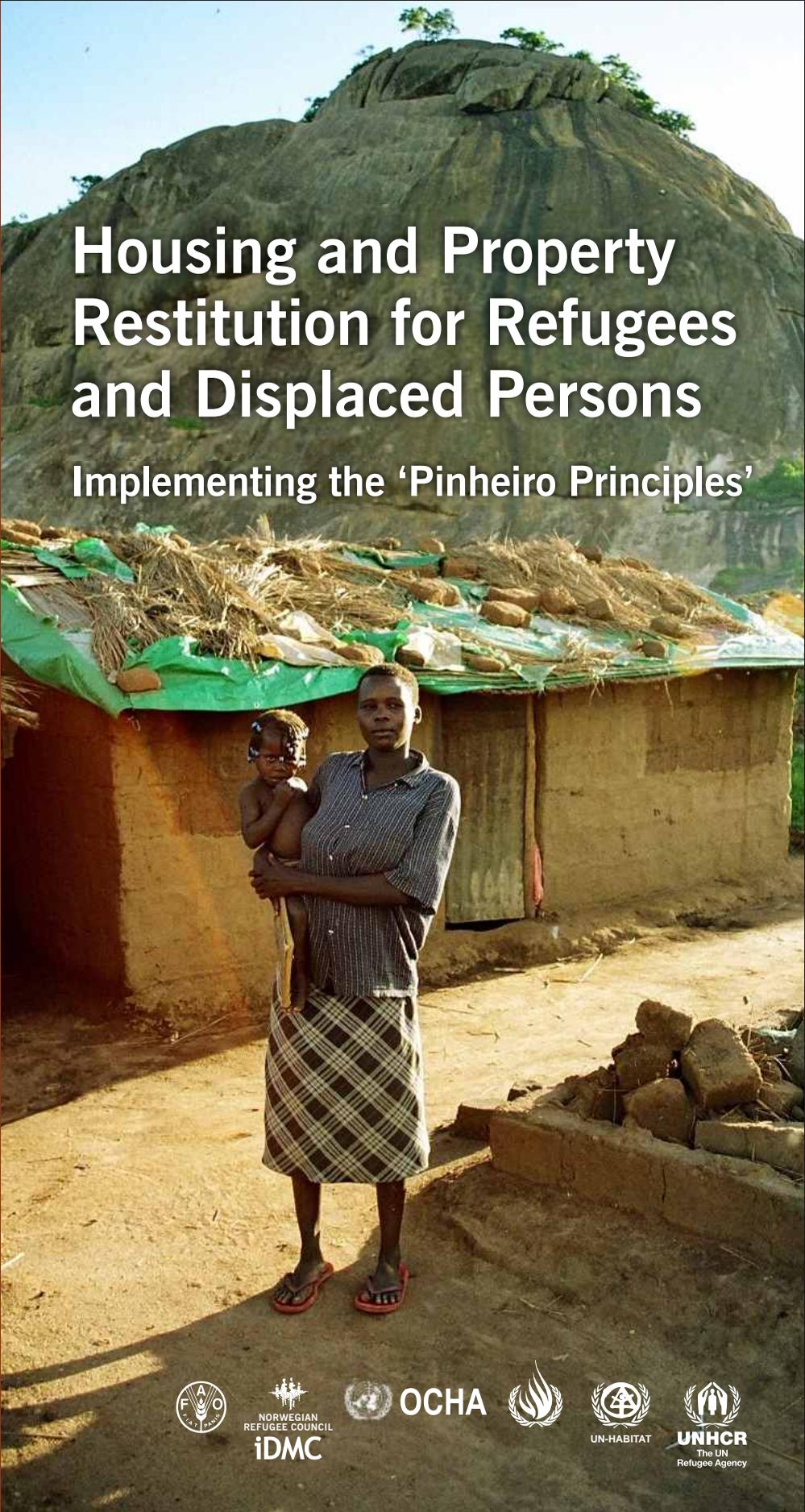


Housing and Property Restitution for Refugees and Displaced Persons

Implementing the 'Pinheiro Principles'



NORWEGIAN
REFUGEE COUNCIL
IDMC



OCHA



UN-HABITAT



UNHCR
The UN
Refugee Agency

Handbook on
Housing and Property
Restitution for Refugees and
Displaced Persons

Implementing the '*Pinheiro Principles*'

March 2007

Cover photo: Uganda: Women and child in Soroti IDP camp (IDMC, Birkenes)

Foreword

From Rwanda to Bosnia, Sudan to Kosovo, Liberia to Sri Lanka, the critical importance of ensuring the realisation of refugees' and internally displaced persons' right to housing and property restitution has become increasingly recognised. While important steps have been taken in a wide range of post-conflict settings, those with responsibility for housing and property restitution issues, whether they are government officials, staff of international agencies and NGOs or members of local civil society groups, often lack practical guidance on how to best go about addressing what are often vastly complex and potentially controversial and divisive issues.

The approval of the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons by the UN Sub-Commission on the Protection and Promotion of Human Rights in August 2005 was an important step towards providing useful guidance on the international standards governing the effective implementation of housing, land and property restitution programmes and mechanisms.

It was against this backdrop that a group of agencies decided to collaborate on the development of a Handbook on Housing and Property Restitution for Internally Displaced Persons and Refugees. This joint effort brought together OCHA/IDD, UN HABITAT, UNHCR, FAO, OHCHR, and the Norwegian Refugee Council (NRC) and the NRC Internal Displacement Monitoring Centre (IDMC), each able to contribute with experience in the legal and practical complexities of property restitution.

Building on the Pinheiro Principles, this Handbook provides important and practical guidance to all those working on housing and property restitution issues. It aims at promoting durable solutions for internally displaced persons and refugees, including the right to return to the homes and properties from which they fled or were forced to leave due to armed conflict and human rights violations. The Handbook should contribute to efforts to strengthen the protection of restitution rights, and in doing so, help to prevent future conflict and consolidate recent peace.

It is our sincere hope that the Handbook will be widely disseminated and will make an important contribution to the principled and informed resolution of housing and property restitution issues world-wide.



