Section III: Overarching Principles

Housing project for IDPs in Colombia (IDMC, Benetti)

Section III of the *Principles* articulates several of the overarching principles on which the right to housing and property restitution rests and with which it is intrinsically linked. The rights re-affirmed in *Principles 3-9* should be closely monitored by users of the Handbook throughout all stages of the restitution process and referenced whenever efforts are made to ignore or undermine the effective exercise of housing and property restitution rights. During the initial stages of the restitution process when restitution rights and relevant procedures and institutions are under negotiation, careful attention should be paid to ensuring that the rights found within the *Principles* are duly taken into account and reflected within the agreements and institutional and legal frameworks developed. Of equal importance, those applying the *Principles* should certify that these rights pervade every aspect of the housing and property restitution process. This would apply, in particular, to the application of the issues addressed in *Principles 10-22*.

Principle 3. The right to non-discrimination

3.1 Everyone has the right to be protected from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status.

3.2 States shall ensure that de facto and de jure discrimination on the above grounds is prohibited and that all persons, including refugees and displaced persons, are considered equal before the law.

Principle 3 begins with a recognition of the right to non-discrimination and the right of refugees and displaced persons to equal treatment, both in *de jure* (legal) and *de facto* (practice) terms. In the specific context of restitution, of course, this right is particularly fundamental given the fact that many instances of displacement are clearly rooted in the intentional discrimination of certain groups – especially racial, ethnic, national and religious minorities. When displacement is demonstrably discriminatory in nature, such as when certain ethnic, racial or other groups are specifically targeted for removal from their homes, these prohibited acts will have the cumulative result of actually *strengthening* the future restitution claims of those displaced in this manner.

In relation to the implementation of restitution programmes, upholding the right to non-discrimination is critical to developing durable solutions to displacement and assuring that the most marginalized groups and vulnerable individuals are able to benefit on an equal footing with respect to their housing and property restitution rights. The *Principles* recognise that refugees and displaced persons cannot be discriminated against because of their uprooted status, and must be guaranteed equal protection under the law. Strict compliance with the non-discrimination principle should ensure that no one or no group entitled to housing and property restitution is prevented, on the basis of discrimination or inequitable treatment, from securing these rights in practice.

Typical Scenarios for Applying Principle 3

Analysing the causes of displacement – Given the universal support for the numerous non-discrimination provisions under international law, it is increasingly rare for outright discrimination to be explicitly enshrined within national legislation. Nevertheless, discriminatory laws potentially affecting restitution rights remain in force in a range of countries and facially

neutral laws are not uncommonly applied with discriminatory effect. When reviewing the causes of displacement and the public and/or private forces responsible for it, efforts should be made to identify any patterns that may indicate that discriminatory factors were responsible for the displacement in question. Particular attention needs to paid in this regard to ethnic and other motivations that may hinder the proper enforcement of housing and property restitution laws. For instance, restitution laws may exist within a country, but in practice may clearly favour the rights of one ethnic group over another. This was originally the case in Republica Srpska, the Federation in Bosnia-Herzegovina, Croatia, Georgia and elsewhere, where ethnic and other motivations clearly guided the content and degree of enforcement of relevant law. Time-limits for restitution claims may be such that they indirectly, but intentionally, discriminate against certain groups to the benefit of another group.

In other cases, discrimination arises when restitution claims criteria restrict claims to current citizens and/or current residents of a given country. This was the case in several formerly Communist countries, though in most cases these laws have been altered and now treat citizens and non-citizens, as well as residents and non-residents in an equitable manner, as far as the assertion of restitution rights is concerned. As noted, in some cases, such as Rwanda, anyone who had fled the country more than ten years before the establishment of certain restitution rights was denied the right to restitution to their original homes or lands; a policy that may give rise to discrimination. By contrast, the Croatian Supreme Court declared a law that attempted to revoke ownership rights over private property for owners who had not lived in their property for more than ten years as unconstitutional. In other cases, restitution claims are restricted to certain periods of time during which the expropriation took place, in effect discriminating against other victims which may have also suffered losses, but during a different (usually previous) historical period. If users of the Handbook identify any such patterns of discrimination, notwithstanding whether the discrimination is clearly intentional or not, this information should be brought to the attention of relevant authorities, accompanied by concrete suggestions for remedial action.

