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**La vivienda adecuada como elemento integrante del derecho
a un nivel de vida adecuado**

Informe del Relator Especial, Sr. Miloon Kothari

Adición

**VISITA AL AFGANISTÁN (31 DE AGOSTO
A 13 DE SEPTIEMBRE DE 2003)* ****

* El resumen de este informe se distribuye en todos los idiomas oficiales. El informe completo, que figura anexo al resumen, se distribuye solamente en inglés.

** De conformidad con el párrafo 8 de la resolución 53/208 B de la Asamblea General, se señala que este documento se presenta con retraso para poder incluir en él los acontecimientos más recientes, incluida la información sobre la nueva Constitución aprobada en enero de 2004.

Resumen

Del 31 de agosto al 13 de septiembre de 2003 el Relator Especial realizó una visita al Afganistán con el consentimiento del Gobierno Islámico de Transición del Afganistán para examinar cuestiones importantes para su mandato, entre las que figuran la situación de la vivienda y la tierra y los servicios conexos como el agua y el saneamiento, la política pública sobre los asentamientos humanos, el alojamiento y la normativa existente para la protección de una serie de derechos humanos pertinentes para una vivienda adecuada, centrándose especialmente en los grupos más pobres y vulnerables, y para subrayar la importancia de los aspectos de género tanto en estas cuestiones como en otras de diferente índole.

El Relator Especial mantuvo diálogos prolongados con las instancias gubernamentales pertinentes, los organismos de las Naciones Unidas y los organismos internacionales, y las organizaciones de la sociedad civil para buscar soluciones prácticas en un país donde, durante los 23 años de conflicto y los últimos 2 años posteriores al conflicto, la lucha por los derechos a la vivienda y a la tierra, incluidos los de los más de 2 millones de refugiados que han regresado del Pakistán y el Irán, ha constituido un factor crítico que ha contribuido al clima de inseguridad y tensión que existe en ciertas partes del país.

Se visitaron las ciudades de Kabul, Kandahar y Jalalabad y zonas rurales de las provincias de Kabul, Kandahar, Nangarhar y Parwan. A lo largo de la visita del Relator Especial, quedó patente la necesidad de solucionar una serie de cuestiones esenciales para garantizar una vivienda adecuada como elemento integrante del derecho a un nivel de vida adecuado, como por ejemplo: la ocupación de tierras; el grave estado de destrucción de las viviendas y la tierra, de las instalaciones de saneamiento, de los recursos hídricos y de los medios de vida, entre otros, después de más de dos décadas de conflicto; los que se producen de forma habitual sin que se ofrezca una indemnización u otra solución alternativa; la especulación sobre el suelo con dinero supuestamente procedente del cultivo de amapola y marihuana que se invierte en propiedades inmobiliarias, con el consiguiente drástico aumento de los precios, lo que hace que las viviendas y la tierra resulten inaccesibles para amplios sectores de la población. Las denuncias de encarcelamientos y, en algunos casos, de torturas y tratos inhumanos o degradantes infligidos a las personas que se resisten a ser desalojadas por la fuerza y a los defensores de los derechos humanos que protegen los derechos a la vivienda y a la tierra también confirman la necesidad de solucionar la situación desde la perspectiva de la indivisibilidad de los derechos.

El Relator Especial destaca que la complejidad de los derechos a la vivienda y a la tierra en el Afganistán hará necesario trabajar en todos los niveles del sistema para lograr la realización universal del derecho a la vivienda y a la tierra; esto supondrá: luchar contra la corrupción y la ineficacia del poder judicial y las instituciones provinciales y gubernamentales, hacer frente a la ocupación de la tierra por parte de los comandantes y otros miembros poderosos de la clase dirigente en detrimento de los pobres y las personas que no poseen tierras; poner fin a la especulación sobre el suelo y prestar los servicios esenciales, lo que incluye los servicios de abastecimiento de agua y saneamiento para el enorme sector de la población afgana que vive en una situación de pobreza extrema. Si bien los retos y la complejidad que entrañan estas cuestiones son desalentadores, el Relator Especial se vio alentado al ir cobrando conciencia durante y después de su visita, gracias tanto a los agentes gubernamentales como no gubernamentales, de la importancia de tratar las cuestiones relativas a la vivienda, la tierra y la

propiedad como parte integrante de las estrategias de seguridad y desarrollo sostenible. En el informe se presentan también iniciativas individuales innovadoras y de éxito que se han puesto en marcha y que pueden seguir desarrollándose para contribuir a la aplicación del derecho a una vivienda adecuada.

Sobre la base de las conclusiones del Relator Especial, en el informe se incluyen recomendaciones generales y específicas que pueden seguir el Gobierno de transición y otras partes interesadas para adoptar un enfoque amplio con respecto a los derechos a la vivienda, la tierra y la propiedad y basado en una combinación consciente de la vertiente humanitaria, los derechos humanos y el desarrollo sostenible.

Entre las recomendaciones del Relator Especial cabe señalar: la elaboración de una amplia política nacional sobre la vivienda y la tierra, una clara delimitación de responsabilidades dentro del Gobierno y las instituciones en lo referente a la toma de decisiones, teniendo especialmente en cuenta las necesidades y derechos de las mujeres y de los grupos vulnerables; la declaración de una moratoria sobre los desalojos forzosos hasta que se elabore dicha política; el desarrollo de mecanismos de supervisión apropiados para la aplicación del derecho a una vivienda adecuada mediante, por ejemplo, el fortalecimiento de las capacidades de la Comisión Independiente de Derechos Humanos del Afganistán; y la dotación con recursos adecuados del nuevo Tribunal especial para la resolución de litigios sobre la propiedad, especialmente respecto a su competencia para examinar denuncias procedentes de las provincias. El Relator Especial destaca también que es necesario reforzar la capacidad del Ministerio de Asuntos de la Mujer y del Fondo de Desarrollo de las Naciones Unidas para la Mujer (UNIFEM), así como que es preciso que el Gobierno de transición en particular, y la comunidad internacional, desarrollen un enfoque común de amplio alcance para garantizar los derechos y cubrir las necesidades de las mujeres con respecto a la vivienda y a la tierra.

Annex

**REPORT OF THE SPECIAL RAPPOREUR ON ADEQUATE HOUSING
AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD
OF LIVING, AND ON THE RIGHT TO NON-DISCRIMINATION, IN
THIS CONTEXT, MILOON KOTHARI, ON HIS MISSION TO
AFGHANISTAN, 31 AUGUST-13 SEPTEMBER 2003**

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Introduction

1. The Special Rapporteur visited Afghanistan from 31 August to 13 September 2003 upon the invitation by the Islamic Transitional Administration of Afghanistan to examine issues of relevance to his mandate, including the situation of housing and land, and related services such as water and sanitation, public policy on human settlements, shelter, legislation that exists to protect a range of human rights relevant to adequate housing, including protection against forced evictions and displacement, with particular focus on the poor and the vulnerable groups, and to emphasize gender aspects of these and other issues.

2. Based on the legal basis for his mandate given in Commission resolution 2000/9,¹ the Special Rapporteur has defined the right to adequate housing as “the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity”. Throughout his activities, including in his previous annual and country mission reports to the Commission on Human Rights,² the Special Rapporteur has adopted the indivisibility approach to his mandate, and aims to explore linkages with other related rights such as the rights to food, water, health, work, property, security of person, security of home, and with the right not to be subjected to inhuman and degrading treatment. This approach also necessitates his examining together a range of issues related to adequate housing, including land, property, forced eviction, access to water and sanitation, health, poverty, gender, children, indigenous people, minorities and vulnerable groups.

3. During both the 23 years of conflict and the past 2 years of a post-conflict situation, the struggle for housing and land rights has been a critical factor. In the context of a post-conflict situation, and given the particular history of Afghanistan, the Special Rapporteur recommends a perspective of analysis of housing, property and land issues based on human rights law. Such an analytical framework takes as its cornerstones the protection of security of tenure, security of the home and security of the person. Combined with the principles of non-discrimination and gender equality such a perspective offers a comprehensive direction both for this report, to analyse the existing housing and land rights crisis and to elaborate the urgently required housing and land policy and legislation.

4. Issues related to housing, land and property are of crucial importance in Afghanistan today, and to a large extent fuel the prevailing lack of security in many parts of the country. Some of the crucial matters include: land occupation; destruction of houses and land, sanitation facilities, water sources and livelihood, etc., as a result of over two decades of conflict; lack of adequate housing for part of the over 2 million returning refugees repatriating from mainly Pakistan and Iran, and for a large number of internally displaced persons; regular occurrence of forced evictions without compensation or alternative arrangements, and land speculation with money allegedly stemming from poppy and marijuana cultivation invested into real estate and thereby increasing prices dramatically, making housing and land inaccessible for large parts of the population.

5. At the same time the Special Rapporteur was encouraged by the emerging realization during and after his mission by governmental and non-governmental actors alike of the importance of addressing housing, land and property issues as an integral part of security and sustainable development strategies. As the report will also show, individual innovative and successful initiatives have been launched which can be further developed to contribute to the

implementation of the right to adequate housing. This report seeks to further contribute to the development of a comprehensive approach to housing, land and property rights to be used by the Transitional Government and the international community.