Dr Jacques Diouf
Director-General
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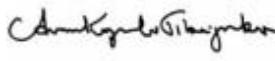
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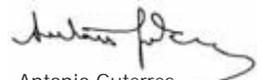
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The Food and Agriculture Agency of the United Nations (FAO) has a long-standing concern with enhancing access to land by the rural poor in order to reduce poverty and hunger and to promote sustainable rural development. Rural landlessness is often the best predictor of poverty and hunger. Secure access to land provides a valuable safety net as a source of shelter, food and income in times of hardship, and a family's land can be the last available resort in the instance of disaster. Providing secure access to land in countries emerging from violent conflict is fundamental to achieving sustainable peace. In partnership with international, governmental and civil society organizations, FAO's Land Tenure and Management Unit provides technical assistance through guidelines and projects to re-establish rural land tenure institutions and land administration systems in post-conflict settings.



iDMC Information, Counselling and Legal Assistance Programme

The Norwegian Refugee Council (NRC) has been working on restitution of housing, land and property since the middle of the 1990s when the Information, Counselling and Legal Assistance Programme (ICLA) was created. ICLA's objective is to facilitate durable solutions for refugees and displaced through provision of information on situation in places of origin and legal aid to address discrimination and restriction in access to rights. Along with legal support to facilitate access to political, social and economic rights, NRC has provided legal aid on property restitution. Housing, land and property issues have become a major part of several ICLA programmes. This work which started first in the Balkans has now extended to more than a dozen countries including Burundi, Democratic Republic of Congo, Sudan, Uganda, Georgia, Azerbaidjan, Afghanistan, Pakistan, Sri Lanka and Colombia.

The Internal Displacement Monitoring Centre (IDMC) of NRC monitors conflict-induced internal displacement worldwide at the request of the United Nations. The Geneva-based centre runs an online database providing updated information on internal displacement in some 50 countries. On behalf of NRC, the IDMC monitors political and institutional developments related to housing, land and property issues and promotes good practices based on NRC's experience and in line with the Pinheiro principles.



OCHA Office for the Coordination of Humanitarian Affairs

Inter-Agency Internal Displacement Division (IDD)

The Inter-Agency Internal Displacement Division (IDD) of the Office for Humanitarian Affairs (OCHA) was created by the Emergency Relief Coordinator to enhance the collaborative response to internal displacement. The Division prioritized thematic issues affecting internally displaced persons including housing, land and property rights issues. It also provided direct technical support missions on property issues to country teams and national authorities in Uganda, Sudan, Liberia and Pakistan.

At the global level, in recognition of the importance of the realization of refugees and internally displaced persons right to housing and property restitution, IDD contributed to the development of the Pinheiro Principles. It also initiated the development of this handbook to provide practical guidance to all actors involved in land, housing and property restitution issues.



The mission of the Office of the United Nations High Commissioner for Human Rights (OHCHR) is to work for the protection of all human rights for all people; to help empower people to realize their rights; and to assist those responsible for upholding such rights in ensuring that they are implemented. In carrying out its mission OHCHR will pay equal attention to the realization of civil, cultural, economic, political, and social rights, including the right to development.

OHCHR's part of the present Handbook falls mainly within the scope of its work on the right to housing and related issues, based on the inclusion of the right to adequate housing in the Universal Declaration of Human Rights in 1948 and its reaffirmation and explicit recognition in a wide range of international human rights instruments as a component of the right to an adequate standard of living, and as part of the body of universally accepted and applicable international human rights law. Operationally, OHCHR works with governments, legislatures, courts, national institutions, civil society, regional and international organizations, and the United Nations system to develop and strengthen capacity, particularly at the national level, for the protection of human rights in accordance with international norms. Institutionally, OHCHR is committed to strengthening the United Nations human rights programme and to providing it with the highest quality support. OHCHR is committed to working closely with its United Nations partners to ensure that human rights form the bedrock of the work of the United Nations.



In post conflict societies, land and property are key issues as they often are closely associated with the conflict. Proper land and property restitution mechanisms and governance approaches are therefore a priority in building and sustaining peace. The UN-HABITAT lead Global Land Tool Network aims to establish a continuum of land rights, strengthen poor land management practices, prepare land tenure systems and tools, assist in strengthening existing land networks, improve global coordination on land, assist in the development of gendered tools which are affordable and useful to the poorest population segments and disseminate knowledge on security of tenure. The main objective of the Network is to facilitate the attainment of the Millennium Declaration and the Millennium Development Goals through improved land management and tenure tools for poverty alleviation and the improvement of the livelihoods of the poor.

UN-HABITAT undertakes operational activities in several countries recovering from natural disasters or complex emergencies. It works with central and local governments, the Inter Agency Standing Committee, NGOs and UN Country Teams to respond in line with the UN-HABITAT "Sustainable Relief and Reconstruction" Framework. As part of a series of housing, land and property tools, a special "Immediate measures land management evaluation tool" has been developed recently to guide initial situation assessments and recovery programming after disasters. UN-HABITAT has a growing portfolio of operations in specific "housing, land and property restitution" and "land administration" programmes in Sudan, Uganda, Liberia, Somalia and other countries.



UNHCR's involvement with the voluntary repatriation of refugees is a core function derived from our mandate for the international protection of refugees and the search for a durable solution for each refugee. Over the years, UNHCR has also been empowered by various UN GA resolutions to engage in the protection of IDPs. UNHCR's main challenges with respect to return, whether by refugees or IDPs, are to promote the enabling conditions for voluntary return, to ensure the exercise of a free and informed choice and to mobilize support to underpin successful return. Successful return requires immediate access to basic services as well as the means to make the return sustainable. For every returnee access to their land, houses and property is a priority.

Returnees not only have the right to return to their countries of origin, they also have the right to recover the homes and land from which they fled or were evicted.

During the past decade, apart from strong advocacy for housing, land and property restitution, UNHCR has been involved in standard setting, including providing support to Governments with the development of housing restitution legislation. UNHCR has established or otherwise assisted the work of legal aid centres instrumental in assisting refugees in processing restitution claims. Housing construction and repair projects were developed to complement the recovery process.

Table of Contents

Foreword	3
Introduction	9
How to Use the Handbook: Applying the Principles on Housing and Property Restitution in the Field.....	12
Section I - Scope and Application	15
Principle 1 - Scope and application	16
Section II - The Right to Housing and Property Restitution	23
Principle 2 - The right to housing and property restitution	24
Section III - Overarching Principles	31
Principle 3 - The right to non-discrimination	32
Principle 4 - The right to equality between men and women.....	36
Principle 5 - The right to be protected from displacement	39
Principle 6 - The right to privacy and respect for the home.....	42
Principle 7 - The right to peaceful enjoyment of possessions.....	44
Principle 8 - The right to adequate housing	48
Principle 9 - The right to freedom of movement	51
Section IV - The Right to Voluntary Return in Safety and Dignity	53
Principle 10 - The right to voluntary return in safety and dignity	54
Section V - Legal, Policy, Procedural and Institutional Implementation Mechanisms	59
Principle 11 - Compatibility with international human rights, refugee and humanitarian law and related standards.....	60
Principle 12 - National procedures, institutions and mechanisms.....	63
Principle 13 - Accessibility of restitution claims procedures	68
Principle 14 - Adequate consultation and participation in decision-making.....	72
Principle 15 - Housing, land and property records and documentation	74
Principle 16 - The rights of tenants and other non-owners.....	79
Principle 17 - Secondary occupants.....	81
Principle 18 - Legislative measures	85
Principle 19 - Prohibition of arbitrary and discriminatory laws	87
Principle 20 - Enforcement of restitution decisions and judgments	89
Principle 21 - Compensation	92