Inequitable application of restitution programmes – It will also be important for users of the Handbook to monitor restitution programmes to ensure that any inequitable application of these measures is not discriminatory. In some countries, for instance, restitution or return rights are accorded only to certain ethnic or religious groups to the detriment of others. In Croatia, ethnic-Croat nationals who fled their homes during the conflict in 1990s had, in practice, far greater possibilities of exercising their restitution rights than ethnic-Serb Croatian nationals who fled their homes at the same time and due to the same circumstances. These restrictions, particularly in a country with a history of extensive social housing resources, served to severely skew the restitution effort. In Sri Lanka, displaced Muslim communities continue to face disproportionate difficulties in securing their housing and property restitution rights. When such cases arise, the *Principles* can act as an independent normative framework to be used to support the non-discriminatory application of restitution laws.

Filing and enforcement of restitution claims – Different forms of discrimination can also take place during the actual restitution claims process with certain groups facing unjustifiable obstacles to the filing of claims, such as language, education and other barriers, as well as during the enforcement of restitution claims in cases where only those members of a certain ethnic group succeed in implementing their claims, while others are unable to do so because of discriminatory factors. In some cases, arbitrarily imposed deadlines for submitting restitution claims may also be designed to favour one ethnic group over another. Once again, the *Principles* can be utilised to promote fairness in these processes.

Common Questions

What role can the international community play in preventing discrimination in the context of restitution?

In a number of settings, the international community has played an indispensable role in assisting in the repeal of discriminatory laws which were being used to justify the non-enforcement of restitution decisions in favour of returnees. This was the case, in particular, in Bosnia Herzegovina and Kosovo where a series of pre-war and mid-conflict laws were repealed due to the direct involvement of the international community. Following the Dayton Agreement, Republika Srpska (RS) issued a *Law on Use of Abandoned Property* in 1996 that made repossession conditional on reciprocity in the Federation and deprived holders of occupancy rights in socially-owned housing of their rights under this law in cases where the owner had not been making active use of the housing in question. These provisions were used almost exclusively against non-Serbs who were displaced from RS-controlled territory during the conflict. Pressure exerted by the Office of the High Representative (OHR), UNHCR and others led to the repeal of this and other discriminatory laws. In this instance, the law was replaced by the *Law on the Cessation of Application of the Law on the Use of Abandoned Property*, which granted owners, possessors and users of real property rights to repossess the real property with all the rights they had prior to 30 April 1991 or before the real property became abandoned. In neighbouring Kosovo, UNMIK Regulation 1999/10 on the *Repeal of Discriminatory Legislation Affecting Housing and Property in Kosovo* led to the repeal of various housing and property laws that were used to discriminate against ethnic Albanians.

Do judicial bodies ever address these issues?

Yes, increasingly so. For instance, the UN Human Rights Committee has determined on several occasions that the denial of restitution or compensation rights to property claimants violated the equal treatment and non-discrimination provisions of the Covenant on Civil and Political Rights. Two of the more interesting cases that users of the Handbook may wish to review are *Simunek v. Czech Republic* (1995) and *Adam v. Czech Republic* (1996). In Kosovo, the Housing and Property Claims Commission referred frequently to acts of discrimination as the basis for some of its decisions re-affirming the restitution rights of those facing discrimination. Courts in Colombia have also been active in developing jurisprudence supporting the housing and property restitution rights of the large IDP population in the country.

Are those without fixed abodes guaranteed restitution rights?

Although traditional communities, in particular indigenous peoples and nomads, are not explicitly mentioned in *Principle 3*, these groups should be ensured rights to housing, land and property restitution equal to those enjoyed by other groups, and not subjected to any form of discrimination in this regard. Even though such groups may not have fixed abodes or legally recognised or formal ownership rights over land which they habitually use or occupy, it is important that the restitution rights of indigenous peoples and nomadic groups are fully addressed. This is particularly true in terms of rights to use pasture and agricultural or grazing land in countries or areas of return.

How can customary laws be used to prevent discrimination?

In a variety of ways. For instance, in Burundi land tenure disputes were traditionally handled (through mediation or arbitration) by local councils of elders, the *Bashingantahe*. Until recently according to the constitution all civil disputes had to be presented to local council prior to consideration by a court. When such disputes make it to court, the courts often confirm the *Bashingantahe* decision, even when such decisions are based mainly on customary law. In recent years, however, and largely because of the many years of conflict, the *Bashingantahe* have been strongly politicised, and seen as increasingly less impartial and undemocratic, particularly with respect to the exclusion of women. As a result the *Bashingantahe* are no longer mentioned in the constitution (though according to the new communal law, there remains the possibility to use them if the parties agree, but it is no longer an obligation). Because of the complex legal system in Burundi, with a combined use of customary and written law that do not always provide a clear and reasonable solution to disputes, mediation is now often favoured as a means for resolving land conflicts, including those caused by discrimination.