6. The mission was conducted in the cities of Kabul, Kandahar and Jalalabad, and in the rural areas in the provinces of Kabul, Kandahar, Nangarhar and Parwan. The visit entailed meetings with a number of ministers, including the Minister of Rural Rehabilitation and Development; the Minister of Women's Affairs; the Minister of Justice; the Deputy Minister of Urban Development and Housing; the Deputy Minister of Finance, and the Deputy Minister of Interior. The programme also included meetings with members of the Constitutional Commission, the Judicial Commission, the Afghanistan Independent Human Rights Commission's central and regional offices, representatives from a wide range of United Nations agencies and programmes, as well as with both international, national and local non-governmental organizations, including women's groups. On the provincial level the programme also included on-site visits to urban settlements, rural villages, formal and informal IDP camps, women's shuras in Parwan and Kandahar, meetings with governors in Kandahar and Nangarhar, local court judges in Jalalabad, local Kandahar commander, and various projects related to housing undertaken by the international community.

7. The Special Rapporteur wishes to express his appreciation to the Islamic Transitional Administration of Afghanistan for the cooperation extended to him by a wide range of ministries. The Special Rapporteur also wishes to thank the United Nations Assistance Mission to Afghanistan (UNAMA) and the Special Representative of the Secretary-General for Afghanistan for logistical and substantive assistance and advice. Particular appreciation is extended to the Human Rights Unit of UNAMA for its ample planning and coordination of the visit despite limited capacity and short notice.

8. The Special Rapporteur also wishes to extend a special thanks to UN-Habitat and UNHCR for their active involvement. The cooperation between the two organizations contributed to a large extent to a useful mission. The Special Rapporteur welcomes that his mission has contributed to even more coordination between these and other agencies in the country. In addition, a number of United Nations agencies and programmes provided valuable insight and assistance to the Special Rapporteur, including UNICEF, UNIFEM, the United Nations Environment Programme (UNEP), the World Food Programme (WFP) and others.

I. HOUSING AND LAND IN CONTEXT - MAIN OBSTACLES AND TRENDS

9. The relationship to housing, land and property has been complex throughout the modern history of Afghanistan, which has been illustrated by repeated - and failed - attempts to undertake land reforms of rural and agricultural land to regulate modalities of ownership and use. After 23 years of conflict, national reconstruction, political and social, constitutes a major challenge, highlighting a number of obstacles with direct influence on the implementation of the right to adequate housing.

10. **Land grabbing/occupation:** Land occupation by warlords and commanders striving to maintain or increase power in various parts of the country is widely considered to be one of the main obstacles to the implementation of the right to adequate housing, to the detriment of the rights of marginalized groups of society such as female-headed households, returnees, internally displaced persons (IDPs) and ethnic groups.

11. **Forced evictions:** Accompanied by violence and excessive use of force, and without compensation and alternative arrangements, forced evictions are reported from all parts of Afghanistan.

12. **Insecurity:** Prevailing insecurity in large parts of the country remains the main concern of the Government, the international community at large and the Afghan people. Concerns are linked to the prevailing presence and resistance, particularly in remote rural areas of the country, of Taliban and reportedly al-Qa'idah forces, continuing clashes between factions on the regional level, rivalry between local commanders, or "warlords", and the abuse of power in the absence of an enforceable system based on the rule of law.

13. **Lack of an effective legal system:** The existing national legislation on housing and land rights lacks clarity and is founded on customary law, civil law, religious law and State law. The capacity of existing courts to effectively deal with the vast number of property disputes is limited and the confidence among the public in the legal system faltering. Partly as a result of the lack of faith in the formal court system, people are continuously solving their problems and disputes through informal and customary means, including the Jirga.

14. **IDPs and returnees:** The influx of returnees within a limited time frame following the fall of the Taliban has no precedent in other post-conflict situations. The impediments for people to return to their homes presented by destruction of their homes, occupation of their houses and their land and prevailing insecurity in some areas have created a large IDP community for which long-term solutions must be sought.

15. **Drought:** In addition, Afghanistan has suffered from several consecutive years of drought that have affected several regions, resulting in the drying up of water wells, a decrease of livestock, the devastation of agricultural land and the subsequent abandonment by families, especially nomads, of their homes and places of origin in order to find food, housing and water.

16. **Landlessness:** Access to adequate housing in Afghanistan is closely linked to access to land. Landlessness is widespread throughout the country, although the scales vary significantly from province to province. According to the World Food Programme,³ as many as 68 per cent and 63 per cent of people, respectively, are landless in the provinces of Faryab and Jawzjan. Other information indicates that, in Bamyan province alone, an average of 39 per cent of the households were landless, with important variations within the province, from 15 to nearly 90 per cent, depending on the individual village.

17. The complexity of the issues involved means that achieving the right to adequate housing and land for all will entail working at all levels of the system: from combating corruption and inefficiency in the judiciary and governmental and provincial institutions, to coming to grips with land occupation and the impunity systematically enjoyed by commanders and other

powerful members of the establishment at the detriment of the poor and the landless, to arresting land speculation, to the provision of essential services, including water and sanitation to the large proportion of the Afghan population living in poverty.

II. INSTITUTIONAL AND LEGAL FRAMEWORK

A. Bonn Agreement

18. After 23 years of conflict, and the fall of the Taliban in 2001, a United Nations-sponsored conference was held in Bonn, Germany, gathering Afghan leaders from different factions to lay the foundation for the future of Afghanistan. The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (the Bonn Agreement), was signed on 5 December 2001, drawing up the conditions and framework for a transitional process towards peace and national reconstruction. In accordance with the Bonn Agreement, an Emergency Loya Jirga established the Afghanistan Transitional Administration to govern the country until the national elections take place in June 2004.

19. The Bonn Agreement also laid down the framework for the laws and regulations to be applied during the transitional period, indicating that the 1964 Constitution should be applied until the adoption of the new Constitution, which has now been adopted in January 2004 by a Constitutional Loya Jirga. The Bonn Agreement also called for the establishment of, inter alia, an independent human rights commission and a judicial commission. The Special Rapporteur was encouraged by the work of the Afghan Independent Human Rights Commission (AIHRC) established to undertake human rights monitoring, investigation of violations of human rights and development of domestic human rights institutions.

B. International human rights instruments

20. Afghanistan has ratified all of the fundamental human rights treaties, except the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and has also recognized the competence of the Committee on the Elimination of Racial Discrimination to receive and examine individual complaints of violations of the International Convention on the Elimination of All Forms of Racial Discrimination. However, Afghanistan has not recognized the competence of the Committee against Torture to examine similar complaints, nor has it ratified any of the optional protocols to the fundamental human rights treaties.

21. The 1964 Constitution did not give any guidance as to the status of international treaties in relation to the Constitution itself, or with national laws. During his mission, the Special Rapporteur had the possibility to meet with members of the Constitutional Commission, where he emphasized the need of a clear reference to international human rights treaties in the new Constitution. A number of other actors, including AIHRC, have also stressed this issue.

22. According to chapter 1, article 7 of the new Constitution “(t)he State shall abide by the United Nations Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights”. Chapter 1, article 3, also states that

“no law can be contrary to the beliefs and provisions of the sacred religion of Islam”. Whereas the Special Rapporteur welcomes the commitment in the new Constitution to observe international human rights treaties to which Afghanistan is party, he is nevertheless concerned that the new text does not clearly set out the status in cases where national law or the Constitution itself are not in compliance with international human rights treaties and that existing safeguards and guarantees do not provide adequate protection of human rights, including the right to adequate housing as a component of the right to an adequate standard of living.

C. The right to adequate housing in the Constitution

23. When meeting with members of the Constitutional Commission, and when presenting his preliminary findings, the Special Rapporteur stressed the need to introduce the explicit right to housing, land and property in the new Constitution. Although articles 38 and 40 in chapter 2 of the new Constitution⁴ do not seem to weaken the provisions with respect to security of tenure as contained also in the 1964 Constitution, the Special Rapporteur is concerned that the new Constitution does not contain a clear recognition of the right of everyone to adequate housing, land and property, particularly since the new text is not clear as to the prevalence of international human rights treaties in case of conflict with the constitutional provisions or national law. These international human rights treaties lay down the obligations of Afghanistan with respect not only to the right to adequate housing, but also on a number of other issues of primordial importance for the Afghan population, such as women’s equal rights, the right to health, the right to education, the right to food, the right to security of the home and person and the freedom of opinion and expression, just to mention a few.

24. Article 25 of the 1964 Constitution contained a generic non-discrimination clause. The Special Rapporteur welcomes the fact that the new Constitution, after considerable debate at the Constitutional Loya Jirga, explicitly includes a reference to women in this context, chapter 2, article 22, stating that “(a)ny kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan - whether man or woman - have equal rights and duties before the law”. The obligation to respect the right to adequate housing on an equal and non-discriminatory basis would sometimes necessitate that the State give due priority and take affirmative action with respect to groups living in unfavourable conditions or are victims of discriminatory practices. The reference to women in the non-discrimination clause is a step forward, although the Special Rapporteur believes that the possibility could have been seized to further strengthen protection against discrimination, with particular consideration of such groups.