Section VI - The Role of the International Community, Including International Organisations..... 95
Principle 22 - Responsibility of the international community.....96

Section VII - Interpretation98
Principle 23 - Interpretation.....100

Concluding Remarks..... 100

Principles on Housing and Property Restitution for Refugees and Displaced Persons (full text) .101

Useful Contacts..... 111

Index..... 112

The agencies wish to express their special gratitude to Scott Leckie of the Centre on Housing Rights and Evictions (COHRE) for preparing the substantive draft of the *Handbook*.



Introduction

Over the past several decades, inter-governmental agencies, government officials, United Nations and NGO field staff and others working in protection or support capacities with refugees and internally displaced persons (IDPs) have become increasingly involved in efforts to secure durable and rights-based solutions to all forms of displacement based on the principle of voluntary repatriation. In more recent years, the idea of voluntary repatriation and return have expanded into concepts involving not simply the return to one's country for refugees or one's city or region for IDPs, but the return to and re-assertion of control over one's *original home, land or property*; the process of housing and property restitution.

As a result of these developments, since the early 1990s several million refugees and IDPs have recovered and re-inhabited their original homes, lands and properties through restitution processes, while smaller numbers have accepted compensation in lieu of return. These efforts have been played out from Bosnia-Herzegovina, Afghanistan to South Africa and from Tajikistan to Guatemala, Mozambique and beyond. This historic change in emphasis from what were essentially humanitarian-driven responses to voluntary repatriation to more rights-based approaches to return are increasingly grounded in the principle of restorative justice and of restitution as a legal remedy which can support refugees and internally displaced persons in their choice of a durable solution (whether return, resettlement or local integration).

This shift has had a profound impact upon the entire return and repatriation dynamic, as well as the manner by which the international community and local actors have become involved in these initiatives. Importantly, these changes have not been purely political or humanitarian in nature, but have been increasingly reflected in international, regional and national laws and other instruments which explicitly recognise housing and property restitution as a basic, self-standing human right, interdependent with a series of related rights. The right to a remedy for human rights violations has perhaps been best articulated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, based on existing human rights and humanitarian law principles. With respect to restitution the Basic Principles state that "(r)estitution should, whenever possible, restore the victim to the original situation before the gross violations of human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship; return to one's place of residence, restoration of employment and return of property".

There is a growing recognition, therefore, in both law and practice, of the necessity of consciously undoing the effect of human rights violations and other causes of displacement through reliance on the principles governing the emerging right to housing and property restitution. This has been accompanied by an understanding that return without restitution can only ever provide an incomplete durable solution to displacement.

Field staff of inter-governmental organisations, international NGOs and those active at the national and local levels, whether working in the humanitarian, post-conflict or early recovery sectors, now regularly face difficult situations where they are entrusted with securing housing and property restitution rights for refugees and IDPs. They can often find themselves unprepared to deal appropriately with the numerous complexities and risks associated with the implementation of restitution rights. Given the impossibility of developing a 'one-size fits all', universally applicable approach to the global restitution question - because of the tremendous diversity of restitution predicaments from country to country, and sometimes even from county

to county within a country - the challenges confronting those entrusted with protecting and securing restitution rights are considerable.

While a growing number of those working within the international refugee, humanitarian and human rights communities have direct experience in one or the other aspects of the restitution question, particularly those with experience in the Balkans or the Great Lakes region, most practitioners in the displacement sphere – whether at the field or headquarter levels - still have not have received the training or developed the expertise required to deal adequately with the many often agonising policy decisions and complex legal, judicial and quasi-judicial processes associated with promoting and implementing housing and property restitution rights.

With a view to building capacity to better assist in these processes, this Handbook presents information and practical guidance for officials working on housing and property restitution questions on how to most effectively promote the right of refugees and internally displaced persons to return to and re-inhabit the homes and properties from which they were originally displaced, and also how to find non-return-based durable solutions that include fully enforceable housing and property restitution rights, including compensation rights. The Handbook is intended, in particular, to aid those engaging in these processes to successfully promote these rights in a manner fully consistent with international human rights and other standards.

The basis for the present Handbook is the *Principles on Housing and Property Restitution for Refugees and Displaced Persons ('Pinheiro Principles')*, which were endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005. The *Principles* are the result of a seven-year process which initially began with adoption of Sub-Commission resolution 1998/26 on *Housing and property restitution in the context of the return of refugees and internally displaced persons* in 1998. This was followed from 2002-2005 by a study and proposed principles by the Sub-Commission Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro.

The *Pinheiro Principles* provide restitution practitioners, as well as States and UN and others agencies, with a consolidated text relating to the legal, policy, procedural, institutional and technical implementation mechanisms for housing and property restitution. As such, the *Principles* provide specific policy guidance regarding how to ensure the right to housing and property restitution in practice and for the implementation of restitution laws, programmes and policies, based on existing international human rights, humanitarian, refugee and national standards. To this end the *Principles* reflect some of the most useful provisions from various national restitution policies, programmes and practices, including those developed for Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Cyprus, Guatemala, Iraq, Kosovo, Rwanda, South Africa and Sudan.

How to Use the Handbook: Applying the Principles on Housing and Property Restitution in the Field

This Handbook is intended to practically assist a variety of actors and institutions, including headquarters and field staff, to secure protection and durable solutions for refugees and other displaced persons through the application of the *Principles on Housing and Property Restitution* to various situations of displacement.

The Handbook is organised on a principle-by-principle basis. Coverage of each of the 23 principles begins with a brief description of the rationale and legal basis for including the principle in question within the text. This is followed by ‘typical scenarios’ in which each principle could be applicable. These scenarios provide practical examples on how the contents of each principle have been addressed previously in restitution processes, and how practitioners can most effectively benefit from best practices and lessons learned over the past decades in addressing restitution questions.

These examples are then followed by ‘common questions’ that restitution practitioners may confront in applying the *Principles*, and which are intended to assist in clarifying many of the most frequent restitution challenges. Both the ‘typical scenarios’ and ‘common questions’ sections in the Handbook have been purposely kept concise, with only limited reference to legalistic language, and without reference to footnotes. Housing and property restitution practitioners who are interested in accessing more detailed information about the legal basis of each of the *Principles* and how these may have already been applied in the field, are invited to review the various materials listed under the ‘useful guidance’ section which conclude the analysis of each *Principle*.

