- The Special Provincial Court has rarely travelled to the provinces.⁴¹ Judges partly prefer and partly have to stay in Kabul as things happen there, for example, the trainings for judges held by the international community. The Court has to ask the chief justice for permission to travel to the provinces and ask for money to pay for their accommodation and transport. There has been a lack of funding and support from the Supreme Court. Thus cases from the provinces have to be referred to Kabul and the claimant has to go to

³⁸ In an interview conducted on 31 May 2004 the judges of the Special Court said that 300 cases had been registered in the preceding two weeks.

³⁹ 1 May 2005 Consultative Meeting. The idea behind this is that a judge that deals with a certain area of the city will gain an expertise on that area, and thus will be more efficient and effective.

⁴⁰ Interview with the former Head of the Special Provincial Court.

⁴¹ The mobile teams that Decree 89 provides for have never been established due to lack of vehicles and budget for accommodation. (1 May 2005 Consultative Meeting)



Kabul. Cases therefore get seriously delayed, going back and fore from Kabul to the province in order to obtain information, often having to pass through both the courts and the law departments in each place. The Special Provincial Court often asks the provincial courts to do the preliminary work on the cases but it is not their duty to do so and so sometimes they cooperate and sometimes they do not. (The former Head of the Court stated that it was necessary to have representatives in the provinces to do this work.)

The actual procedure for referring cases to the Special Court is bureaucratic and confused. In Mazar, in our legal counsellors experience, returnees will hide their identity in order to avoid the Special Court process and use the local courts or avoid the court process altogether. On the other hand cases that should go to the Special Court are not referred by the local courts but dealt with by them.

Returnees do not usually have the resources to travel back and fore to Kabul regularly; and the case studies show how time consuming it is to take a case to Kabul. Defendants will rarely turn up which at best delays and at worst ends cases. The law provides that if a defendant comes to Kabul from a province he must have an address in the city or provide a witness to guarantee that he will be present at the court sessions. Often these defendants do not have a place to live in Kabul and do not have witnesses in the city to provide such a guarantee. In addition, the court often requires witnesses to testify that the defendant is in fact occupying the premises in question and that the claimant is in fact the owner of the property. However, it is usually too costly for witnesses to travel to Kabul.⁴² In Maimana, NRC has cases that should be referred to the Special Court but going to Kabul is simply not possible for the client.

The statistics of the Special Court speak for themselves: after nine months the court had received 148 cases of which 48 were refused, 51 were under progress, 47 had had some implementation on them and 3 were solved!⁴³

⁴² 1 May 2005 Consultative Meeting.

⁴³ Table of cases referred to the Special Provincial Court from the provinces, mid-August 2004.



- The law department (*huquq*) that all cases must pass through has exhibited a lack of capacity and inefficiencies, and along with perceived corruption has caused huge delays/ problems before the case even gets to the Special Court. The judges express that although the law provides that the law department must fully investigate each case prior to forwarding the case to the court, this is not happening in practise. The court receives incomplete investigations and much time is wasted having to investigate the case themselves or in sending the case back to the law department for further investigation. This is happening particularly in the provinces.⁴⁴
- As envisioned by Decree 89 refugees and returnees need a quick process, not a long drawn-out court process. Refugees coming from Peshawar and further a field lament that they cannot wait for months and years and coming back and fore endlessly to follow their case is also very difficult.
- During the court process either party (usually the defendant) can delay the progress of the case by not turning up. Afghanistan procedural law requires both parties to be present in the court for the case to be heard. As there are no punishments for being absent and no rules concerning contempt of court, this is a very frequent problem - The Karte Parwan Shop Case (Case 14) is an example of how a case can be delayed in this way in the court. The Sub district 5 House Case (Case 2) is an example of how this procedure can also be used in the Kabul Law Department - who handles the cases before they go to court.

Poor and illiterate claimants get frustrated or simply do not understand the court process. Delays are thus often the claimant or defendant's fault as they do not write their petition or take months to do so or they do not attend court at the same time. This understanding of the target beneficiaries does not seem to have been taken into account by the service provided.

The Special Court is generally perceived as inadequate to solve the returning refugees' problems. The citizens often view the judges as corrupt or lacking

⁴⁴ 1 May 2005 Consultative Meeting.



authority, and the procedures as cumbersome and inefficient. What is more it is only operating in Kabul where the poor from the provinces cannot reach. Corrupt or not, the judges simply do not have the capacity and facilities to fulfil their function. Salaries, though more than a normal judge's salary, (if they have actually received their increase), are inadequate to defeat corruption and intimidation.

In NRC's experience many clients will try to avoid the court process and try to find a solution to their disputes through mediation and *jirgas*⁴⁵. This is for a number of reasons: decisions can be reached much faster than through the court process; there are few costs; the decision-makers are less susceptible to bribery and corruption; and the process is more easily accessible to the illiterate. *Jirgas* are often a good solution, the decisions of which, if formalised, would greatly assist the formal system.

Recommendations

1. Some serious momentum has to be instilled in this Court, the judges increased in number and urgency attached to solving cases. The judges' working hours should be defined and followed and case discussion meetings should be held more than once per week. Time lines in the Decree should be adhered to and those judges that fail in this should be called to account. The process must be speedy, it should not be thought acceptable for a case to take months as this is not a normal court; it is supposed to be quick in order to assist refugees to return and continue their lives.⁴⁶

⁴⁵ *Jirgas* are products of Afghanistan's patriarchal, tribal society, which lays a strong emphasis on solving conflicts 'privately' within the family, village or clan. A *jirga* is a decision-making forum at which theoretically all/any adult males can participate. Decisions should be based on principles of Islamic law but perceptions of what the law is, is influenced heavily by Afghan tribal traditions. As *jirgas* reach their decisions by consensus they tend to try to settle disputes through compromise, which makes them an effective mechanism for conflict resolution. However if one party does not accept the decision it cannot be enforced where traditional community policing powers have broken down.

⁴⁶ Although Special Court judges agree that reforms should be instituted that will support a more efficient adjudication process, they do not agree with the enforcement of a deadline for resolution of cases believing that this will hinder the making of quality decisions. (1 May 2005 Consultative Meeting)



Funding should be increased and provision made for computers and court equipment as well as better premises.⁴⁷ Budgets should be accessible to the Heads of the Courts and thus unnecessary bureaucracy, whereby the budget and expenditures of the Special Court are tightly controlled by the Supreme Court, should be cut out.

2. The Special Court should have a respected status with well-trained judges who are paid adequately⁴⁸ and are accountable; accountability and transparency established through proper reporting methods as well as more detailed and clear procedures and processes which are monitored. This will decrease corruption as well as enable the judges to operate effectively.

Special Court judges should receive in-country training by international judicial experts, and be given the opportunity to study effective judicial systems in countries that share commonalities with the Afghan system.