25. The Special Rapporteur also welcomes the fact that article 14 of the new Constitution mandates the State to develop a strategy for distributing public estates to “deserving” citizens.

26. However, the absolute recognition of human rights is in itself not enough if the Constitution does not spell out mechanisms for the implementation of these rights. The Special Rapporteur notes with some concern that the draft Constitution does not provide for a complaints procedure if constitutional rights are violated. Experiences from other countries show that the inclusion of this right in the constitutional framework and appropriate complaints procedures are essential. The Special Rapporteur has previously highlighted the recognition in the Constitution of South Africa of the right to adequate housing as a positive example⁵ on the

national level, as well as the landmark decision of the Constitutional Court of South Africa in the so-called “Grootboom judgement”,⁶ which confirmed that the right to adequate housing places a duty on both the State and other stakeholders to respect the right, and found a positive obligation on the State to protect, promote and fulfil it.

D. National legal framework

27. The task to undertake a thorough reform of the national legal framework, faces a number of challenges.

Complex system of legal regimes

28. Housing and land rights are governed by a complex system of legal regimes, including customary law, civil law, religious law and State law.⁷ State law has been created through decrees or edicts passed by Afghan kings and presidents. These have been published in an official gazette since 1963. Frequent regime changes, subsequent repealing of previous decrees and the institution of new ones, have contributed to confusion and lack of clarity of the formal State law. Land rights, for example, are currently regulated to a large extent by a number of edicts from the Taliban regime passed in 1999 and 2000, which remain in form as they complied broadly with the terms of the 1964 Constitution.

29. In case a matter is not covered by State law, the Civil Code applies, a written expression of mainly Islamic principles compiled in the 1970s based on Islamic jurisprudence, with preference given to the Hanafi doctrine. Similarly, if a matter is not covered by the Civil Code, the religious law, the Shariah, is directly applicable. In addition, there is a complex system of customary laws, established through community practice and adherence by members to group norms. Pashtun customary law is one of the more elaborated customary laws and dominates the norms in many areas of the country.⁸

30. The differences between customary and statutory law is clearly demonstrated with regard to inheritance of immovable property by women.⁹ According to the Civil Law, articles 1993-2102, of the property to be divided between the existing children, two thirds is allocated to the son(s) and one third to the daughter(s), regardless of the number of brothers and sisters. Despite the existing provisions, the Special Rapporteur received numerous testimonies according to which customary law prevails and, if there is a male heir, female members of the family do not inherit any property. If a husband dies, in the absence of a male heir, the brothers of the deceased traditionally take over his property. Another common feature, in order to keep house and land within the family, is that the widow is urged to marry a brother-in-law.

Judicial mechanisms

31. Land disputes, recovery, restitution and other conflict resolutions with regard to immovable property are officially dealt with by civil courts. Rulings by the civil courts can be appealed to a second instance and finally to the high court. However, only disputes that cannot be solved by traditional conflict resolution mechanisms, i.e. local, community or tribal shuras, the village or the commission on the restitution of property, can be considered.¹⁰ However, as a result of the complexity of the legal framework, rulings are often made on the basis of an

uncertain mixture of State, civil and religious law, contributing to the sense of lack of clarity about the contents of the law. There is also a lack of confidence in the formal legal system and customary laws remain an important recourse for justice.

32. As per Presidential Decree No. 89 of 30 November 2003, regarding the Creation of a Special Property Disputes Resolution Court, a new land court has been created, abolishing the previous Special Land and Property Court established in 2002 in order to resolve the enormous caseload of land and property disputes, i.e. involving land, residential houses, apartments, shops, commercial warehouses and other real estate, and particularly to study complaints by returnees and internally displaced persons. According to information received, the effectiveness of the old Court, as of the judicial system as a whole, was low. Several ministries and the justice department in Jalalabad, indicated that there were few cases referred from the provinces. The main differences between the old and the new one is:

(a) That staff of the Special Property Disputes Resolution Court can travel to provinces to hear cases;

(b) The Ministry of Interior is tasked with implementing the court's decisions; and

(c) An appellate court is equally created. As of to date, it still remains to be seen whether the creation of the new Special Property Disputes Resolution Court will increase the effectiveness of the judicial system to deal with land and property disputes.

Lack of confidence in the judicial system

33. Testimonies from the various provinces visited by the Special Rapporteur revealed that parties involved in property disputes showed little confidence in the Court, which is considered to be purely Kabul-centred. According to UNHCR and the Norwegian Refugee Council, which jointly have started to provide legal advice in property disputes involving returnees and IDPs in several cities, they were also reluctant to refer complaints to the civil courts or the Special Court. The lack of confidence in the courts is also closely linked to the lack of confidence in the implementation machinery. While Decree No. 136 stipulated that chiefs of police in Kabul and provinces were responsible for the enforcement of the court judgements, the real implementation power was considered to be in the hands of commanders, and influential members of the establishment. A certain control over and accountability of such actors has to be achieved, if Decree No. 89, giving the responsibility of implementation to the Ministry of Interior, is to have any effect on the lack of confidence in the implementing machinery.

34. The testimonies received by the Special Rapporteur also indicated that there was a general belief that corruption is widespread within the judicial system, also contributing to a lack of confidence in the judicial system, particularly among the poorest and least influential groups of society. Accounts of corruption were received particularly from women, and in the words of one of them "more money is changing hands in the court houses, than at the money exchange". Notwithstanding the extent of corruption, the widespread belief that corruption is prevalent is in itself an obstacle for women and vulnerable groups to access their housing and property rights.

35. **The Special Rapporteur strongly favours, as a matter of priority, support for the development of national legislation on housing and land rights, based on Afghanistan's international human rights commitments, incorporating and codifying into one comprehensive source of customary law, civil law, religious law and State law.**

III. ADEQUATE HOUSING AS A COMPONENT OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING - GENERAL HOUSING CONDITIONS AND ACCESS TO ESSENTIAL SERVICES

36. Not only homes and buildings have been destroyed during two decades of conflict, but also water and sanitation facilities. Wells and boreholes that were not destroyed often collapsed due to abandonment, lack of maintenance, resources or organization. According to the estimates by UNICEF, around 65 per cent of the urban population do not have access to safe water, compared to over 80 per cent of the population in rural areas. It is thought that the lack of access to safe water is a contributing factor to the internal movement of families to already strained IDP camps and urban areas.¹¹

A. Urban

37. The 1978 Master Plan is supposed to provide the tool to manage the development of Kabul city. The Master Plan is based on an envisaged city of 2 million inhabitants. There has been no recent population census, but the most recent estimate by the Central Statistics Office in 1995-1996 was that Kabul city had 2.7 million residents; the figure today is probably considerably higher. The many years of conflict and an estimated 60 per cent of the capital destroyed or damaged¹² made the implementation of the Master Plan difficult if not impossible. Through the Special Rapporteur's meetings with various ministries and United Nations agencies it came to light that the current status of the Kabul and other city master plans is unclear even among government officials. Although city master plans are continuously used as arguments for new construction, demolition of houses for development purposes, etc., the implementation of the Master Plan is supposedly suspended.

38. Provision of services such as water, electricity and sanitation facilities is expensive and attractive, available serviced land is limited and often accessible only to families with certain resources. The poor are referred to areas where services are more difficult and expensive to provide. These locations also attract returnees who after exile find that their land and houses have been taken over by others, and also internally displaced having sought security in Kabul city. According to UN-Habitat, the so-called informal settlements having developed thus on public or State land outside the limits of the Master Plan constitute over 60 per cent of the housing stock.¹³ A positive sign is that the Transitional Government recently has recognized the rights of all squatters living in urban areas and that the National Development Framework calls for upgrading of all informal settlements.

1. Homelessness

39. Over two decades of conflict have resulted in severe destruction and have left houses, public buildings, sanitation and other systems all over the country in ruins and homelessness is a reality for many. At the same time urban areas have seen a dramatic growth in population due to the return of refugees, the presence of internally displaced persons who cannot return to their

areas of origin, as well as an influx from rural areas of Afghans hoping for better employment possibilities and improved economic and social conditions in general in the capital. As an example, according to estimates around 65,000-70,000 houses have been destroyed in Kabul alone while the population has grown twofold since September 2001.¹⁴

40. The situation of the homeless in Kabul reached a critical point with the approach of the winter in 2002. In order to provide the homeless with shelter during the cold months, the Transitional Islamic Authority of Afghanistan announced that it would allow the homeless to move into abandoned and ruined public buildings. What was intended as an emergency solution has, in light of slow progress in rehabilitating Kabul, become a permanent feature in the city, and an increasing number of homeless people take refuge in war-damaged buildings. According to UN-Habitat, approximately 1,500 families are currently living in ruined buildings and schools around the city in over 40 locations. Another estimated 60,000 families live in partially destroyed houses and apartments. Among other sites, the Special Rapporteur visited the ruins of the Russian Cultural Centre where, according to the residents themselves, around 165 families had been living for over a year and a half. From the collapsed ceiling metal bars are hanging and, apart from one toilet constructed by UNICEF last February according to residents, the building has no water or sanitation facilities. The residents include returnees from Pakistan, internally displaced persons from Parwan province and Kuchi nomads, and many of them hold UNHCR refugee cards. The Special Rapporteur also spoke to several of the residents who were abandoned women or widows.