The very broad nature of the *Principles* and their comprehensive contents need to be borne in mind by users of the Handbook. The *Principles* seek to achieve many things: Namely, they assert specific rights to housing and property restitution, re-affirm a range of related rights, outline in detail a range of legal, policy, procedural and institutional arrangements which are vital for the achievement of restitution rights and conclude by outlining an ideal role for international organisations in securing these rights. While there are exceptions, generally these issues arise at different stages of the displacement cycle. For instance, the recognition of restitution rights necessarily precedes the establishment of specialised restitution procedures and institutions, just as questions surrounding the enforcement of judicial decisions confirming restitution rights necessarily precede the organised re-possession of homes and lands by returning refugees and IDPs by refugees and displaced persons, who may then choose either to return to their original residence or to use restitution as a means for supporting and alternative choice of resettlement or local integration. Restitution, thus, is very much of a step-by-step

process and those involved in applying the *Principles* need to take this into account in using the Handbook.

The text of the *Principles* should be treated as a unified whole and every effort should be made by those using the Handbook to ensure that all of the issues addressed within the text are treated with the requisite seriousness. Handbook users should note that no guidance is offered on the application of the preamble of the *Principles*. A full text of the Principles on Housing and Property Restitution for Refugees and Displaced Persons is contained near the end of the Handbook.

Those using the Handbook will frequently be working in positions requiring them to advocate for the enforcement of the housing and property restitution rights of refugees and displaced persons. In this regard, they should familiarise themselves thoroughly with the human rights re-affirmed in the *preamble* of the *Principles* and *Principles* 1-10 with a view to ensuring that these rights are adequately respected and protected throughout *all stages* of the restitution process. This would apply to a wide range of settings; from advocacy efforts during peace negotiations to ensure the inclusion of restitution rights within any eventual agreement, to the assertion of restitution rights within established restitution procedures on behalf of an individual refugee or IDP within post-conflict or post-disaster settings. Indeed, the housing and property restitution rights held by all refugees and displaced persons should guide the efforts of all those responsible for return, repatriation and other durable solutions, be they policy-makers, lawyers, NGOs, UN staff members or others.

Users of the Handbook are encouraged to pay particularly close attention to *Principles* 11-22. It is these latter *Principles* that will require concerted attention in field situations where often the most difficult and complex restitution challenges are generated. The analyses of *Principles* 11-22 are substantive in nature and designed to be user-friendly to those working in the field on these issues. Each section seeks to give practical examples of how the particular issues concerned have been addressed in other restitution activities, and which past experiences may be most useful to refer to in developing responses to new restitution questions.

Handbook users should be aware that the areas covered below are specific to housing and property restitution processes in mid-conflict, post-conflict and post-disaster settings. A wide range of housing, land administration and property concerns are common to all conflicts and disasters to one extent or another, but the Handbook *only examines* the question of housing and property restitution rights of refugees and displaced persons as elaborated in the *Principles*. As such, users of the Handbook will find essential guidance on questions such as facilitating restitution in the context of refugee or IDP return, resolving housing, land and property disputes and dealing appropriately with the question of secondary occupation of refugee or IDP homes and lands, what types of issues require attention in the context of legal reform, what institutional framework may work most effectively to secure restitution rights and related themes.

If the Handbook appears to use more examples from Eastern Europe and, in particular, the Balkans than elsewhere, this is due to the fact that the restitution process has been more widespread, prominent, and some would say more successful, than in other regions. At the same time, while restitution processes during that past decade have been undertaken throughout the world, including Europe and the Balkans, it appears that the global restitution focus in coming years will be on Africa's restitution challenges. These efforts may ultimately require different approaches and tools than those which played out in Eastern Europe and assorted other regions and sub-regions given the widespread application of customary law

throughout the continent. Practitioners will need to be aware of both the global lessons learned on restitution, and the unique features of the restitution question in the African context (and elsewhere) where solutions to displacement will be sought in future years.



Section I: Scope and Application

Principle 1. Scope and Application

1.1 *The Principles on housing and property restitution for refugees and displaced persons articulated herein are designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.*

1.2 *The Principles on housing and property restitution for refugees and displaced persons apply equally to all refugees, internally displaced persons and to other similarly situated displaced persons who fled across national borders but who may not meet the legal definition of refugee (hereinafter “refugees and displaced persons”) who were arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence, regardless of the nature or circumstances by which displacement originally occurred.*

The *Principles* begin by emphasising their broad scope and application in their key objective of assisting relevant national and international actors to adequately address the legal and technical issues linked to the housing and property restitution rights of refugees and displaced persons.

The *Principles* are inclusive in nature and apply in situations where displacement has resulted in people ‘arbitrarily’ or ‘unlawfully’ being deprived of their former homes, lands, properties or places of habitual residence. In practical terms, therefore, this standard applies firstly to *all* refugees and displaced persons forcibly removed from or otherwise forced to flee their ‘homes, lands, properties or places of habitual residence....regardless of the nature or circumstances by which displacement originally occurred’.

The *Principles* apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as ‘ethnic cleansing’, development projects, forced evictions and natural and manmade disasters. Whenever a person or community is arbitrarily displaced from their homes and lands the *Principles* can be used as guidance. This would imply that all refugees and displaced persons recognised as such by the international community should be protected by the terms of the *Principles*.

In recognising the housing and property restitution rights of all refugees and displaced persons, the *Principles* do not distinguish between categories of displaced persons in terms of defining their restitution rights. This is an important expansion of the language frequently used to describe displacement, which often refers more restrictively to ‘refugees and internally displaced persons.’ The *Principles*, however, use the simplified but more expansive language of ‘refugees and displaced persons’. This term is expressly intended to be more inclusive by conferring restitution rights to a broader group of rights-holders. This formulation, therefore, allows for the incorporation of three groups – refugees, internally displaced persons (including those displaced by disasters), and displaced persons who flee across national boundaries but who are *not* refugees.

Ultimately, the *Principles* take the perspective that neither war, human rights abuses, development projects nor disaster are in and of themselves justifiable grounds upon which to legitimise the arbitrary or unlawful acquisition, expropriation or destruction of homes and lands over which refugees and displaced persons continue to retain rights. Grounded firmly in existing

international law, policy and best practices, the *Principles* recognise the fundamental nature of housing and property restitution as a key concern of States and the international community, and ultimately as a fundamental feature of long-lasting peace and sustainable development.