Currently there is very little court reporting. There are no transcripts and it is difficult to see if a ruling is consistent with others or not. When a case is closed it is returned to where it came from, most often the law department. There is no public case report. Additionally there are no individual reports documenting what an individual judge has thought, said or done so that if a judge makes a wrong decision he can stand unchecked. Proper case reports as well as an annual report to the President are recommended.

As for transparency, though the constitution states that trials must be open, the permission of the judge is generally needed to attend the court. And there is no court-room as such but one room the judges (of each court) all share so the setting is more akin to an office than a public court house. Thus the use of international monitors would open up the process as well as verify whether judges were adhering to procedural law, which needs clarification and

⁴⁷ The Special Court judges support the recommendation for funding to improve court facilities. (1 May 2005 Consultative Meeting) The NRC will consider possible funding of computers and computer training for the Special Court, provided it remains operational.

⁴⁸ The Special Court judges support the recommendation for training and increased salaries. (1 May 2005 Consultative Meeting)



simplification. Judges who misuse their powers and do not follow the law should be held accountable, including making public such actions and the names of those who are responsible.

Additionally, the Ministry of Refugees and Repatriation has the competence from Decree 297 to follow up cases in the Special Court and to check the implementation of its orders. In practice the judges do not accept their 'interference' nor do the officials have the capacity. MoRR should be strengthened and allowed to carry out this function.

3. Now, at the same time, the security of the judges has long been a concern but has not been adequately dealt with - judges still feel vulnerable and insufficiently protected. There has to be a body that the judges can turn to and rely on when they are being pressurised or threatened and it is suggested that a specialised team from the Department of Security, in conjunction with the specialised police team as discussed below,⁴⁹ could do this. It would involve both protecting the judge (security team) and exposing and apprehending the commander, public official or Supreme Court/provincial court judge involved (police team). This would certainly not be easy but is absolutely crucial to stop the current impunity and resultant intimidation of judges.

4. The substantive law needs to be 'cleared up' and widely disseminated.⁵⁰ Clarification, coordination and integration of the many relevant laws are necessary and a comprehensive set of materials prepared for the judges. The gaps in the law need to be recognised and addressed, for example how to address the abandonment laws of government schemes (see cases).

Judges need principles on which to base their decisions especially for multiple ownership claims involving some with a historical and/or social legitimacy that cannot be dismissed by invoking the law. The instruction to the South African Land Claims Court to decide what is "just and equitable" in cases of multiple claims of ownership could usefully be applied in Afghanistan, where a strictly

⁴⁹ Recommendation number nine. The Special Court judges agree that their security is a top priority and that security issues hinder the resolution of cases. (1 May 2005 Consultative Meeting)

⁵⁰ Judges of the Special Court support this recommendation. (1 May 2005 Consultative Meeting)



legal approach to property ownership can be seen from the case reports to be creating further injustices. For example, a refugee maintaining a prosperous new life in the west can return and claim his house, evict a family who have been living there for the last 10 years who bought it *bona fide* and then rent it out to an INGO and go home; property laws that ignore the realities of the current situation can sometimes lead to inappropriate or unintended consequences.

Principles should be based on government policies as to how to deal with the severe shortage of housing and the increasing landlessness of the people. At the moment there is no coherent land policy. Recommended for the time being then, most obviously for the benefit of group cases, is the Court's interaction with the ad hoc Land Commissions established by the Ministry of Agriculture and the Land committees established by UNHCR in order to address the land problems of returnees and IDPs in a holistic manner.

Procedural laws also need clarification, particularly to avoid indefinite delays due to defendants not showing up in court.⁵¹ It is recommended that the law provide that cases be adjudicated in a defendant's absence, when he or she has not provided a reasonable excuse for not appearing in court.

5. The Special Court must be present in the provinces.⁵² The primary level of the Court should be present in each provincial city. A separate court can be established in each city or a new section of the general primary court/city court should be made. If this is not financially possible - though it should be seen as a short-term humanitarian aid measure - then as already suggested by the former Head of the Special Provincial Court, representatives should be installed at these courts to do the initial leg work and then refer cases on to the Court. Either way, the judges should be trained in Kabul.

⁵¹The Special Court has recommended to the Supreme Court that decisions on cases be made even if the defendant does not appear in court. However, a decision on this recommendation has not yet been made. (1 May 2005 Consultative Meeting)

⁵²This recommendation is supported by the Special Court judges. They believe that the court's presence in the regions will help to overcome the obstacles of claimants and defendants not appearing in court, and will improve the quality of investigation into cases. (1 May 2005 Consultative Meeting)



At the District level there is generally a great lack of capacity and much commander influence. There is also a lack of accountability due to the fact that many of these judges use solely *shariat* law and write decisions partly or wholly in Arabic, which the people cannot understand. In areas where there are government offices representatives of the Special Court should be appointed, be these new positions or new responsibilities for incumbent judges. However, in other areas, judges travel out to remote districts for a few days a week. In these areas a representative could accompany such missions.

6. The Special Court should have jurisdiction over IDPs.⁵³ Of course here the definition of an IDP is a problem as is the questionable capacity of the Court to take on all these extra cases but a restrictive definition could be given with criteria to be met in order to assist IDPs clearly displaced due to conflict. Typically, IDPs have the same issues and are in the same situation as refugees but they 'simply' did not pass over a border.

7. The Special Court should be responsible to resolve refugee cases irrespective of the defendant, even if it is a government department. Whether it is the primary Special Court that takes the cases or a sister body to the primary Special Court be established, the Special Court should have jurisdiction where one party is a government entity (and the other is a natural person or entity). This would counteract the influence of government officials over the decisions of the ordinary courts. More significantly, however, it would mean that there would need to be rules as to how municipalities and government ministries should be dealing with returning refugees so that the Court's decisions would be made in line with urban/rural property policy. A coherent approach to these issues could most easily be taken by a specialised body, where the issues were understood, the rights of refugees addressed and this done in a timely fashion.