41. Prior to the visit of the Special Rapporteur, in late August, the Ministry of Refugees and Repatriation, the Ministry of Urban Development, the municipality of Kabul and UNHCR concluded an agreement according to which 30 abandoned public buildings are to be rehabilitated. Simultaneously the agreement provides for the building of 1,500 housing units for returnees unable to afford to construct houses of their own. The Special Rapporteur welcomes the initiative and will follow its implementation with interest. However, such initiatives should be part of a comprehensive national action plan for housing and land.

42. The lack of a comprehensive action plan and clear strategy has led to the delay of a durable solution for the homeless in Kabul and gives room for abuse. An example is found in Qala Wahid, subdistricts 5 and 6, an area severely destroyed after having been the front line for armed fighting on several occasions. Qala Wahid comprises around 10,000 traditional-style houses and its rehabilitation could therefore to a large extent solve the current housing crisis in Kabul. However, according to information received, the reconstruction of the area is at a standstill due to the Kabul municipality originally having planned to destroy the existing buildings and replace them with a modern neighbourhood. While these plans do not seem to materialize, the owners of the houses in Qala Wahid are not allowed to proceed with reconstruction. Homeless people take advantage of the status quo situation and reside in the abandoned homes until their owners return, some of them meanwhile investing considerable resources in repairing the houses. During a visit by the Special Rapporteur to the area, he received testimonies according to which some families have nevertheless started repairing their houses. According to the information received the municipality guards regularly carry out patrols in the area, but families that are able to pay a bribe are allowed to continue reconstruction.

43. The number of people and families living in inadequate housing and living conditions also illustrates the lack of urban planning with regard to housing and essential services. Although it

must be emphasized that the enormous influx of returnees to Afghanistan, including particularly Kabul, after the fall of the Taliban, has no precedents in other post-conflict situations, it could have been anticipated and planned for by both the transitional authority and the international community to a larger extent than has been the case.

2. Lack of essential services and environmental concerns

44. The rapid population growth in urban areas has put an additional strain on water supply and the already weak waste management system.¹⁵ According to UNEP, waste-water collection and treatment is virtually non-existent and waste water is disposed of in open sewers, canals and ditches between houses and the same water is also sometimes used for drinking and to wash food, thus contributing to water and sanitation-related diseases such as diarrhoea and cholera. Cross-contamination of groundwater wells is also common. The inadequate waste collection also contributes to contamination of water when waste is piling up in narrow streets between houses, together with human excrement.

45. Improved access to safe water has been a priority for the international community. UN-Habitat and Kandahar municipality have created waste collection points in all districts of the city. Waste is brought to the collection points by waste collectors going from house to house armed with wheelbarrows, to be then transported to the city landfill. In Herat water has been chlorinated with the assistance of UNICEF, which reportedly has contributed to the decrease of cholera cases in the city. In Kabul new water pumps and repair of water reservoirs and pipelines, and electric generators are being provided thanks to German involvement. However, despite positive examples, UNEP indicates that “almost all of the international community’s efforts have been implemented without proper policy guidance or coordination”.¹⁶

46. The persistent drought, the lack of drinking water and irrigated land in rural areas and the subsequent lack or loss of livelihood have also contributed to internal displacement within the country, which in turn has put additional strain on already scarce resources in areas seeing an additional influx of people.

47. In this context, the Special Rapporteur wishes to draw attention to general comment No. 15 on the right to water adopted by the Committee on Economic, Social and Cultural Rights in November 2002 and its general comment No. 12 on the right to the highest attainable standard of health adopted in 2000. General comment No. 15 emphasizes that “(t)he right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art. 11, para. 1)”. The general comment further states that “(w)hile the adequacy of water for the right to water may vary according to different conditions”, availability, quality, accessibility and access to information on water must be ensured. Particular attention should also be given to article 8 according to which environmental hygiene “encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions”.

48. While the Ministry of Environment has the primary responsibility, the Special Rapporteur recommends that, given the interlinkages between the right to adequate housing and environmental concerns, the main ministries taking active responsibility for the improvement of adequate housing also adopt an environmental strategy in compliance with, inter alia, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

B. Rural and remote areas

49. The right to water, usage of grazing land and usage of land for the collection of firewood are also issues of dispute in several rural areas, with direct bearing on the access to adequate housing. Such conflicts are particularly common in Hazarajat in the Kabul province and areas of the North and East of the country, and with regard to disputes over use and access to water widespread in the South, the region most affected by the last years of drought.

50. Ethnic or tribal land disputes have been ongoing for many years. For the past five years, two Pashtun tribes, the Mohmand and the Kuchi, have been claiming the same land in the Mohmand Dara district in the Nangarhar province, basing their claims on occupation of land going as far back as 100 years. The dispute also illustrates the complexity of land rights in Afghanistan, as the main portion of the claimed land is reportedly Government-owned. A decision taken by the district authorities, and confirmed by the Jalalabad provincial court, affirming the Kuchi's right to the disputed land since they had been living there for over 70 years, was subsequently quashed by the Supreme Court, as the decision had not taken into account that the bulk of the disputed land was Government-owned.

51. In the remote town of Bamiyan, the capital of the Central Highlands or Hazarajat in the central part of Afghanistan, at an altitude of over 2,500 metres with extreme weather conditions - houses, the market place, schools and other buildings were completely destroyed or made unusable by the Taliban. A large number of inhabitants found themselves homeless and forced to move into surrounding caves, which had been a traditional form of housing in the area in the past. In 2001/02, UNHCR, with its implementing partners, both international and national, and under the aegis of the United Nations Assistance Mission in Afghanistan (UNAMA) in its overall coordinating role, initiated a project to provide aid and assistance to this population. It was then proposed to build new houses (on land earmarked by the local authorities - the Governor playing a lead role) to accommodate this population that had taken refuge in caves. Efforts were made to provide access to water and additional facilities. Although a positive initiative, it also illustrates the complexity involved in providing housing in areas generally deprived of adequate housing. The humanitarian agencies were faced with a situation where a new influx of people, not necessarily homeless but living in deplorable conditions, took refuge in the caves in order to benefit from the project.

52. On the provincial level, authorities attempt to solve similar situations by allocating land to landless persons, often without the stipulated expressed and written approval by the central Government. Although some of these efforts have been successful others are questionable, in terms of the fairness of the selection of beneficiaries.

IV. HOUSING, LAND, PROPERTY AND THE PREVAILING SITUATION OF INSECURITY

53. As mentioned, prevailing insecurity remains the main concern in large parts of the country, particularly in rural and remote areas. The North Atlantic Treaty Organization (NATO) commands the International Security Assistance Force (ISAF), whose presence in the country is to ensure security in Kabul. In September, during the mission of the Special Rapporteur, discussions were ongoing within NATO to increase the size of the peacekeeping force, currently composed of 5,500 troops, and to extend its mandate to include also rural areas. The NATO-led peacekeeping force is distinct from the Coalition force in Afghanistan led by the United States of America. The Coalition forces have also made an effort to address the need to enhance security in rural areas, through the establishment of so-called Provincial Reconstruction Teams (PRTs), in order to “strengthen the presence of the central Government, improve security, and facilitate the delivery of reconstruction assistance”.¹⁷ The first PRT was established already in February 2002, and at the time of the mission of the Special Rapporteur PRTs existed in Balkh, Bamiyan, Kunduz and Paktia provinces and the intention is to establish additional PRTs also in the cities of Ghazni, Herat, Jalalabad and Kandahar within the near future. Although there is a general agreement that the security situation in rural areas needs to be improved as a matter of priority and as to the usefulness of PRTs to this end, certain concerns were brought to the attention of the Special Rapporteur by both governmental, United Nations and non-governmental actors. Although the PRTs are to be established in cooperation with the Transitional Government, several ministries indicated that they felt bypassed and excluded from the process and that the Government has limited influence on the strategy and implementation of PRTs. Since the purpose of the PRTs extends beyond improving security as such, several United Nations and non-governmental actors emphasized that the “facilitation of the delivery of reconstruction assistance” by the PRTs needs to be closely linked and coordinated with development initiatives by the international community at large, including those related to the repatriation of refugees and internally displaced persons, the building and reparation of houses, provision of essential services, etc.