Typical Scenarios for Applying Principle 1

Influencing the contents of peace agreements – Illustrating the growing realisation that addressing housing and property restitution rights and justly resolving any related housing or property disputes are crucial to long-term peace, a range of peace agreements have explicitly included provisions on housing, land and property restitution rights for refugees and displaced persons. Though Annex 7 of the 1995 Dayton Accords ending the conflict in Bosnia-Herzegovina is the most widely known peace agreement enshrining restitution rights, additional agreements ending conflict in Sierra Leone, Liberia, Guatemala and others incorporate, to varying degrees, the housing, land and property restitution rights of refugees and displaced persons. The *Principles* can be used as guidance for developing measures to implement those agreements that enshrine restitution rights, and be used as a basis to justify explicitly incorporating housing and property restitution rights within peace agreements during peace negotiations.

Post-conflict peace operations – A range of UN peace operations have been directly involved in housing and property restitution efforts. Operations such as the UN Mission in Kosovo (UNMIK) established, administered and managed the Kosovo Housing and Property Directorate (HPD) and Housing and Property Claims Commission, while a Land and Property Unit within the UN Transitional Authority in East Timor (UNTAET) developed detailed proposals for institutionally addressing restitution questions. By contrast, peace operations such as the UN Transitional Administration in Cambodia (UNTAC) and the UN Assistance Mission in Afghanistan (UNAMA) consciously choose not to address restitution issues within their mandates. When peace operations do not engage in these activities, this does not necessarily mean that restitution issues go unanswered in the countries concerned. In Afghanistan, for instance, UNHCR and NGOs such as the Norwegian Refugee Council (NRC) engaged in a variety of restitution efforts, including the provision of free legal aid to thousands of returnees seeking to return to their original homes and lands and to those seeking to resolve ongoing land disputes, through local courts and non-judicial customary dispute resolution procedures.

The *Principles* can be of use, therefore, both as a basis for designing formal restitution institutions within the context of post-conflict peace operations, whether or not such institutions are included in the original mandate of the bodies concerned and they can act as a signpost for guiding restitution efforts in the field that may rely more on local and national courts or traditional dispute resolution processes.

Voluntary repatriation/return operations and agreements – Coordinated voluntary repatriation/return operations and the agreements upon which they are based, can also include explicit housing and property restitution provisions in support of returnees. Voluntary repatriation agreements concerning Vietnam, Guatemala, DR Congo, Mozambique, Rwanda, Cambodia, Angola, Georgia, Burundi and many others have enshrined derivations of housing and property restitution rights. The *Principles* can be used as an important source of international standards supporting the inclusion of restitution concerns within future voluntary repatriation and return efforts.

Natural and manmade disasters – Natural and manmade disasters including earthquakes (e.g. Pakistan, 2005), tsunamis (e.g. Asia, 2004), storms and floods (e.g. New Orleans, 2005) and development projects such as dams often result in the large-scale displacement of people from their homes, lands and properties. In some settings, the displaced are arbitrarily and/or unlawfully prevented from returning to and recovering their homes, and/or otherwise involuntarily relocated to resettlement sites despite their wishes to return home. The *Principles* – covering *all* displaced persons, including those forced to flee their homes due to disaster - can be referred to as an important source of international standards supporting the rights of disaster-affected populations to return to and recover their former homes and lands should they so wish.

Multi-faceted (complex) emergencies – The *Principles* are also applicable in countries enduring multi-faceted or complex emergencies. For instance, in the case of Sri Lanka, the 2004 tsunami struck the country at the same time mass displacement generated from the enduring conflict there remained far from a durable solution. As a result, many conflict-IDPs and tsunami-IDPs remain unable to return to their original homes and lands. The *Principles* provide a basis for ensuring that *both* those displaced due to conflict and those displaced due to disaster are treated equitably, and that both groups are able to exercise their housing and property restitution rights when circumstances so warrant.

Situations of local integration or resettlement as alternate durable solutions – Finally, the *Principles* are applicable to all groups of refugees and displaced persons for whom repatriation/return either is not voluntarily chosen as a durable solution or where repatriation/return is politically obstructed or otherwise not feasible due to ongoing conflict, security or other concerns. This would concern, for instance, long-term refugee and IDP populations residing in settlements or camps outside of their country or place of origin and others who may have found temporary, but not durable, solutions to their displacement. It is important to note, in this regard, that long-term displacement *does not* extinguish or de-legitimise restitution claims. Nor does a decision to resettle or integrate locally. The *Principles* can be used as a basis for continuing advocacy on behalf of the long-term displaced and to ensure that restitution rights are taken seriously.



Common Questions

Who is responsible for implementing housing and property restitution rights?

Ultimate responsibility for securing the implementation of the rights found in the *Principles* rests with the State. This is, of course, particularly true when the State itself is directly accountable, whether by action or omission, for the displacement caused. When displacement is caused by *non-State actors*, (guerrilla groups, insurgents, militias, private companies, etc), the State/territory in which the displacement took place, and in which those displaced had or have citizenship or other legal rights, also remains legally responsible for ensuring the implementation of housing and property restitution rights. At the same time, non-State actors responsible for any crimes or human rights violations leading to forced displacement are also liable for these acts under the terms of international human rights law and international criminal law, and will need to be held accountable by the relevant authorities. In situations of transitional governance where the UN is exercising effective powers of State (e.g. Cambodia, Kosovo, East Timor, etc), the UN Transitional Authority concerned would maintain primary responsibility to implement international human rights law, as described in the *Principles*.

Are the Principles legally binding?

The *Principles* are not a treaty or a formal law and thus do not have the same legal status accorded such texts. Nevertheless, the *Principles* do have *persuasive authority* and are *explicitly* based on existing international, regional and national law. The *Principles* were prepared by leading legal experts in these fields and were formally approved by an official United Nations human rights body – the Sub-Commission on Protection and Promotion of Human Rights – which is accountable to the UN and its member States.

How are the terms ‘arbitrary’ and ‘unlawful’ best understood?

References to the terms ‘arbitrary’ and ‘unlawful’ are often found in human rights law as prescribed pre-conditions for determining whether a given act or omission contravenes or is consistent with the law in question. Generally, an arbitrary act is one with no legal (or lawful) basis and is without normative justification. An unlawful act is one which is clearly contrary to the relevant law concerned, which can include both national and international legal standards. With respect to international human rights standards these are not met e.g. when national legislation allows the authorities to conduct a forced eviction operation that results in mass displacement. In determining whether displacement is either arbitrary, unlawful or both, due regard must be paid to both the terms of municipal and national laws, together with the relevant international laws binding on the State concerned. However, it should also be noted that certain laws can be implemented in an arbitrary manner and that national laws sometimes are arbitrary in character. The European Court of Human Rights for example has repeatedly underlined that a law must fulfil certain criteria not to be considered arbitrary.