8. The Law Department should have a team responsible for cases going to the Special Court. In close coordination with the Court it should continue to

⁵³ Judges of the Special Court support this recommendation provided that the court is properly staffed and resourced to cover any expanded jurisdiction. This also applies to recommendations seven and ten. (1 May 2005 Consultative Meeting.)



mediate the cases which would benefit from this approach, the decisions for which should then be confirmed by the Court as formal legal decisions or the results otherwise registered officially i.e. the new status or the changed ownership of the land. And this could be extended to provide a mechanism to formalise property decisions of *jirgas*, the decision-making forum of Afghanistan's informal justice system, which are often more appropriate for dealing with complicated land disputes. For cases that are forwarded to the Special Court, the Law Department should carry out full and complete investigations.⁵⁴

9. The organisation of a specialised team within the police is recommended as a way to strengthen and hold to account police officers responsible for apprehending defendants, enforcing court orders and evicting occupants from others property.⁵⁵

10. Lastly there is the argument to extend the jurisdiction of the Special Court into moveable property and money disputes i.e. to cover cases involving refugees' belongings such as furniture and cars and the money disputes of rent, pledge and goodwill arrangements or the non-payment of electricity bills or taxes. The rationale is that the disputes have arisen from the situation arising in the refugees' absence and have similar fact patterns to the other property disputes or are often connected to an underlying property dispute. The idea again is that a specialised court is more efficient because the judges know the issues and so redress can be obtained quickly allowing refugees to get on with their lives. The counter-argument is of course that other courts should help to share the burden as there are so many refugees, returnees and IDPs. The alternative would then be to have specialised judges within the ordinary court system, trained in these areas by the Special Court judges.

Conclusion

The Special Court for Property Disputes Resolution is currently failing Afghan

⁵⁴ Judges of the Special Court support this recommendation. (1 May 2005 Consultative Meeting)

⁵⁵ Judges of the Special Court support this recommendation. (1 May 2005 Consultative Meeting)



refugees, returnees and IDPs. The findings of this report illustrate that the Special Court is seldom an engine of justice but rather another barrier to the successful return and reintegration of Afghan refugees and IDPs.

Of course corruption is endemic throughout the entire legal system of Afghanistan and the rule of law is not yet established in much of the country. However, there is the possibility of and the need for an exemplary land and property court with judges that could be held to higher standards than others. That was the vision for the Special Court: it is imperative that the government with the assistance of the international community make it happen through reforms. Other courts can then follow.

To abolish the Special Court, as envisaged by an impending decree, only to redistribute the cases to the ordinary courts, is not the most useful response to the ineffectiveness and inefficiencies of the Special Court. The establishment of a specialized court dealing with land and property cases of refugees, returnees and IDPs was a positive development, and it is much too early to eliminate this court.

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APPENDIX

Case Reports

The following cases are intended to show the practical and procedural problems currently facing those trying to use the Special Court and provide the basis for the offer of recommendations for reform. They are only some of the cases followed by NRC's legal counsellors and it is our understanding that cases that arrive at NRC centres constitute only the tip of the iceberg. However the overall information obtained is a clear illustration of the operations of the Special Court and the problems faced by the returnees, refugees and IDPs of Afghanistan. The cases are divided under categories, according to the issues and problems that the cases illustrate: corruption, political influence, and abuse of process. Some of the cases also illustrate the serious inefficiencies and obstacles caused by not having the Special Court present in the provinces.

The original goal was to document only cases in the Special Court but it became apparent that in order to show the whole picture cases going through other courts as well as the enforcement process also had to be shown in order to show the confusion, intimidation and corruption currently denying displaced people of their rights.¹ As will be seen, cases that should be in the Special Court are not, cases generally take months or years if they are decided at all and in the provinces claims are difficult or impossible to pursue due to the fact that the Special Court is not physically there.

It should be noted that the work of NRC's legal counsellors does not necessarily involve following a case continuously through all the legal steps as their input is not always required. Rather they provide advice and action when necessary in order to spur the authorities into action, allow clients to avoid paying bribes and represent clients in proving their case and ensuring the law is followed. If some of the case reports seem tedious to read that is because they are recording an often tedious process!

¹ Some case reports record that cases started in the Special Commission. However, they will have been in the Special Court post November 2003 to be included.



The names of individual clients have been omitted for reasons of confidentiality as have the names of defendants sometimes for reasons of confidentiality and sometimes in order to protect the clients and/or our legal counsellors. It was felt necessary also to omit dates of meetings and other legal actions for similar reasons. However timelines are given, time delays being one of the major criticisms of the Court's operations. Given the conditions that exist in Afghanistan at the moment, it is very difficult to produce a rigorously impartial, referenced and cross-checked report, but every effort has been made to ensure that the following accounts are as truthful and accurate as possible. This report does not aim to explain Afghan law: when necessary for comprehension the author has included explanations in the case studies but for an account of Afghanistan's property law please refer to NRC's property law manual.

Corruption

Case Number 1: Karte Char House Case

In this case NRC's client owned a house in Karte Char, District 3 of Kabul City. Formerly a wealthy area, most of the houses were destroyed in the civil war. The client left for Germany 24 years ago and during that time three other people had obtained deeds from the Court.

This case had been under the study of the Special Court for over a year when NRC's client approached NRC's Kabul ILAC. Originally, the Special Commission had said that NRC's client held the original title deeds and as such the house belonged to him, and it should be vacated for him. He had had 38 documents relating to the house and some important witnesses including a Minister and an Ambassador.

However, the Defendant's relatives were occupying the house and the Defendant was very wealthy. The legal counsellors suspected he was bribing the judges so that a decision from the Special Court was not issued.



NRC's client came to NRC's Kabul ILAC and brought the relevant documents. He also showed the legal counsellors the orders he had obtained from various authorities asking that this case be accelerated. The legal counsellors wrote a letter to the Special Court stating that their client had the documents proving he was the rightful owner, as the decision of the Special Commission had stated, and that the Court should now order the Defendant to leave the house. The legal counsellors met the concerned judges and they said they would inform them of the outcome.

The next week NRC's client came to NRC's Kabul ILAC and told the legal counsellors that the Court had told him that they had lost the copy of the official title deed that the NRC's client possessed. (For verification purposes the issuing Court keeps a copy of the official title deed (*qabala-i-sharayee*)). It seemed to the legal counsellors that this was a conspiracy instigated by the Defendant to enable a forgery document to be used to show the ownership of the Defendant.

The next month the legal counsellors wrote a second official letter to the Special Court, referring to their first letter and asking them to pay attention to the case and resolve it. The next day NRC's client was arrested by the police for forgery. His friend came to NRC's Kabul ILAC to tell the legal counsellors. One of the legal counsellors phoned the Kabul Police Commander to ask why his client had been arrested. The Commander was confused so the legal counsellors visited him to explain that the police actions were mistaken. He contacted the police department which had made the arrest and NRC's client was released.

The legal counsellors wanted to meet with the Head of the Special Court to ask why the Court was postponing the case. However they could not make any progress. They believe that the delay is because the Defendant is wealthy and since it is an expensive house on valuable land he is bribing the judges and similarly maintaining good relations with the authorities. NRC's client has important friends but in this case the money seems to be the more powerful factor.



So then the legal counsellors also contacted the Defendant and asked him why the case was being delayed. He said he was ready to attend court anytime but NRC's client was not ready to go. For now the case can be taken no further.