54. The Special Rapporteur does not question that an improved security situation is, and should be, the number one priority of the actors involved in the transitional process. According to statistics from September 2003,¹⁸ attacks against relief workers have increased substantively in the past year and humanitarian organizations are warning that the worsening of the security situation will have a negative effect on reconstruction work. The Special Rapporteur nevertheless notes that the focus on security in a strict manner risks to be implemented to the detriment of the development of a comprehensive sustainable development approach. Although the National Development Framework (NDF) highlights the need to build human and social capital and that a systematic and integrated approach will be necessary to develop secure livelihoods, it also takes its point of departure in the security and humanitarian crisis faced by the country, and the same vision is in the Special Rapporteur’s view prevailing in the international community. This might have counterproductive results, when the underlying reasons for prevailing insecurity, as opposed to its symptoms, may easily be ignored. This is particularly true with respect to housing, land and property rights, as conflict over such rights have been one of the main causes of conflict for the past more than two decades, and remains a major contributing factor to prevailing insecurity across the country. The existence of a housing and

land crisis, including the phenomenon of land grabbing, is also a major stumbling block to the return of people to their homes.

V. LAND AND HOUSE OCCUPATION

55. The main challenge for the Government is to come to grips with the prevailing culture of impunity. In the absence of a clear land and housing rights policy, an effective judicial system to address land and housing disputes and equally effective implementation mechanisms, the interim period is being used by the country's security establishment and opposing factional leaders to occupy land for personal use or for speculation purposes. As a result, a climate of insecurity and uncertainty has been created in which commanders and influential members of the establishment continue to occupy public and private property with complete impunity, and in which the poor and vulnerable are forced to live in conditions not fulfilling the requirements for adequate housing, at constant risk of being evicted.

56. According to information received by the Special Rapporteur, the Civil Law provides that arable land not owned by an individual is the property of the State and occupation of such land is not permitted. However, uncultivated and unusable land without an owner may be occupied and considered the property of the occupier subject to the Government's permission. If land is occupied continuously for 15 years and no other claims are made on the property, the occupier will become the owner of the land. However, the Special Rapporteur was also given contradictory information, according to which the time stipulated for adverse possession is in fact 13 years, and various interpretations as to from when the time of possession should be counted, one example of the lack of clarity and awareness of the law.

57. Land occupation by warlords striving to maintain or increase power in various parts of the country is widely considered to be one of the main obstacles against the implementation of the right to adequate housing. Commanders have used the occupation of land to increase their power base and as a means of patronage. Marginalized members of society, such as female heads of households, seem according to the testimonies received to be particularly affected by illegal confiscation of land, houses and property. Close affiliation with commanders has often been used by some ethnic groups to occupy the property of others. Information submitted to the Special Rapporteur from various sources, indicates the ways in which commanders dispossess the vulnerable including the occupation of pastoralist areas, and houses, land and property belonging to refugees, the distribution of occupied land as a means of patronage but also the confiscation of harvest and water.

58. The Special Rapporteur received numerous testimonies about land being occupied by commanders with impunity at the detriment of the most vulnerable groups of society. Land occupation also affects the contributions being made by the international community. The Special Rapporteur visited a site in district 6 at the outskirts of Kandahar which had been allocated to UN-Habitat for the construction of houses reserved for poor families, including female-headed households. However, the land had recently been occupied by one of the warlords in the area and the building project has therefore not been able to materialize.

59. Ethnic, religious and linguistic minorities are among those at particular risk of having their homes deprived them due to occupation. As an example of land occupation in Kabul itself, the Special Rapporteur visited returnees from the Hindu and Sikh community living in the Sikh

temple, or Gurdwara, Joiee Sheer, receiving testimonies claiming that their houses have been occupied by a number of powerful commanders in Kabul city.

60. The Hindu and Sikh presence in Afghanistan has allegedly enjoyed relative peace and security under the rule of successive regimes. A small part of the community left Afghanistan before the fall of the Najibullah era, but it was in the beginning of the 1990s when the Hindu and Sikh community started to leave the country in large numbers, culminating when the Taliban took over Kabul. According to representatives of the community, before the 1990s, the Hindu and Sikh community in the capital amounted to 15,000-20,000 families. At present, only an estimated 350 families are to be found in Kabul. After the fall of the Taliban, some of them returned, mostly from India, to Afghanistan to find many of their houses, shops and temples ruined, or occupied by powerful commanders, allegedly belonging to the Northern Alliance. While the testimonies indicated that some of the Hindu and Sikh community members had felt obliged, or coerced, to sell their houses for negligible sums prior to fleeing abroad, others claim that they still hold valid legal ownership documents. Not having access to their houses, a large number of Hindus and Sikhs currently live in the community's temples, such as Kart-e Parwan, Baghban Kochah and Joiee Sheer.

61. The example of the Hindu and Sikh community also illustrates another common problem, the lack of confidence in the judicial system and the fear of reprisals. While the community has brought their situation to the attention of the President's Office, several ministries, including the Ministry of Interior, and United Nations agencies and programmes, without success, the testimonies clearly indicate a fear that bringing complaints to court would result in reprisals, threats and persecution by those occupying their homes and lands.

VI. FORCED EVICTIONS

62. The obligation to protect the right to adequate housing requires the State and its agents to prevent violation of that right by the State itself, individuals, private entities and other non-State actors. As recognized by the Commission on Human Rights in its resolution 1993/77, and also in general comment No. 7 of the Committee on Economic, Social and Cultural Rights, "the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing". However, according to information received, there is a lack of awareness about the country's obligations under international law among the political establishment, illustrated by the absence of clear standards on evictions in national law.

63. The Special Rapporteur is particularly concerned that forced evictions, accompanied by violence and the excessive use of force and without compensation and alternative arrangements, are reported from all parts of Afghanistan. In a country where the housing stock and related essential service systems have been severely damaged, it is necessary to find a balance between development priorities and housing, land and property rights. However, the lack of clarity of the legal system and existing remedies, the incapacity of the judiciary to deal effectively with housing rights, including land and property disputes, and the disregard for the right to participation in the decision-making process, may contribute to evictions being undertaken without respect to national law and international human rights treaties, often at the expense of the poor.

During his mission, the Special Rapporteur intervened in a case of forced evictions taking place in Shirpur village, near Wazir Akbar Khan in Kabul city. In the morning of 3 September, 100 armed police officers, allegedly led by the Kabul Chief of Police, accompanied by bulldozers and trucks, destroyed the homes of 30 families, affecting 250 people, including women and children. The destruction of the houses was made without immediate warning and without enabling the residents to rescue their belongings. A number of residents, primarily women and children were inside their houses when the destruction started, which, together with reported use of excessive force by the police, resulted in injuries.

64. According to information received, the land concerned is public, the property of the Ministry of Defence. Wazir Akbar Khan has become one of the most expensive and attractive areas of Kabul and the land had reportedly been allotted by the Ministry of Defence to high-ranking dignitaries, including within the Government. However, the residents of Shirpur village, most of them poor, had according to testimonies, lived in their houses for many years, some families for 25-30 years, most of the heads of households being employees or former employees of the Ministry of Defence. Notwithstanding the legal considerations as to property rights in this case, the Special Rapporteur expressed the view that the way in which the forced evictions took place, including excessive use of force, amounted to serious human rights violations according to international human rights law. The Special Rapporteur also issued a statement to this effect which was communicated to the President prior to release. The conclusions of the Special Rapporteur were further confirmed by investigations made by the Afghan Independent Human Rights Commission (AIHRC)¹⁹ in the case, as well as by testimonies by some ministers and other high-ranking government officials.

65. In his preliminary findings, the Special Rapporteur called for appropriate measures to be taken against responsible ministers and the Kabul Chief of Police. The case, and the intervention by the Special Rapporteur, received elaborate attention both in international and national media.²⁰ On 17 September, in light of the events above, President Hamed Karzai issued Presidential Order No. 3861, establishing an Independent Investigative Commission to investigate the forced eviction and destruction of houses in the Shirpur area and to look into reports of illegal and unfair distribution in Kabul. In a future phase, the Commission is to be authorized to assess the situation also in other parts of the country. In addition, according to the information received, the Kabul Chief of Police was dismissed as a result of his involvement in the forced evictions in Shirpur village. The ministers involved²¹ remain in power.

66. Although, at the time of writing, the report of the Commission has not yet been made public, the Special Rapporteur has been informed that the conclusions of the Commission include that the allotment of the land in Wazir Akbar Khan had in fact not been legal and that the residents of Shirpur have the right to full compensation and be provided their right to adequate housing in an alternative place. The Special Rapporteur welcomes the initiative to undertake an in-depth investigation into the events of Shirpur and other subsequent actions, and has subsequent to his mission communicated with the President to encourage these developments. He is nevertheless concerned that the report of the Independent Investigative Commission has not yet been publicly released. The Shirpur case, although highly publicized, is merely one of many examples of how the lack of clarity with regard to housing, land and property rights can be abused. Making public the findings of the Commission can contribute to a serious discussion on the current practice, prevalent across the country, of forced evictions.