Do the Principles apply only to housing and land, or does the term ‘property’ also encompass commercial properties, including agricultural land?

While the *Principles* are primarily concerned with restoring the rights of refugees and displaced persons to land, housing and property which they owned, held rights over or otherwise lived in at the time of their displacement, they also **refer to** rights to re-acquire



commercial properties, including agricultural land upon return. This would apply, in particular, in instances where such properties/lands were arbitrarily or unlawfully acquired during the time of displacement.

What are some of the key lessons learned in dealing with restitution challenges?

The past two decades have been witness to a growing number of efforts, both locally- and internationally-driven, grappling with the complexities of housing and property restitution. Some of the key lessons learned during these processes include:

- the desirability of including restitution rights directly within relevant peace agreements, Security Council resolutions and voluntary repatriation/return agreements;
- the positive contributions that can be made by including restitution competencies within the staffing structures of post-conflict peace operations;
- the need for planning - early, appropriately and integrally - for how to best deal with restitution concerns, and to determine the applicable legal and policy framework during the planning process;
- the recognition that peacekeepers have an important role to play in securing restitution rights (e.g., they may be required to perform law and order functions, secure housing and property records and protect public officials and humanitarian aid workers who are implementing restitution programmes and the lives of returnees and displaced persons themselves);
- ignoring the restitution demands of returnees will tend to aggravate rather than reduce tensions or violence;
- restitution remains equally important for those who choose not to return (i.e. who choose to resettle, integrate locally or who voluntarily wish to receive compensation in lieu of actual return); and
- the growing awareness that the resolution of housing and property restitution claims and disputes can be a vital contributor to economic and social stability, as well as broader reconciliation efforts within post-conflict peace building efforts.

What is the relationship between restitution as a legal remedy and the voluntary choice of a durable solution to the original displacement?

Restitution practitioners need to distinguish between legal remedies and durable solutions. Durable solutions may include return, local integration, or resettlement to a third location. The choice of a durable solution by the affected population must be voluntary and informed, and practitioners have an important role to play in ensuring that decisions are freely made and based on accurate information. As discussed below, the *Principles* clearly provide that housing and property restitution rights are not prejudiced by the non-return of those possessing these rights. Thus, restitution is not affected by the voluntary choice of resettlement or local integration, as opposed to return. Indeed, restitution can play a critical role for those refugees and displaced persons choosing not to return. For instance, voluntary sale, exchange or lease of restituted properties can generate an income stream that can contribute to sustainable local integration or resettlement. Restitution, as a legal remedy, is often a fundamental precondition for the sustainability of virtually all imaginable



durable solutions, not just return. In this sense, housing and property restitution may often be the first step in restoring a degree of autonomy to persons reduced to poverty and dependence by virtue of arbitrary displacement from their homes.

What about economic migrants?

While there may be some limited exceptions, in general terms those who have left homes and lands for exclusively economic reasons and have migrated to a third country, and who were otherwise not physically forced to move from their place of origin, are not included as a protected group under the *Principles*. If these types of movements were the result of clear violations of economic and social rights attributable to the State concerned, however, there may be grounds for applying the *Principles*.

Useful Guidance

For background information on the origin and nature of the Principles, see:

-  Final Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1). This document contains the official text of the *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, as approved by Sub-Commission Resolution 2005/21 of 11 August 2005.
-  Progress Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (E/CN.4/Sub.2/2004/22). This document contains the first draft version of the *Principles on Housing and Property Restitution for Refugees and Displaced Persons* as well as a supplementary Draft Commentary on the Draft Principles themselves (E/CN.4/Sub.2/2004/22/Add.1). See also: Sub-Commission Resolution 2004/2 of 9 August 2004.
-  COHRE, *The Pinheiro Principles – United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons*, Geneva, 2006.

For further information on restitution issues generally, see:

-  Aursnes, I.S. and Foley, C., 'Property Restitution in Practice: The Experience of the Norwegian Refugee Council' in *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons – Volume 2* (Scott Leckie, ed.), Transnational Publishers, chapter 12, 2007.
-  Barkan, E., *The Guilt of Nations: History and Injustices*, W.W. Norton & Co., New York, 2000.
-  van Boven, T., Final Report: Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (E/CN.4/Sub.2/1993/8), 1993.
-  Brooks, R. L. (ed.) *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, New York University Press, New York, 1999.
-  International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements*, ICHRP, Geneva, 2006.
-  USAID – Office of Conflict Management and Mitigation, *Land and Conflict – A Toolkit for Intervention*, 2004.

-  Williams, R., 'Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice', in NYU Journal of International Law and Politics, vol. 37, no. 3., 441, 2006.

For information on displacement resulting from natural disasters or development project, see:

-  Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *Basic principles and guidelines on development-based evictions and displacement* (UN doc. E/CN.4/2006/41, appendix)
-  The recently finalized Operational Guidelines on Human Rights Protection in Situations of Natural Disasters by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, and their related Manual.
-  *Akkus v. Turkey*, Application No. 19263/92, Judgement of 9 July 1997. This case is a so-called systemic case which has been followed by tens of other cases before the European Court of Human Rights. It shows the difficulties involved in restitution for land lost as a result of development.



Section II: The Right to Housing and Property Restitution

Destroyed house in Ruhengeri, Rwanda (IDMC, Birkenes)

Principle 2. The right to housing and property restitution

- 2.1 *All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.*
- 2.2 *States shall demonstrably prioritise the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.*

Section II of the *Principles* is crucial to the understanding of the concept of housing, land and property restitution from an international human rights perspective. The term *restitution* refers to an equitable remedy (or a form of restorative justice) by which individuals or groups of persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position. The right to a remedy for human rights violations has perhaps been best articulated in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law* (2005), which states that “(r)estitution should, whenever possible, restore the victim to the original situation before the gross violations of human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship; return to one’s place of residence, restoration of employment and return of property.”

As a general legal remedy, of course, restitution has a lengthy history stretching back more than a century, while the specific assertion of housing and property restitution rights date back to UN resolutions in the 1940s. In the past several decades, a comprehensive, individual right of refugees and displaced persons to housing and property restitution has emerged. *Principle 2.1* recognises this fundamental right of all refugees and displaced persons to housing, land and property restitution.