Case Number 2: Sub-district 5 House

NRC's client claims that in 1986 his father bought a house by customary document (*qabala-i-urfi*) in sub-district 5, Kabul. In the early/mid nineties when there was fighting in Kabul he fled to Pakistan. He asked his neighbour to live in his house temporarily in order to look after it but then that person also fled as fighting increased. Then a lawyer occupied the house and made a forged document. He then also left because of the war.

NRC's client returned to Afghanistan. He moved back into his house but the lawyer also came back and claimed that the house was his. The case was under the study of the Special Court but NRC's client found it difficult to follow up as the lawyer had good relations with the judiciary. The lawyer argued that he was not a returnee and so the case should not be in the Special Court, which is incorrect. The Court then rejected the case and referred it to the sub-district 5 Court. This would decrease the level of study on it.

The legal counsellors went to their client's house. They asked the neighbours what they knew and visited the representative of the area. They gave the representative a letter explaining their client's claim and asking him to establish the truth of the matter. They accepted the customary document, that the fingerprints were correct and said yes the house belonged to NRC's client.

The legal counsellors went to the Defendant's house to meet him. They discussed the case for an hour but he insisted the house belonged to him. The same day the counsellors met the Head of the sub-district 5 Court and the judge on the case. He said that he wanted to advise the parties to accept mediation. The legal counsellors told NRC's client that he should try to negotiate but this approach failed. They also went to see the Defendant a second time but unsuccessfully.



After some time the legal counsellors approached the District Court again. They met the relevant judge and the Head of the Court again and explained that their client was in the right. They followed up by sending an official letter to the Court explaining that as their client was a returnee they should refer the case to the Special Court.

NRC's client came to NRC's Kabul ILAC two weeks later and told the counsellors that the District Court had referred the case to the Special Court. According to the procedure, they sent it to the Law Department (*huquq*) for them to refer it on. The Law Department declared that NRC's client and the Defendant must be present at the department in order to refer the case but when this was arranged the Defendant did not turn up. Now they have waited many months for the Defendant to attend the *huquq* but he has not gone and the *huquq* will not pass the case on to the Special Court though procedurally it can and should.

Case Number 3: Qala-e-Fatullah House Case

NRC's client left Afghanistan 23 years ago as a refugee. He has been living in America. He had a house in Qala-e-Fatullah, District 10 of Kabul. He returned in 2003 and wanted to take his house. The house was under the protection of the state from 1983 until 1994 i.e. the government had control of the property and could use it or rent it out until NRC's client returned.² However then NRC's client's brother had given a petition to the government to ask for the house back and so the officials living there had been asked to leave and the house was given to the brother.³ NRC's client's brother had then given the house to his son who wanted to rent the house. NRC's client told the nephew that he should return the house to him. However, the nephew had given the house "in pledge"⁴ to another person.

² Then the property should be returned within 4 months according to Regulation 789 for the Protection of Statement Apartments 1990.

³ It has been a common practice for a family member of the property owner to be given the property.

⁴ See case number one.



When NRC's client arrived and found out that his nephew had given the house in pledge, he informed the police. He said that the police delayed the case for about 3 months and that he could not take his house back. Then he complained to the Special Commission and after another two or three months the case was referred to the Special Court with the opinion that it was NRC's clients house and the pledge document was invalid. Then the Special Court ordered that the house be given to NRC's client. However the person living in the house refused to leave.

NRC's client came to the office after another few months of non-action. The NRC's client told the legal counsellors that he had paid a lot of money in bribes to the judges but that it still took a long time as if the judges solved the case immediately they would not be able to benefit from more bribes. He also paid money to the person living in the house under pledge. The police should have implemented the court order immediately but they had either not received the order or not implemented it.

The legal counsellors wrote a letter to the Commander of Police and also visited the Commander to ask him to implement the order of the Court. The police led a delegation consisting of a prosecutor, a member of the law department and a member of the police department to the house and told the person living there that he was disobeying the court order and now this was the final notice and he had 48 hours to leave. The person signed a document that was also witnessed by his neighbours stating that according to the order of the court he had notice and would leave the house in two days.

Two weeks later NRC's client returned to NRC's Kabul ILAC and said that the person had only emptied the first floor and was living on the second floor. NRC's client said that the person claimed that he had got an order from the Supreme Court that said he had the right to live on the second floor until the appearance of NRC's client's nephew. NRC's client said that the district police had said that Kabul Garrison HQ had interfered in their affairs and they halted



the eviction of this person. This means it is likely that the person has good relations with someone in the Garrison or paid them off.⁵

The legal counsellors made another appointment with the Police Commander. They complained to him that the District police did not want to force the person to leave due to the Garrison's interference. The Commander phoned the District Police and told them to evict the person from the house immediately. Two days later NRC's client came to NRC's Kabul ILAC and said that the person had been evicted.

Case Number 4: Sub-District 10 House Case

NRC's client claimed that he worked at the Department of Housing Construction. This department gave him an apartment in 1987 and he was paying rent monthly from his salary. He left the country in 1996 due to the Taliban and went to Pakistan. He returned after the interim government took power and found that his apartment had been given to another person. This person had paid the whole amount of the cost of the apartment and was wanting to obtain the title deed from the court.

NRC's client went back to work at the Department but when he went to the Head of the Department to complain about the fact that his apartment had been given to another, the Head dismissed him from his job. Now he has no shelter and no job. However, according to the Department's regulations the apartment is his for life and indeed after he dies his family inherits it.

NRC's client had taken his case to the Special Court but they said they could not accept it there as one side to the dispute was a government administration. Thus NRC's client took his case to the law department and they referred it to sub-district 10 court. However there had been no progress on the case.

First the legal counsellors tried mediation with the occupier but he was not willing to mediate. Then they tried to see the Head of the Department but he

⁵ Of course this person who paid the pledge money has a claim to get his pledge money back from NRC's client's nephew.



refused to meet with them. They discussed the case with his staff but reached no satisfactory conclusions. The Department was relying on a rule in the regulations, which states that if people are absent for three months their apartment can be redistributed. However this is in normal circumstances, not if people are fleeing a war-zone. NRC's Kabul ILAC received about 15 other similar complaints. It seemed from the counsellors' investigations that the Head of the Department had been distributing these apartments to his friends and relatives who were not even workers.

The counsellors wrote an official letter to the sub-district 10 Court asking that no title deeds be given out until their clients' cases were solved.

The counsellors then wrote a letter to the Ministry of Housing and Urban Development. They complained that the Head of the Department of Housing Construction would not meet them and explained NRC's clients' cases. They noted that the Head seemed to be distributing apartments to his relatives and argued that NRC's clients were entitled to their apartments. They also wrote that now there were 100 new apartments available for renting and so NRC's clients should otherwise receive from these.