67. In Jalalabad, as part of the efforts to reconstitute government-owned land, 95 houses along the Jalalabad canal, near Joy Haft neighbourhood, were destroyed at the end of July, allegedly without any advance notice having been given to the residents. Amongst the expelled were a number of internally displaced persons and returnees holding UNHCR Voluntary Repatriation Forms. According to the local authorities, the forced eviction was part of its implementation of a general plan of repossession of government-owned land on the basis of a Presidential Decree No. 362 of April 2003 on the illegal occupation of government properties. At the same time, the President's Office affirmed that no decree or other presidential order had been issued authorizing the demolition of the houses along the Jalalabad canal, but that the evictions were more likely a result of a decision of the provincial Governor or the local shura.

68. Another example brought to the Special Rapporteur's attention was the demolition between June and October 2003 of houses and the forced eviction of an estimated 200-250 households in Sar-e-Pul city, in the north-western part of the Sar-e-Pul province, reportedly in order to construct a road and to allow the extension of electricity in the city. According to information received, the residents were given 5 to 15 days' prior notice and no compensation, nor have alternative housing arrangements been provided to those affected. There is also information indicating that the residents have been threatened with imprisonment, and even execution, if they resisted the demolitions. The order to demolish was reportedly given by a local commander, Haji Payendah, with the help of the mayor allegedly appointed by him, based on a letter from the Ministry of Urban Development and with the alleged approval of the Ministry of Water and Electricity to create space for new power lines. According to the most recent information received, the construction project is currently suspended as financial resources are lacking to complete the work. Meanwhile, some of the affected residents have moved back to a few houses only partially demolished, others live with their families, rent houses or have left the area, resulting in inadequate housing conditions, displacement, and additional financial burdens.

69. AIHRC has also documented numerous cases where human rights defenders or other persons protesting against house demolitions and evictions have been threatened with imprisonment, torture and persecution. This further confirms the need of adopting an indivisibility approach to ensure the right to security of tenure, security of the person and security of the home.

70. Afghanistan is party to the International Covenant on Economic, Social and Cultural Rights and has as such an obligation to ensure the basic elements of the right to adequate housing, which include legal security of tenure. General comment No. 7 on forced evictions, adopted by the Committee on Economic, Social and Cultural Rights in 1997, it is recognized that "forced evictions are prima facie incompatible with the requirements of the Covenant" and provided explicit legal guidance on how Governments can pursue enduring solutions. The Committee further underlines that the procedure to be applied in relation to forced evictions should include, inter alia: an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; provision of legal remedies; and provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

71. The Committee has also emphasized that evictions must not result in homelessness and that, in cases in which those affected are unable to provide for themselves, the State must take

all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

72. The Special Rapporteur recommends that a moratorium on all forced evictions be made until such time as clear, comprehensive national housing and land policy has been adopted and an effective judicial system to address disputes in this regard. Such a national policy should establish a clear division of responsibility as to decision-making and take into particular consideration the needs and rights of women and vulnerable groups, including returnees, internally displaced persons, the poor, persons with disabilities and minorities. The national housing and land policy will also have to establish the participatory consultation process to follow in cases of resettlement, land distribution, and where alternative housing, land and compensation will have to be allocated for those evicted, in accordance with the International Covenant on Economic, Social and Cultural Rights and other relevant human rights instruments.

VII. INTERNALLY DISPLACED PERSONS AND RETURNEES

73. According to figures from the Office of the United Nations High Commissioner for Refugees, the current number of internally displaced persons in Afghanistan is currently approximately 300,000, out of which two thirds are still dependent on assistance, including food resources. Over half of the total number of displaced persons are found in the south. In April 2003, as an attempt to resolve the issue, UNHCR initiated its “Facilitated Group Return” (FGR) initiative in order to identify obstacles to voluntary repatriation and where possible work towards their solution. It is recognized that the prevailing situation of insecurity in parts of the country remains an obstacle for the return of internally displaced persons to their areas of origin. However, according to UNHCR, testimonies from internally displaced persons and refugees to the FGR also indicate that issues related to housing and land rights constitute common reasons for the reluctance to return, such as current occupation of their land, houses and property by commanders or the destruction and deterioration of their houses.

74. According to the Office of the United Nations High Commissioner for Refugees, an estimated 1.7 million refugees returned to Afghanistan, mainly from Pakistan and Iran, between March and September 2002 alone. However, the accuracy of this figure is affected somewhat by the fact that they reflect the number of returnees having received repatriation assistance and not necessarily the number who repatriated, including spontaneously, nor does the figure reflect the phenomenon of multiple repatriation.

75. Although the bulk of the returnees have been able to return to their homes of origin, UNHCR has through its monitoring of repatriation identified the house, land and property-related issues as main obstacles against return and reintegration. This does not only concern refugees who have returned to Afghanistan, but also those residing outside the country. According to testimonies given to the Special Rapporteur, one example was the attempted return in 2002 to the Nawavad village in the Kohistan II district, Kapisa province: 130 houses, as well as land plots, owned by refugees in Pakistan are under continuous occupation since 1998 by armed commanders from a neighbouring district.

76. The Special Rapporteur visited a number of formal and informal IDP camps during his mission, including the Hisarshahi settlement in the province of Nangahar, east of Jalalabad,

under the responsibility of the Ministry of Refugees and Repatriation. The settlement comprises 264 internally displaced families of Gujurs from the northern provinces of Takhar and Baghlan, as well as a few Pashtun families from Kunduz and Balkh. In January 2003, 89 Gujur families attempted to return to their village of origin Qalai Murad in Baghlan. Only three families were in reality able to return, as the houses the community used to live in have been occupied by members of the Tajik community, who in turn claim to be the rightful owners.

77. In order to facilitate return, UNHCR has focused increasingly on shelter assistance projects with the objective to support the neediest returnees to rebuild their homes at their place of origin or return. The Transitional Government has requested the organization to concentrate mainly on rural areas. The Special Rapporteur welcomes the elaboration of the UNHCR Shelter Guidelines for 2003 aimed to assist sub- and field offices to implement shelter assistance in a coordinated manner. The Special Rapporteur particularly welcomes the incorporation in the guidelines of a participatory component, through a community-based approach where the community itself has the main responsibility to determine the most needy beneficiaries; incorporation of an environmental concern with respect to building material to be used; and that particular priority will be given to “widows and especially those with several children, disabled, the aged, chronically ill-headed households or the neediest of the needy (economically or otherwise, who have no means to construct or rehabilitate their shelter)”. **The Special Rapporteur would, however, recommend that more emphasis be given to long-term infrastructure planning and development and access to essential services, other than water provision, which would necessitate increased involvement by the Government and organizations such as UN-Habitat and UNDP. This is particularly important given the foreseen decrease of assistance by key actors such as UNHCR and WFP in the near future.**

VIII. WOMEN, HOUSING AND LAND

78. Afghanistan has recently, on 5 March 2003, ratified the International Convention on the Elimination of All Forms of Discrimination against Women, a step which must be welcomed. As mentioned above, it is, however, of concern that the new Constitution does not explicitly recognize the rights of women to property, housing, land and inheritance.²²

79. Women have suffered greatly from the destruction, homelessness and the culture of violence and lawlessness created by decades of war. Among the almost 2 million returnees, the vast majority are women and children, including widows. According to AIHRC, one of the most frequent kinds of human rights complaints received concerns female returnees who have found their houses taken over by military commanders not willing to leave. Few options are available to women. War widows and female-headed households have no place to go, and women thus find themselves forced to remarry or live with male relatives simply to ensure a roof over their heads. AIHRC has also documented an important number of cases where women who have inherited land have been forced to marry commanders, as part of the warlords' efforts to occupy land and other property.

80. Through his meeting with the women's shura in Kandahar, the Special Rapporteur received numerous accounts of obstacles faced by women relating to the right to adequate housing, such as: difficulties to claim inheritance; increased speculation on housing and land; forced marriages of widows to ensure that land and property remain within the family; and being

refused access to courts. The Special Rapporteur also received several testimonies concerning women whose husbands, owing to drug addiction, could no longer ensure the income of the family and whose families had therefore been evicted on several occasions.

81. The right to adequate housing also implies having access to a safe and secure home. However, domestic violence is widespread.²³ According to the Special Rapporteur on violence against women,²⁴ domestic violence being considered a private matter, “(t)here is a failure on the part of authorities, as well as the public, to acknowledge, address and adequately tackle violence against women by their spouses, or other family members within the home”. In Kabul, a number of non-governmental organizations, with the support of AIHRC, have started to create women’s shelters for women being victims of violence, providing health care, food and a roof, as well as certain job training and literacy courses. However, although well intentioned initiatives, the shelters are not sustainable solutions. The Special Rapporteur was informed that the women benefiting from shelter in some instances chose to return in order to ensure housing for themselves and their children.

82. There is an urgent need to strengthen the operational capacity of the Ministry of Women’s Affairs and UNIFEM, which should be combined with the development by the Government and the international community as a whole of a joint comprehensive approach to ensure the rights and needs of women with respect to housing and land. Again, positive examples could be the establishment of women’s shuras and the creation of Women’s Development Centres, but these initiatives remain sporadic and a more holistic approach is called for.