The terminology used – housing, land and property restitution - is a composite term developed on the basis of dozens of legal and other standards that have been adopted in past decades explicitly or implicitly recognising the restitution rights of refugees and displaced persons. These standards are found within treaty provisions under international law, international and regional human rights law, international humanitarian law and international criminal law, innumerable UN Security Council and UN General Assembly resolutions, UNHCR Executive Committee Conclusions, UN Commission on Human Rights and Sub-Commission on the Protection and Promotion of Human Rights resolutions and related standards, general comments issued by the UN human rights treaty bodies, various peace agreements ending conflicts, a range of voluntary repatriation agreements concluded between UNHCR and States of origin, and within the jurisprudence of many human rights bodies including the European Court on Human Rights and others. A growing number of national laws also enshrine various formulations of housing, land and property restitution rights for returning refugees and displaced persons.

While compensation issues are also addressed later in *Principle 21*, it is within *Principle 2.1* where the question of compensation, either in combination with restitution or *in lieu* of restitution, is first raised. While both restitution and compensation rights are enshrined within

the text, *Principle 2.2* indicates that there is a clear predilection for restitution to be treated as the *preferred remedy for displacement*. States are expected to *demonstrably prioritise* restitution rights, and therefore, not view rights to restitution and rights to compensation as necessarily of the same value when seeking durable solutions.

In essence, the *Principles* take the view that efforts to secure return-based restitution must be exhaustively explored and determined to be impractical prior to any subsequent efforts which may rely on compensation-based durable solutions to displacement. This would not, however, be the case in the event that groups of refugees or displaced persons, as injured parties, *consciously and voluntarily chose or express a clear preference* for compensation-based durable solutions on the understanding that this may conclude the restitution process for them, and result in them being unable to submit future housing and property restitution claims. This would be particularly true when refugee-hosting States were seeking to forcibly repatriate refugee groups, despite clear indications that conditions for safe and dignified return were not in place and that the refugees themselves were opposed to return. Another example would be a situation where a very long period of time has passed since the displacement, and the displaced have rebuilt their lives elsewhere in such a way that they would not want to relocate even if the conditions for return were safe.

Users of the Handbook will need to be cognizant of the fact that disingenuous offers of cash or other forms of compensation are often made to refugees and displaced persons by those hoping to prevent restitution and return and thereby surreptitiously extinguishing outstanding restitution claims. These practices need to be closely monitored to ensure that they are not inconsistent with the international human rights norms reflected in the *Principles*, or used to coerce the displaced to return prematurely or involuntarily.

Consequently, (and this is particularly true when displacement was clearly arbitrary or unlawful) the provision of compensation should not automatically be seen as an acceptable alternative to restitution when actual return-based restitution is made infeasible due to resistance by a certain State or political grouping or because of the unwillingness of the international community to strongly support restitution rights. Rather, given the primacy of restitution rights within the *Principles*, unless displaced persons wish explicitly to receive compensation in lieu of return, compensation is only viewed as an acceptable substitute for the physical recovery of original homes and lands when three key conditions are met: 1. When the restoration of housing, land or property rights is *factually impossible*; 2. When those possessing restitution rights voluntarily prefer compensation-based solutions; and even then, and; 3. Only following a determination to this effect by an independent and impartial tribunal or some legitimate and competent body without vested interests in the matters concerned.

It is important for users of the Handbook to be clear that the term *factually impossible* (also sometimes referred to as ‘materially impossible’) firstly addresses the actual physical damage or destruction of housing, land and property so commonly a result of armed conflict, or in the event of some natural disasters, the actual non-existence of original lands (in the event of a mudslide, for example). The term does not refer to particular political or related obstacles which may prevent a particular restitution case from being resolved on the basis of actual re-possession of original homes and lands. However, it can be used in reference to circumstances where the new purpose to which a parcel of land has been put during the absence of the refugee or displaced person, now constitutes a public good or brings considerable economic benefit to the area concerned. In such an instance where the social cost of implementing an individual restitution

may be unreasonably disruptive (such as would be the case were a factory employing 200 workers having to be demolished to enforce a restitution claim), this could in some situations be classified as materially impossible, and compensation arrangements would need to be considered.

At the same time, it must be emphasised that combined solutions of both restitution (to the original home or land) and compensation (to enable re-building of a damaged or destroyed home) may offer the most durable solution to the plight of individual refugees and displaced persons. In other instances, a remedy of pure compensation (both in-kind and/or cash) may provide the best and most desired method of resolving outstanding restitution claims, as long as the criteria outlined above are subject to full compliance.

Typical Scenarios for Applying Principle 2

During the preparation of voluntary repatriation/return plans - The basic concepts found in *Principle 2* should be raised by practitioners during the drafting of any documents addressing the proposed return of refugees or displaced persons to their original homes and lands to ensure that explicit recognition is given to the housing and property restitution *rights* of returnees. During negotiations with States (and other agencies) on these issues, the principle that restitution must be treated as a *preferred* remedy (again, not tied solely to return as a durable solution) should be strongly supported. Voluntary repatriation to one's own country without explicit provisions ensuring that the housing and property restitution dimensions of return are respected has become increasingly difficult to justify and will likely result in unfinished and incomplete displacement solutions.

When public officials resist the option of restitution – When users of the Handbook encounter public officials reluctant to accept the right of refugees and displaced persons to return to their original homes, reference to *Principle 2* and the extensive normative basis supporting this provision may be useful. Reference to the considerable body of law at all levels recognising restitution rights – national, regional and international – will strengthen arguments encouraging public officials to accept restitution rights. For instance, in Bosnia-Herzegovina and in a variety of other settings, the international community's insistence on the principle of restitution was vital in ultimately changing what were originally very recalcitrant governmental views opposed to any form of minority return that would undue years of attempted 'ethnic cleansing'.

When assisting States wishing to legislate on restitution issues – An increasing number of States have or are engaging in legislative efforts in support of housing and property restitution rights. The Republic of Georgia, Albania, Bosnia-Herzegovina, South Africa and many others have been involved in these processes during the past decade. Legislative drafting efforts provide a good opportunity to present the *Principles* to the drafters involved, and to encourage them to use the text as a basis for the eventual restitution laws that emerge from these processes.

When compensation in lieu of restitution is under discussion – Though just, satisfactory and realistic compensation proposals are rarely put forward by States, including those that are reluctant to allow refugees or displaced persons to exercise their housing and property restitution rights, if this occurs practitioners should aim to ensure that the contents of *Principle 2* are taken fully into account. In some instances, it may be advantageous to consider compensation in lieu

of restitution when this is clearly the expressed wish of the refugee or displaced communities concerned and when return-based restitution would, in the words of the International Law Commission's *Draft Articles on State Responsibility* "create a burden out of all proportion to the benefit deriving therefrom". Conversely, great care must be exercised to ensure that such norms are not used to prevent legitimate return and the exercise of the housing and property restitution rights of refugees and displaced persons.