However they received no reply and then the Minister was changed. They also asked the State Affairs Department to study these cases and suggested that the distribution of these apartments and the obtaining of title deeds be put on hold.

At the time of writing the counsellors were waiting for the new Minister to be appointed by the President and then they would take this case up with him. However, this is the sort of case that in the author's opinion could be more easily dealt with in a sister Special Court or body with the authority to summon the Head of the Department of Housing Construction.

Case Number 5: Bagrami Land Case

NRC's client is one of four co-owners of 15 jeribs of pastureland land in Bagrami District. Their fathers owned the land and had a legal document from the court from over 30 years ago. In 1965 there was a District court decision



stating that the land belonged to them. NRC's client and his family fled to Pakistan in 1992. His land was occupied by a powerful *mujahidin* commander who is involved in Harakat-e-Inqilab-e-Islami, a political group.

NRC's client returned in 2002 and tried to get back his land. His co-owners, who were not refugees, had started an action in the Bagrami District court, which decided in 2003 in their benefit. However the Defendant did not accept the court decision and he appealed. Eventually the documents were sent to the civil appeal court in the first months of 2004.

NRC's client came to NRC's Kabul ILAC after the case had been under progress at the appeal court for one month and he said that the responsible judge was asking him for money and if he had no money for a part of the land. The legal counsellors went to see the judge to ask about their client's case and he said that he would read the decision from Bagrami District court and affirm it if it was correct. If it was mistaken he would refer the case back to the District court for a new judgement.

Two weeks later NRC's client brought the legal counsellors the order from the appeal court, affirming the Bagrami District court decision. He was very grateful that NRC had enabled him to proceed his case without the normally required bribe. NRC's client took the order to Bagrami District court and the court informed the defendant of the decision. He left the land and NRC's client got it back.

Political Influence

Case Number 6: Karga House Case

NRC's client's brother who was a lecturer and poet owned a house in Karga. In the early 1990s robbers broke into his home and he was killed and the jewelry and other possessions looted. He had no wife or children. The District 5 Police Department was informed and NRC's client and another brother took care of the property. During the civil war they pledged the house to a person against 150,000 Afghani. NRC's client took his family to Pakistan but the other



brother remained in his apartment in Micro-rayon. The person who the house was “pledged”⁶ to was killed in the war and his son occupied the house.

During the Taliban regime, the cousin of the man who NRC's client's brother had bought the house from claimed that the property was inheritance property and that this house was the quota of his father. He forcefully evicted the son of the man who had taken the house in pledge from the house and sold it to another person who is a shopkeeper in Kabul. NRC's client returned to Afghanistan soon after 11 September 2001.

NRC's client came to NRC's Kabul ILAC and said that the case was under the study of the Special Court. However a couple of months later the Special Court sent the case to Paghman District Court. NRC's client said I am a returnee and my case should be in the Special Court. He made a petition to the Supreme Court in order to change the court back but the Supreme Court only ordered the Special Court to pay attention to NRC's client's petition and the Special Court ignored this. NRC's client sent another petition to the Supreme Court and the deputy of the Supreme Court ordered that if there was no legal obstacle the Special Court should pay attention to the case. However the Special Court refused to pay attention to the case.

At the beginning of this year Kabul Civil Appeal Court sent an official letter to the Paghman court. They had decided that there was no reason for the case to go back from Paghman to the Special Court. There was also a letter to say to Paghman District Court that the Supreme Court did not accept NRC's client's petition to change the court.

In fact the Defendant has connections with Paghman District Court. Indeed, he is a member of the Etihadi Islami party and was being supported by Ministers and so the Special Court and the Supreme Court could not do anything. NRC's client's case is one complaint of many: the Defendant had taken other property in the area in order to build a villa and in a meeting with the

⁶ The English word pledge is used here for the *rahn* or *gerawi* contract. The owner receives a fixed sum of money and the payer has the right to use the property for the contracted period. It is temporary ownership. At the end of this period the owner returns the money and takes back his property.



local representative the legal counselors were told that all the people were complaining about him and making petitions but with no result due to his connections. He had also made forged documents and occupied these people's lands and then resold the land, giving money to his supporters. Everybody knew about his activities, the local authorities all confirmed to our legal counselors that this was the reality. President Karzai gave an order to make a commission to follow up these people's case. However nothing has happened.

This spring NRC's client came to NRC's Kabul ILAC and said that the case was now registered in Paghman District court but that he did not want to go there. The legal counselors advised their client to find the original seller of the property and bring him to the office to try to start negotiations. Thus the son of the man who sold the house to NRC's client's brother came to the office and attested that his father had sold the property to NRC's client's brother. He said that the defendant made his claim about his inheritance rights as he had good relations with the Taliban and other commanders, not because there was an inheritance right.

Then the legal counselors went to the defendant's apartment but he was not there. They left a message with his family to tell him to come to NRC's Kabul ILAC. His daughter gave the counselors his mobile number. The counselor phoned him and asked him to come to NRC's Kabul ILAC. Surprisingly he came the next day and brought some legal documents from various courts. He said that his cousin had sold the land without permission of the other inheritors and so he should compensate the other inheritors. He asked the counselors if they would participate in a *jirga* to resolve the issue.

NRC's client agreed and said that if the Defendant did not arrange the *jirga* then he would ask the elders. However after that despite repeated attempts the counselors could not get the defendant to set a date for a *jirga*. He was obviously not willing to accept mediation so NRC's client was obliged to follow the case through the court.



Two months later NRC's client informed the counselors of his case number at Paghman District Court and the legal counselors advised him to prepare his statement for the court. The court called the defendant to be present at the court for a judicial session but it did not take place.

The legal counselors sent two letters in the summer months to Paghman District Court to ask what was happening on the case. The court replied, they said that if the Defendant came the NRC's client was not present and when the NRC's client came the Defendant was not present. Therefore they could not make a judgment. The legal counselors believed this to be an excuse. Thus the case continues to sit in the Paghman District Court.

Case Number 7: Sharora House Case

NRC's client said his father was martyred during the war between Najibullah and the *Mujahedin* but that previously he had worked at the Ministry of Security and so had received an apartment from the Ministry.⁷ The apartment is in Project Sharora, District 4 of Kabul. During the Kabul war the family went to Pakistan. They returned when the Transitional government was established and they lived in their apartment. However, the then Head of the Department of Construction forcefully evicted his family and occupied the apartment, also keeping the furniture and other contents. The neighbors witnessed the event and said that he had been accompanied by armed men. In fact, Basir Salangi, the then Commander of Kabul Police had ordered the Shari Naw police station, responsible for Districts 4 and 10, to evict the family.

NRC's client came to NRC's Kabul ILAC and the legal counselors registered the case and saw that he had the relevant legal documents. They asked him to bring his neighbors to the ILAC to witness that he was telling the truth.