83. In this context, the Special Rapporteur recommends the Government to take guidance from his study on women and adequate housing presented to the Commission on Human Rights in 2003 (E/CN.4/2003/55), and the framework which the Special Rapporteur is currently developing related to adequate housing and violence against women.

IX. GOVERNMENT

84. It must be recognized that the Transitional Government, particularly the Ministry of Urban Development and Housing and the Ministry of Rural Rehabilitation and Development, are showing a certain political willingness to take action, such as the recently developed Government Guidelines for Agencies Funding, Implementing and Monitoring Shelter Activities in Rural Afghanistan. Another positive example to be mentioned is the Transitional Government’s support to the National Solidarity Programme, its recognition of the rights of all squatters in urban areas and calling in the NDF for upgrading of all informal settlements. The Ministry of Refugees and Repatriation has also proposed the establishment of an inter-ministerial land commission to examine the possibility of distributing land to returnees, a proposal which has yet to be concretized. A High Commission on City Development has been created, chaired by the Vice-President, in which various ministries are involved. Mandated to guide the city development programmes inside and outside Kabul and to deal with others issues related to land and house occupation, it nevertheless lacks executive power to ensure its effectiveness.

85. There are numerous positive signals and individual initiatives aimed at addressing the housing, land and property concerns. However, even acknowledging that available resources are not sufficient, there is a clear lack of institutional responsibility and political will. The main challenge faced by the Transitional Government to ensure adequate housing in a country where the infrastructure is largely destroyed, is by all standards daunting. In addition the totality of the development budget relies on external resources which does not necessarily facilitate the responsibility-taking by the Government and that do not cover the expenses needed. There is also a tendency to rely increasingly on bilateral aid.

86. The possibility for the Transitional Government to ensure respect for the right to adequate housing is also limited due to the weakness at the municipality level. Not only did municipalities lose administrative infrastructure, public records and qualified staff during years of conflict, but there is also a prevailing lack of close relationship between the central Government and municipalities particularly in rural areas which has contributed to a culture of lack of accountability. In crucial areas like urban planning and land, functional responsibilities are overlapping between and within the municipalities and key ministries, such as the Ministry of the Interior and the Ministry of Urban Development and Housing.

X. THE INTERNATIONAL COMMUNITY, INCLUDING UNITED NATIONS AGENCIES AND PROGRAMMES

87. The exceptional work carried out by a number of United Nations agencies and programmes, in particular UNHCR, UN-Habitat and UNICEF, is vital. The Special Rapporteur welcomes the growing collaboration amongst various United Nations agencies and programmes on housing and land rights issues, including in cooperation with the Ministry of Rural Rehabilitation and Development and the Ministry of Refugees and Repatriation; the adoption of the IDP agenda by UNHCR; the community model developed by UN-Habitat; the work done by UNICEF on the provision of water and sanitation; the promotion and realization of women's right to housing by the shuras in districts of the Shomali Plains; and the setting up of the Land Committee in Nangahar province to find durable solutions to land-related problems and property rights affecting returnees and IDPs. Particularly welcomed is the initiative by UNHCR to become involved in finding durable solutions to the housing situation in urban areas. The Special Rapporteur hopes that this may open the door for further cooperation between UNHCR and UN-Habitat, in the spirit of the recently concluded memorandum of understanding between the two organizations.

88. The Special Rapporteur would like to highlight the role of UN-Habitat and its often successful work at the community level, based on the approach adopted by the Habitat Agenda. UN-Habitat has been present in Afghanistan for almost 15 years and remained active in Afghanistan during the period of the Taliban. With no recognized government as a counterpart and with the absence of civil society work in the area of housing, the organization created the concept of "Community Forum".²⁵ The idea is based on the investment of a small grant into communities, to start small community income-generating schemes. Through a process of community consultation, the profits generated from these businesses are invested in social services, such as medical clinics, schools, literacy courses, improvement maintenance of water wells and hand pumps, rehabilitation of houses, etc. The first Community Forum was

established in Mazar-e-Sharif and consisted of women only. According to testimonies received, when the Taliban took over the city in 1998, the men became the voice of the Community Forum towards the outside world, but women remained active and the forum thereby managed to survive. With the development by the Transitional Government of the National Solidarity Programme (NSP), inspiration for its design was to a large extent taken from the urban Community Forum concept, which with the NSP is now on the way to being implemented in rural areas.

89. The issue of housing and land rights in Afghanistan is crucial and cross-cutting, of direct or indirect concern to basically all United Nations actors, whether UN-Habitat, UNHCR, UNAMA, UNICEF, UNIFEM, FAO, WFP, UNEP and others. Notwithstanding the many good initiatives being taken and launched by individual organizations, there is a need for coordination with all partners concerned in order to enable initiatives to become more oriented towards sustainable development instead of focusing mainly on emergency and humanitarian relief, as they do today. With few exceptions, the United Nations programmes and agencies still operate in an emergency mode, with humanitarian relief as the main focus. Shelters are still the priority, as opposed to the realization of the right to adequate housing, including access to livelihood opportunities and essential civic services, such as water, sanitation and electricity.

90. Increased coordination could be achieved through a joint United Nations Housing and Land Task Force, at the national level, which has been established on the provincial level with positive results. Attention should be given to the right to adequate housing and related rights within the framework of the Common Country Assessment and the development of the United Nations Development Assistance Framework (UNDAF) for the next five years.

XI. NATIONAL HUMAN RIGHTS INSTITUTION

91. Through the Special Rapporteur's meetings with AIHRC it clearly transpired that land and housing issues were issues of concern in all of AIHRC's key focus areas, i.e. transitional justice, women's rights, children's rights, human rights education and, in particular, monitoring and investigation. The Special Rapporteur was encouraged by the dedication, integrity and competence of AIHRC.

XII. CIVIL SOCIETY

92. The courageous work of civil society organizations in conflict areas should be recognized. According to information received, violent attacks and threats against relief workers and human rights and humanitarian organizations have increased dramatically during the past year and the working and security conditions have deteriorated.

93. As is the case of governmental authorities, both at the central and provincial level, there is a tendency for civil society to rely solely on the work and support of United Nations agencies and programmes. At the same time, the United Nations agencies and programmes continue to rely to a large extent on international non-governmental organizations as implementing partners for projects and programmes, which does not promote capacity-building within national and local civil society organizations, nor does it promote sustainability of such projects. The national

non-governmental community has also experienced a certain loss of activists, including human rights defenders, having been appointed to positions within the transitional establishment. **While the international community, including the United Nations, has a vital role to play, civil society, including national and local non-governmental organizations, can contribute more actively to foster a human rights environment. Human rights education, particularly on women's rights and on the range of economic, social and cultural rights, is of primary importance.**

XIII. CONCLUSIONS AND RECOMMENDATIONS

94. **The Special Rapporteur's mission to Afghanistan coincided with the preparations of the Constitutional Loya Jirga, increased security tensions in certain rural provinces, and continuing incidents of land occupation and forced evictions countrywide. The Special Rapporteur is encouraged by the fact that his visit and the initiatives of other actors seemingly have contributed to a new resolve amongst United Nations agencies, AIHRC and civil society to focus on housing, land, property and forced eviction issues. He will continue to follow the situation in Afghanistan closely and hope that his dialogue with the Transitional Government, UNAMA, AIHRC, UN-Habitat, UNHCR, UNICEF and other bodies will continue.**

95. **The existing obstacles against the implementation of the right to adequate housing and land are of enormous proportions and facing the challenge will necessitate joint efforts by not only the Transitional Government but also national non-governmental actors and the international community alike. In the attempts to ensure and improve the security situation across Afghanistan, the non-implementation of land and housing rights, such as forced evictions and land occupation, as a potential reason for prevailing and future insecurity, must be recognized. The main challenge will be to elaborate a conscious combination of the humanitarian, the human rights and the sustainable development approach. Towards this end, the international community needs to direct financial and technical assistance.**

96. **The Special Rapporteur, therefore, strongly argues for the adoption of an indivisibility approach with respect to the right to adequate housing and other related rights to his mandate, including the right to land, the right to health, the right to food, the right to security of the person and the home, and freedom of movement. In addition to his recommendation throughout his report, the Special Rapporteur would like to submit the following recommendations:**

(a) Mapping the housing needs of the country and interpreting the data from a human rights perspective would be a first step towards progressive realization of the right to adequate housing;

(b) The Special Rapporteur also recommends the development of a comprehensive national housing and land policy, establishing a clear division of responsibility within the Government and institutions as to decision-making and taking into particular consideration the needs and rights of women and vulnerable groups, including returnees, IDPs, the poor, persons with disabilities and minorities. A national housing and land policy will also have to establish a participatory consultation process to follow in cases of

resettlement, property, housing and land restitution, land distribution and alternative housing and land for those made homeless and landless;

(c) Whether in elaborating housing policies and programmes or adopting specific legislation, particular attention must be given to the need to address - as a matter of priority - the situation of women, including the need of protection of households headed by women and vulnerable women in poor housing and living conditions, IDPs, nomads, minorities and the poorest and most needy segment of the population, and ensure their participation in the development of policies and programmes;