Common Questions

How long do refugees and displaced persons retain restitution rights?

This is one of the most frequently asked questions concerning the restitution issue. It is based on the fact that some refugee and displaced populations have been physically displaced from their original homes for many years, and in some cases, decades. Though no precise answer can be given to this question in terms of a universally valid number of years that restitution claims remain valid, several points can be made. **Firstly**, *Principle 2.2* is clear in asserting that housing and property restitution rights are not prejudiced by the non-return of those possessing these rights. As such, practitioners must distinguish between remedies and durable solutions; restitution rights are not affected by the voluntary choice of resettlement or local integration, as opposed to return and do not lapse purely on the basis of a refugee or IDP not being able to physically exercise these rights. **Secondly**, restitution experiences around the world reveal a very wide range of cut-off dates for establishing the basis of restitution claims. In South Africa, restitution claims could be submitted for any discriminatory land dispossession carried out from 1913 to the end of *apartheid* in the early 1990s. A variety of UN resolutions dating back to 1948 confer housing and property restitution rights on displaced Palestinian refugees. Many of those who lost properties in Eastern Europe from 1945 onwards were accorded restitution rights following the collapse of the Communist governments in the region in the late 1980s and early 1990s. By contrast, restitution claims to recover original homes and lands following the 1994 genocide in Rwanda were only deemed valid if those making the claims had not been displaced for longer than ten years. Similarly, the Czech Republic restricted restitution claims to acts of expropriation occurring after 1948, which had the net result of excluding large numbers of those displaced immediately following the end of World War II from securing restitution rights. While **thirdly**, States cannot arbitrarily apply cut-off dates for outstanding restitution claims. Importantly, restitution rights and related claims to homes, lands and properties do not lapse if and when unreasonable, disproportionate or unfair date restrictions are imposed upon the restitution process.

Does restitution necessarily mean re-possession of an original home?

While the return to, recovery of and repossession of one's original home should remain the core objective of any restitution process, in practice restitution can take different forms depending on local circumstances. A particular restitution process may involve a combination of return, facilitated sales of properties to which refugees voluntarily did not wish to return but which they retained rights over, and where appropriate forms and amounts of compensation were provided. Many possible scenarios can emerge within the context of a restitution process; the central points here, though, remain that in accordance with the *Principles*: 1. Refugees and displaced persons have a *preferential* right to housing



and property restitution as a legal remedy; 2. Any divergence from this should be exceptional and fully justifiable in terms of the relevant law and; 3. All refugees and displaced persons must be able to access durable solutions in conformity with their rights.

Are restitution and compensation mutually exclusive?

No. Although return-based restitution is the preferred remedy following displacement, in some cases a combination of compensation and restitution may be the most appropriate remedy. At the same time, it is important to reiterate that care must be taken to ensure that compensation should not be seen as a simple alternative to restitution when States are hesitant to accept the return of refugees and displaced persons. It should be noted, for example, that although *both* restitution and compensation rights were enshrined in the peace accords ending the war in Bosnia-Herzegovina, the international community decided to focus solely on restitution and return and did not use the mechanism foreseen by the Dayton agreement which envisaged a fund for compensation of destroyed property. The envisaged compensation fund remained empty because of a fear among donors that to compensate the displaced would have served to consolidate ethnic cleansing. On the other hand, according to the procedures of the Iraqi Commission for the Resolution of Real Property Disputes which was established to address the large-scale unlawful confiscation and seizure of land, houses and properties under the Ba'athist regime of Saddam Hussein, claimants are given the choice between requesting restitution or compensation. Where victims opt for the latter option, compensation must be of equal value to the original house, land or property at the time the claim is submitted. The law further identifies the Iraqi State as responsible for paying out this compensation.

Does the local integration of a refugee or IDP extinguish a restitution claim?

No. Some have argued that once a refugee or displaced person locally integrates (i.e. ostensibly finds a durable solution in the area to where they were displaced), any outstanding restitution claims to their original homes or lands are no longer valid. This view is not correct and erroneously confuses the concept of a durable solution with a legal remedy. As mentioned above, restitution claims do not easily lapse and for such claims to be considered no longer outstanding, a proper judicial or other procedure must be in place, rights invoked, claims presented, and eventually adjudicated by an appropriate and independent body. Consequently, if the original cause of displacement was either arbitrary, unlawful or both, and a refugee voluntarily chooses to pursue local integration this does not, in and of itself, mean that they do not continue to enjoy restitution rights over their original homes and lands. Conversely, care must be taken to ensure that States do not prevent local integration by refugees and displaced persons who wish to pursue this solution because of a theoretical right to return that such groups may have in principle, but the effective exercise of which is prevented by the State responsible for the original displacement.

How does customary (traditional) law relate to restitution?

Because a considerable portion of the large-scale restitution challenges facing the international community arise in Africa, particularly in Sudan and countries in the Great Lakes region, it is important to address the appropriate role of customary, traditional or other non-formal legal arrangements in assisting in the restitution process. To take the example of Sudan, formal land legislation is firmly in place in Northern part of the country (including



Darfur), while customary land arrangements are in place in the South of Sudan. Reconciling such differences and incorporating the (human rights consistent) elements of customary or traditional land arrangements existing in the South with the formal provisions in the North – set within the contexts of the peace agreement between the parties and the constitutional framework – will be a complex endeavour, and one that will confront field workers engaged in restitution efforts linked to the implementation of the peace agreement. In many settings customary law arrangements on land are equitable, widely accepted and far more simple to administer and cost effective than formal, title-based systems. As such, in many settings, restitution practitioners will be assisting in the re-assertion of the housing, land and property rights established under customary law.

Useful Guidance

For further information on housing and property restitution rights, see:



Bagshaw, S., 'Property Restitution and the Development of a Normative Framework for the Internally Displaced', in *Refugee Survey Quarterly*, vol. 19, no. 3, Oxford Univ. Press, Oxford, 2000.



COHRE, *Sources No. 7: Legal Resources on Housing and Property Restitution for Refugees and IDPs*, Geneva, 2001.



Leckie, S., *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons – Volume 2* (editor), Transnational Publishers, 2006.



Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons – Volume 1 (editor), Transnational Publishers, 2003.



Zweig, R.W., 'Restitution of Property and Refugee Rehabilitation: Two Case Studies', in *Journal of Refugee Studies*, Vol. 6, No. 1/4, pp. 56-64, Oxford Univ. Press, Oxford, 1993.