Then the legal counselors helped the client file his claim at the *huquq* (law department). Six weeks later, upon hearing that no action had been taken, they

⁷ See case number four.



sent an official letter to ask about the case.⁸ Two weeks later the legal counselors met the Head of Kabul Law Department. He promised to accelerate the case procedure. The legal counselors believe the case was being postponed because the Defendant is an influential person and it is probable he was giving bribes to the officials. They met the Head of Kabul Law Department again the next week. Promises were made but there was no implementation.

At the same time the legal counselors sent an official letter to the Governor of Kabul to ask for his assistance, in order to try to tackle the issue through the police.

Also NRC's client went to the President's Palace and gave his petition to the office of the President. He received an order from the Head of the State Affairs Department for the Governor of Kabul to arrange the eviction of the Defendant from the apartment and it be given to him.

However, the next month NRC's client came to NRC's Kabul ILAC and said that the District 4 Police would not implement the order of the State Affairs Department. The legal counselors met Baba Jan, the Kabul Police Commander. He said that actually the Defendant had obtained a contradictory order from the State Affairs Department and so he did not know which one to implement. He promised to follow this up with the Department in order to clarify the situation. He also said he would implement an order of the Court.

Two months later the legal counselors went again to the *huquq*. This time they met the vice-head of the department. As mediation was impossible as the Defendant had not come to the law department, (whether due to the officials there not asking the police or the police not assisting), they advised him to send the case to the Special Court.⁹ The legal counselors told their client to check the case was registered at the Special Court and the next week he brought the registration number. (This was five months after NRC's client's case was filed

⁸ Normal procedure requires the *huquq* (law department) to contact the defendant to require him to attend the *huquq* or otherwise respond. The police should assist in this process if necessary.

⁹ If the Defendant does not appear the *huquq* can transfer the case to the court.



at the law department.) Then they wrote an official letter to the Special Court. The Special Court ordered the Defendant to appear.

However, the judges told NRC's legal counselors that the police were not assisting in bringing in the Defendant. Now the case is stopped as the Special Court will take it no further since the Defendant has never been present at the law department nor the court.

Case number 8: Wazir Akbar Khan House Case

NRC's client is a businessman who owns a house in Wazir Akbar Khan, District 10 of Kabul. He inherited the house and holds the official title deed, (*qabala-i-sharayee*). He fled to Pakistan in 1996 due to the Taliban coming to power in Kabul. After their downfall he returned to Kabul to find his house occupied by a very powerful general from the Panshir, then a commander of one of the Kabul ANA Divisions, the only person known to be able to control him being the then Minister of Defense, Marshall Fahim.

NRC's client obtained an order from the Special Court, which stated that the General should leave the house. As the order was not enforced, NRC's client then obtained an order to the same effect from the Supreme Court the next month. He also obtained various orders from the office of the President, the Ministry of Refugees and Repatriation and from District 10 Police. He also had a statement from the Afghan Independent Human Right's Commission. The representative of the Attorney-General told the General to leave the house but the General did not receive him well. The next month Kabul's Attorney-General, Kabul's Police Commander and the Kabul Law Department made a report which said that they had visited the General and told him that our NRC's client was the legal owner of the house, as the Special Court had found, but the General would not leave.

The man came to NRC's Kabul ILAC about three months into the process as the Defendant had not left the house despite the above orders and actions. The legal counselors visited the Commander of the Police and he said he would send the matter to the District Police but he indicated that he was afraid to do



anything. Two weeks later the legal counselors visited the Head of Police for the 10th District and told him that he had the responsibility to implement the Court's decision. The head said that he had collected the necessary documents and given them to Kabul's Police Commander who had told him that he would give the papers to Marshall Fahim. (The General's influence on the local police and security was too great for them to be able to tell him what to do.)

Next, one of the legal counselors telephoned the Defendant. He said that his client had the title deed and that the General should obey the orders of the courts and the other authorities. The Defendant said he also had a document, a customary document, which the legal counselor should see before he claimed that his client was the owner. The legal counselor asked him to send it over and it was sent. It was a forgery document, stating that he had bought the house during the Taliban period.

NRC's client told the legal counselors that the General had told him he would leave the house if he gave him \$100,000. Then, after NRC had become involved, he said he would leave for \$80,000. A couple of months later NRC's client gave up and returned to Pakistan.

Case Number 9: Jamiat Islami Case

NRC's client claims that in 1989 he was given an apartment in third Micro-rayon according to Presidential Decree 241 issued by Najibullah, which stated that the apartments in Micro-rayon should be distributed to those in need of an apartment. He paid 50% of the price. NRC's client became a refugee in Russia and locked his apartment and left. In 1995 his apartment was distributed to the deputy of the Faculty of Science at Kabul University, according to the personal order of the then President, Pro. Barhanuddin Rabani. NRC's client's belongings were of course still all inside.

NRC's client returned recently and gave a petition to the Supreme Court. He received an order in his benefit from the Department of *Sharia* law. However, the administrative deputy of the Supreme Court had to sign the order and instead he halted its implementation by keeping it in his office. The legal



counselors believe that this was because the administrative deputy was friendly with a leading figure in the Jamiat Islami party, and the man occupying his apartment, also a member of the party. Thus the case is pending as no one dares to confront the deputy of the Supreme Court.

Abuse of Process

Case Number 10: Tahea-e-Maskan House Case

NRC's client received an apartment from the Ministry of Security (as the General department of Security then was) in Tahea-e-Maskan, District 4 of Kabul, in 1983. As an employee of the state he was entitled to purchase the apartment with a small initial payment, the remaining price to be paid over a 30 year period.¹⁰ He had paid 40% of the installments when he was forcefully evicted from his home during the *Mujahedin* time. A powerful *mujahedin* general also working for the Ministry, had illegally obtained the Ministry's order that the apartment should be given to him. During the Taliban government the NRC's client migrated to Pakistan, while the General fled Kabul. NRC's client returned when the Interim Administration took office and reoccupied his apartment. However after a few weeks the General reappeared on the scene and started harassing him and he was frightened he would evict him again.

NRC's client came to NRC's Kabul ILAC and told the legal counsellors that he knew the General had another apartment, (indeed he had a lot of property). According to the regulations applying to the distribution of state apartments in Kabul, a person who has an apartment has no right to obtain one from the government.¹¹

The case was already under the study of the Special Court. The legal counsellors went to the Special Court and met the relevant judges who said the case was under progress but not decided as they needed more information.

¹⁰ This was according to the Decree under Zaher Shah. Under Najibullah, the government extended the repayment period to 40 years.

¹¹ Regulation 725 on the distribution and sale of state apartments and municipal plots in Kabul city, 1990.