(d) Strengthening the Ministry of Women's Affairs and enhancing the present limited capacity of UNIFEM is necessary in order to develop a joint comprehensive approach, including the Government and the international community as a whole, to ensure the rights and needs of women with respect to housing and land;

(e) Particularly at the provincial level, comprehensive regional, rural and urban, development plans need to be elaborated, with the involvement of the Ministry of Urban Development and Housing and the Ministry of Rural Rehabilitation and Development, based on a national housing and land policy, taking into particular consideration the need to include special provisions in the above plans to address issues such as land distribution to the homeless and low-cost housing for the poorest segments of society;

(f) It is recommended that the Transitional Government, together with UNAMA, should take the lead in developing appropriate monitoring mechanisms for the implementation of the right to adequate housing, such as through strengthening the capacities of AIHRC and the establishment of an inter-ministerial housing and land rights committee with involvement of relevant ministries, local authorities, United Nations programmes and agencies and civil society. Steps should be taken, including by the international community, to ensure the establishment of the inter-ministerial land commission proposed by the Ministry of Refugees and Repatriation to examine the possibility of distributing land to returnees;

(g) Increased coordination within the international community could be achieved through a joint United Nations housing and land task force, at the national level, as has been established on the provincial level with positive results. Within the framework of the Common Country Assessment to be undertaken United Nations agencies and programmes, which will lead to a United Nations Development Assistance Framework for the next five years, due attention should be given to the right to adequate housing, and related rights addressed in this report;

(h) The Special Rapporteur urges further integration of human rights perspectives into national and sectoral policies, housing programmes and rehabilitation initiatives, including through the National Solidarity Programme, with a particular focus on the development and participation of women's shuras, and the Provincial Reconstruction Teams;

(i) The Special Rapporteur recommends the development of a national legislation on housing and land rights, incorporating and codifying into one comprehensive source,

customary law, civil law, religious law and State law, including women's right to inheritance of housing and land, and in compliance with international human rights treaties ratified by Afghanistan. This is of particular importance since the recently adopted Constitution, while recognizing the need for compliance with international human rights instruments, does not explicitly guarantee the respect of the right to adequate housing and related rights;

(j) The Special Property Disputes Resolution Court should be given appropriate resources, particularly with regard to its capacity to consider complaints from provincial areas. Especially in the provincial areas, the issue of access to courts, particularly for women, and corruption within the judicial system need to be addressed;

(k) A moratorium on all forced evictions should be made until a national housing and land policy has been adopted and an effective judicial system to address disputes in this regard is in place. The Special Rapporteur also recommends that the potential role of an enhanced ISAF force in the transitional period be explored, to include the protection of those potentially threatened by forced evictions;

(l) In the context of the consistent pattern of forced evictions and land grabbing across the country, the Special Rapporteur recommends the Transitional Government and relevant actors from the international community, to contribute to the removal of the climate of impunity that currently exists for those who are responsible for such acts. The Special Rapporteur urges an intensification of investigations into such human rights violations and, when appropriate, prosecution of those actors, including commanders and other members of the security establishment;

(m) In all matters of housing and land, including in cases of land distribution and prevention of illegal land occupation and forced evictions, adequate legislation needs to be complemented by measures to ensure effective implementation;

(n) The Special Rapporteur recommends that the main ministries taking active responsibility for the improvement of access to adequate housing also adopt an environmental strategy in order to ensure that the right to adequate housing entails the right to live in a safe environment. The Special Rapporteur urges the Government to take into account the contents of general comment No. 15 on the right to water, giving particular attention to the individuals, most often women and children, and communities living in extreme poverty;

(o) There is a need to strengthen human rights education in the country, including of State actors and the judiciary, particularly on economic, social and cultural rights and women's rights, such as through participation in community forums, other local institutions and through radio broadcasts. All relevant actors, including the Transitional Government, AIHRC and civil society organizations need to intensify awareness-raising efforts and training programmes, towards this end. A particularly useful model which could be considered for cities and provinces of Afghanistan is the "Human Rights Cities" initiative developed by the People's Movement for Human Rights Education (PDHRE) and currently being jointly coordinated by PDHRE and UNDP;

(p) Given the decades of conflict, Afghanistan has not been able to fulfil its reporting obligations under ratified human rights treaties. To enhance the country's integration in the human rights system, the Special Rapporteur recommends that the Transitional Government consider planning for the submission of such reports. From his experiences during a mission in a post-conflict situation, the Special Rapporteur believes that special procedures of the Commission on Human Rights can play an important role in addressing the human rights situation in the country and recommends that Afghanistan issue a standing invitation to such procedures.

Notes

¹ For the legal basis of the mandate of the Special Rapporteur and other information related to his work see also the OHCHR web site: www.unhchr.ch/housing.

² See UN Documents E/CN.4/2001/51, E/CN.4/2002/59, E/CN.4/2003/5, E/CN.4/2003/5/Add.1, E/CN.4/2003/5/Add.2, E/CN.4/2003/5/Add.3, E/CN.4/2003/55 and E/CN.4/2004/48 and E/CN.4/2004/48/Add.1, also found on the OHCHR web site on: www.unhchr.ch/housing.

³ “Afghanistan countrywide food needs: Assessment of rural settled populations”, World Food Programme, 2003.

⁴ Article 38: “A person’s residence is immune from invasion. Other than the situations and methods indicated in the law, no one, including the State, is allowed to enter or inspect a private residence without prior permission of the resident or holding a court order. [...]”
Article 40: “Property is immune from invasion. No person shall be forbidden from acquiring and making use of a property except within the limits of law. Nobody’s property shall be confiscated without the provisions of law and the order of an authorized court. Acquisition of a person’s property, in return for a prior and just compensation within the bounds of law, is permitted only for securing public interests in accordance with the provisions of law. [...]”

⁵ See E/CN.4/2001/51, paragraphs 78-80.

⁶ *Government of the Republic of South Africa v. Grootboom 2000*, (11) Butterworths Constitutional Law Reports 1169 (CC).

⁷ “Land rights in crisis: restoring tenure security in Afghanistan”, Afghanistan Research and Evaluation Unit, March 2003.

⁸ Ibid.

⁹ “Preliminary study of land tenure-related issues in urban Afghanistan with Special Reference to Kabul City”, UN-Habitat, March 2003.

¹⁰ A special commission on the restitution of property was established in 1990 under the Najibullah regime. The Commission on the Restitution of Property was re-established by the Afghan Interim Administration, under direct supervision of the Ministry of Interior, with the task to assist those who cannot recover their properties from different occupants mainly in Kabul province, submitting their views on cases to the Land and Property Disputes Court.

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- ¹¹ Afghanistan Water and Environmental Sanitation Fact Sheet, April 2003, UNICEF.
- ¹² Preliminary Study of Land Tenure Related Issues in Urban Afghanistan with Special Reference to Kabul City, UN-Habitat, March 2003, p. 10.
- ¹³ Ibid., p. 11.
- ¹⁴ “Afghanistan: Focus on Kabul housing shortage”, UN-OCHA Integrated Regional Information Network, 22 May 2003 (see www.irinnews.org).
- ¹⁵ “Afghanistan: post-conflict environmental assessment”, United Nations Environment Programme (UNEP), 2003.
- ¹⁶ Ibid., p. 37.
- ¹⁷ “Afghanistan - complex emergency, situation report #1, Fiscal Year (FY) 2004”, United States Agency for International Development, Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA), Office of United States Foreign Disaster Assistance (OFDA), October 2003 (see www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries).
- ¹⁸ Ibid.
- ¹⁹ For further details, including names of involved ministers, see the AIHRC web site (www.aihrc.org).
- ²⁰ Press articles available at the Office of the High Commissioner for Human Rights.
- ²¹ For further details, see the AIHRC web site (www.aihrc.org).
- ²² For a human rights perspective see Commission on Human Rights resolution 2003/22 on women’s equal ownership of, access to and control over land and equal rights to own property and to adequate housing. See also report on women and adequate housing of the Special Rapporteur (E/CN.4/2003/55) and the questionnaire prepared for the Special Rapporteur’s ongoing study on women and adequate housing at www.unhchr.ch/housing.
- ²³ For a framework linking violence against women and the right to adequate housing, see the opening speech by Dr. Sima Simar, Chairperson of the AIHRC, for the Regional Consultation on women and adequate housing, 28-31 October 2003, New Delhi, India, organized by the Asia Pacific Forum on Women, Law and Development (APWLD) in cooperation with the Special Rapporteur on adequate housing and the OHCHR, at www.unhcr.ch/housing.
- ²⁴ See A/58/421, the report of the Special Rapporteur of the Commission on violence against women, its causes and consequences, on the situation of women and girls in Afghanistan, paragraph 10.

²⁵ *Successful Cities at the Community Level*, Theresa Poppelwell, Regional Programme Manager of the UNDP/UNHCS Programme on Rebuilding Communities in Urban Afghanistan, 2001, (see www.fukuta.unhabitat.org/english/information/Ocassional/Success-Poppelwell).