They directed NRC's client to find the address of the General's other apartment in order to prove this allegation. When the counsellors returned to the Special Court, the Head of the Court agreed that the defendant, the General, had other property but said that they could not do anything, he was too powerful.

So the legal counsellors went to the fifth army division to try to meet the General but they were told he was not on duty. They tried to meet the deputy commander of Kabul Garrison HQ, a powerful person who had also threatened NRC's client but he was also absent.

After two months the legal counsellors went again to the Special Court and talked with the relevant judge. They had not yet issued an official decision but had seen that the Defendant had a lot of properties, including an apartment in Micro-rayon and a high-rise building in Khier Khana, sub-district 11, Kabul, and thus concluded that he had no right to occupy NRC's client's apartment. Further the law states that if someone has obtained an apartment illegally it must be returned to the government or to the rightful owner. NRC's client had proved that the apartment had been legally distributed to him.

The next day the counsellors received the decision of the court stating that the Defendant was not entitled to the apartment and annulling his order from the Ministry. However, the decision also stated that because NRC's client had left the apartment on two occasions (through eviction and war) and had not paid all the installments, the apartment remained to the municipality and it was in the competence of Kabul Municipality to distribute the apartment to its rightful owner. Now, of course, NRC's client had left the apartment due to eviction and then fleeing the Taliban. And legally, the government can resell apartments if 30% of the instalments are not covered. Lastly, the department of security was the competent authority to distribute the apartment. The legal counsellors went to the Court and asked why they had referred this to the municipality instead of to the Department of Security. They realised the judges were fearful of the General. So the legal counsellors went to the Municipality who said they would pass this on to the Department of Security. They were indeed informed



about the Court order and NRC's client officially received the apartment back from the Security Department.

Then NRC's client paid the remaining installments and went to the District 4 Court to get the title deed. Thus this case appeared solved.

However the General intervened: the title deed was not forthcoming from the court. Then, although the period for lodging an appeal had expired,¹² the General petitioned the Supreme Court and got an order for an appeal from the Administrative Deputy of the Supreme Court with whom he happens to have good relations. This was clearly an abuse of the process - it was four months later. The Special Court appeal court made their decision in favour of the Defendant.

Then the legal counsellors wrote to the Department of State Affairs with a copy to the Special Court presenting NRC's client's objections to the appeal. Then the legal counsellors went with NRC's client to petition the Supreme Court. In the end the Supreme Court confirmed the decision of the primary Special Court. Thus NRC's client eventually got the title deed from the District Court (eight months after the primary Special Court's decision).

CaseNumber 11: Ali Chopan Land Case

NRC's client claims that his family had 72 jeribs of land in Ali Chopan, a village near Mazar. He was farming the land until he fled in to Pakistan in 1982 as a refugee. He returned in 1992 but without his family and arranged to rent his land to a man who cultivated the land until 1995. Then this man called NRC's client to come as his neighbour had occupied 53 jeribs of his land. NRC's client returned to Afghanistan and complained to the municipality, they approved his land ownership but said that they did not have a map so it was not clear where his land was exactly. However at this time there was fighting and he was unsuccessful in resolving this and then the Taliban came to power and so he fled again to Pakistan.

¹² The appeal must be made within one month, Article 365 of the Civil Procedure Code.



NRC's client returned in 2002. He went to the municipality again to complain and they made an investigation and they stated it was his land, which he had received as his inheritance right from his father, that it was distributed according to the law and his deed was lawful. They found the owner of the land adjoining his had died and his son had divided his land and the 53 jeribs of NRC's client's land between himself and the other heirs so that it was now distributed between 18 families. The *IMLAC* Department approved the land was registered and then a surveyor from the Cadastral Department approved the location of the land was as NRC's client claimed. The 'defendant' had had 171 jeribs of his land occupied by the government for an army base. It was after this that he occupied NRC's client's land. Apparently he had also had a bad harvest on his land. The municipality referred the case to Nahri Shahi District Court, which approved NRC's client's documents. However as NRC's client was a refugee the court had no authority to make an order concerning this matter and so they said the case should be referred to the Special Court.

The district court referred the case to Balkh law department. They referred it to Kabul law department. NRC's client requested that his case be heard in Mazar as the defendant was in Mazar and he would not go to Kabul. The law department said it would be a case for the special provincial court and so they sent it back to the law department in Mazar to await the circuit judges from the special provincial court as they were scheduled to go to Mazar. NRC's client went to see the Special Court judges when they went to Mazar and they told him to return the following day. When he returned they had left for Kabul. He waited for months but they did not return.

NRC's legal counsellors in Mazar met their client by chance at the law department. They investigated and studied his documents and talked to the Head of the Law department who said they were not responsible for the case as it was with the Special Court. They asked when the Special Court was returning to Mazar as indeed there were a lot of cases but they did not know. The Head of the department advised NRC's client to go to Kabul and said that if he decided to they would send the documents to the Special Provincial Court in Kabul.



The legal counsellors also spoke to the 'defendant' that day who denied that he had occupied land that was not his.

The legal counsellors advised NRC's client that the only way to get somewhere with this case was to refer it to Kabul. He was ready to go to Kabul but he was worried as he said the defendant would not go to Kabul. The legal counsellor explained that the court would request the defendant's presence. They referred the case to NRC's Kabul ILAC who assisted the client to get his case registered at the Special Provincial Court. However two week later the legal counsellors visited the court and found the case had been referred to Balkh Provincial Court for more information/documents, (via the law departments in Kabul and Mazar). They had requested tax documents, the District court's decision, the Cadastral Department's map and the registration document from the *IMLAC* department.

Two and a half months later it was returned to the Special Court where it is under progress. The judge said that he would require NRC's client and the defendant to be present to make a decision. Thus, this case, which was effectively solved one year ago in the District Court, remains unresolved whereas a locally based Special Court could have resolved it immediately.

Case Number 12: Dashti Barchi House Case

NRC's client owns a house in Dashti Barchi, Kabul. His family fled to Iran 18 years ago when he was a boy. His uncle gave the house "in pledge"¹³ to another person in order to get some money. NRC's client returned in 2003 and the person in the house said that he had spent a lot of money on the house and so he should receive compensation for that as well as the pledge money. However in the pledge document it was stated that the man was not permitted to make any changes to the house.

The legal counsellors contacted a local representative in Dashti Barchi and asked him to organise a *jirga*. They also contacted the head of the sub-district police to inform him of the *jirga*. The *jirga* was held the next week in a local

¹³ See case number one.



mosque with the cleric, local elders and our legal counsellors attending. They decided NRC's client should compensate the 'defendant' but NRC's client did not agree to this as he said the amount was too much. The next week NRC's client told the counsellors that the 'defendant' did not want to participate in another *jirga* and would not leave the house. So he wanted to take the case to the court. The legal counsellors advised him to send a petition to the *huquq*.

However NRC's client came to complain about the lack of implementation of Kabul law department and so the legal counsellors sent a letter to the law department complaining about their behaviour and asking them to follow up the case to ensure justice. Soon after, the case was referred to the Special Court. The legal counsellors sent a letter to the Court in support of our NRC's client. However at this time the judges in the Special Court were all changed due to allegations of corruption.

The case did not progress until two months later when the case was sent to the sub-district 6 court with an order to follow up the case, even though the case should have remained with the Special Court. The district court did not accept NRC's client's claim and asked him to prepare documents from his original place of residence, which was Uruzgan. He had been born there but had left 50 years before and so the documents were unnecessary in light of the fact that he had the official title deed, which the case rested on. However, the documents would be difficult to obtain. Thus, the legal counsellors believed this was a diversionary tactic or unnecessary bureaucracy to prolong the case and necessitate bribes.

The legal counsellors went to the Supreme court and discussed the implementation of the district court with the judges of the High Commission: they explained the case had been delayed and diverted to Uruzgan. They told the judges that NRC's client's father had died in Kabul after the family came to Kabul 50 years ago and that the house in dispute was located in Kabul. The criticism was forwarded to the chief justice (*cazil cazote*).

NRC's client still went to Uruzgan and obtained the requested documents. Then the district court sent the case back to the law department. The



counsellors went to the law department and they said they would send the case to the Special Court.

Case Number 13: Khush Halmena Land Case

The municipality distributed a plot to NRC's client in Khush halmena, district 5 of Kabul, in 1990. He made a boundary wall around the plot but was then jailed for political reasons and fled to Pakistan on his release. When he returned he found that the municipality had redistributed his plot to another person. He complained to the municipality showing his original document from them and they took back the plot from the other person. However, they did not give it to him. He complained again but was ignored and so he made a petition to the Supreme Court. The Court ordered the Kabul provincial court to follow up his case. That court referred it to the Special Provincial Court (though the property was inside Kabul) who referred it to Kabul municipality who referred it to sub-district 5 municipality.

Municipal law states that the municipality may reclaim a plot of land if the person has not completed 40% of the building in the first three years of purchase. However, because NRC's client fled as a refugee, the legal counsellors sent an official letter to both the Special Court and to the municipality asking that NRC's client receive his previous plot or a new one. They did not act on the request and a few months later the counsellors visited the Head of the Property Department of Kabul Municipality. He accepted NRC's client's claim and made an order for the planning office to give another plot to NRC's client. However, the distribution of new plots of land has not yet begun.

This seems to be a case where it could more simply have been dealt with by a specialised body for refugees, be it the Special Court or a sister body. Instead time was wasted for both NRC's client and the various courts and authorities involved.

Case Number 14: Karte Parwan Shop Case

NRC's client's father owned a house in Karte Parwan, District 5 of Kabul. He



stayed in Kabul while the rest of the family fled as refugees to Peshawar in 1987. Just after the fall of the Taliban the family received a message that the father had disappeared. His second wife, who he was living with, had said that he had gone to Peshawar but later his body was found near the house. The wife and a police officer/commander were suspected of his murder, though no action has been taken against them (as according to NRC's client they enjoy the protection of a northern alliance warlord). The wife has since fled.

However this second wife had “pledged”¹⁴ the house to the police officer without having the legal title to do so. Thus they had made a forged document to say that he had received the house against 500,000 Afghani. NRC's client's father had owned the house since 1974 and in 1996 he had arranged a *mahr* (marriage settlement) for his wife. It was a customary document, which stated that if he was to divorce her or if he died she would receive part of the house. It also stated that no changes could be made independently to the part of the house. This document was used as the basis of the pledge.

Since then the police officer had made alterations to the house including knocking down part of the boundary wall to make a new entrance and converting the front of the house into shops which he has rented out to shopkeepers.

The case had been under the study of the District court when NRC's client came to NRC's Kabul ILAC. Indeed, he had obtained instructions from the law department to the police that they should evict the police officer from the house but nothing had happened. NRC's client, like many other refugees, lives in Peshawar and was finding it difficult to keep coming back and fore to try to push the authorities in Kabul.

The legal counsellors wrote an official letter to the sub-district 5 court and also Kabul municipality to ask them to stop the defendant's illegal actions. A month later the legal counsellors went to the sub-district 5 Court and the judge said that the defendant had not been present so they had not taken any action. The court had asked the police to bring the defendant but they had not done so.

¹⁴ See case number one.



Six weeks later NRC's client contacted the legal counsellors by phone to say that the defendant had started to destroy the shops and construct new ones. The legal counsellors tried to contact the head of the District 5 police but he was in Dubai. They told his deputy the problem. Then the counsellors met their client at the sub-district 5 court and the judges made another order that the defendant had to be present at the court. The legal counsellors asked the judges to send the case to the Special Court as their client was a refugee. The judges said they needed proof that the NRC's client was a refugee in order to send the case to the Special Court. They also wanted a document showing that he was the legal representative of his father's inheritors (though this was not necessary for the case to be transferred).

The next week NRC's client informed the legal counsellors that the deputy of Kabul municipality had ordered the shops to be sealed off. Then the legal counsellors went back to sub-district 5 Court to find out what was happening. The judges said that they had made three orders to ask the police to bring the defendant to the court but he had not appeared. (They had also instructed the police to find the wife for the criminal case.) The judges lamented their powerlessness in the face of the lack of rule of law. The legal counsellors gave them proof that their client was a refugee and asked them send the case to the Special Court.

Then the legal counsellors went to the District 5 Police to tell them about the municipality's actions and that the Defendant had since broken the seal. They asked them to accompany them to the site to be aware of the house. The legal counsellors also asked officials from the District 5 municipality to come along to see the alterations made to the house including the shops so that they would be in the picture.

The next day the head of District 5 Police informed NRC's Kabul ILAC that the defendant was present at the police station. The defendant phoned the legal counsellor later that day to say he was ready to go to the court. Two days later the Defendant's relative came to NRC's Kabul ILAC and gave an alternative story to that of NRC's client's. The next day the defendant phoned to say he was sick



and in the army hospital. A couple of days later he came to NRC's Kabul ILAC and the legal counsellors asked him questions about his documents, for example, the pledge agreement stated that there was to be no changes made to the house so why had he made these changes? Also they asked why he had told the municipality that he was the owner. He said he was ready to make a *jirga*. NRC's client however did not want a *jirga* but to continue with the court process. However the District Court had not yet sent the case to the Special Court.

NRC's client went to Peshawar and got the legal representative document. Now he is still waiting for the transfer of the case to the Special Court. NRC's client said he had refused to pay bribes to the judges/police/authorities as he wanted to believe in a functioning court system. But now he has reached the point where he feels this attitude is pointless.