Useful Guidance

- *Bosnia-Herzegovina Law on the Cessation of Application of the Law on the Use of Abandoned Property,* 1996.
- Feldman, S., (ed.) *Discrimination and Human Rights: The Case of Racism*, Oxford University Press, 2001.
- *UNMIK Regulation 2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*, 2000.

Principle 4. The right to equality between men and women

4.1 States shall ensure the equal right of men and women, and the equal right of boys and girls, to housing, land and property restitution. States shall ensure the equal right of men and women, and the equal right of boys and girls, inter alia, to voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property.

4.2 States should ensure that housing, land and property restitution programmes, policies and practices recognise the joint ownership rights of both male and female heads of the household as an explicit component of the restitution process, and that restitution programmes, policies and practices reflect a gender-sensitive approach.

4.3 States shall ensure that housing, land and property restitution programmes, policies and practices do not disadvantage women and girls. States should adopt positive measures to ensure gender equality in this regard.

Gender equality refers to the equal enjoyment by women, men, girls and boys of rights, socially valued goods, opportunities, resources and rewards. Equality does not mean that men and women are the same but that their enjoyment of rights, opportunities and life chances are not governed or limited by whether they were born male or female. Equality rights are widely recognised at the international and national levels, and have been consistently interpreted to require the implementation of positive measures designed to eliminate the effects of *de facto* or *de jure* discrimination on the basis of sex.

Consequently, under *Principle 4*, housing and property restitution laws and processes must not only not discriminate, but they must also ensure the right to equality of men and women, as well as equality between boys and girls. Several grounds on which equality must be assured, are noted in *Principle 4.1*. These include voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property. These are all areas where women and girls have traditionally been disadvantaged. This *Principle* also uses the language "the equal right of men and women, and the equal right of boys and girls," which underscores that the right to equality also extends to children, as is consistent with the United Nations Convention on the Rights of the Child.

Principle 4.2 also explicitly recognises that States should ensure that housing, land and property restitution programmes, policies and practices recognise the *joint ownership rights* of both male and female heads of the household. This provision is meant to combat sex discrimination which may occur when only male 'heads of households' are informally recognised as rights holders or when they are provided with formal title to housing or other property ownership rights, leaving women without legal control over what should also be treated as their property. This bias is often most visible when women are regarded as the 'head of the household' only if they are single or otherwise unaccompanied by a man. To avoid this, the *Principles* call for recognition of joint ownership rights within families. As such, restitution programmes should seek to implement a gender strategy, in particular where the *status quo* effectively discriminates against women's right to ownership, either in law or in practice. This can be ensured by conferring equal rights to women and/or joint ownership rights when restitution claims are considered by the relevant judicial bodies.

Principle 4.3 recognises the need to implement positive measures in order to ensure that restitution efforts are based on equal treatment. Such measures could include the design of special programmes aimed at assisting women and girls to make restitution claims, gender-sensitivity training for officials entrusted with working on restitution matters, providing special outreach about restitution issues to women's organisations or women's networks, and/or providing special resources to households headed by single women so that they are also able to avail themselves of their housing and property restitution rights.

Typical Scenarios for Applying Principle 4

Developing gender-sensitive restitution programmes and procedures – *Principle 4* can be used as a basis for building gender-sensitivity into restitution programmes and procedures, and ensuring that women enjoy equal treatment with men in these processes or are able to benefit from special measures designed to achieve procedural and substantive equality. In practical terms, this would mean that support should be given to the development of special measures to enable women to achieve equality with men, including steps to ensure that women and men can experience *all* aspects of the restitution process on equal terms, including the eventual conferral of joint and equal rights to the home, land or property over which rights were confirmed during the restitution process.

Monitoring women's housing and property restitution rights – Any monitoring efforts of women's enjoyment of housing and property restitution rights should include coverage of any sexual or gender-based violence carried out by non-State actors, particularly when this amounts to 'persecution' under refugee law or when it otherwise violates the rights of women to return to their homes 'in safety and dignity'. Many women are unable to return home because they are afraid of being tortured, raped or subjected to other forms of violence by non-State actors.

Working in countries with inequitable recognition of inheritance rights – Users of the Handbook who are working in countries where women's inheritance rights are not recognised on equal terms to those of men, should widely distribute the *Principles* and carry out training programmes designed to promote their application. They can also seek to uphold the *Principles* as an impartial normative standard based upon existing of human rights law, and carry out advocacy efforts designed to achieve equality in the area of inheritance rights.

Common Questions

What are the consequences of discriminatory inheritance regimes?

Inheritance rights are always important, but particularly so in the context of restitution processes following conflict. In many post-conflict settings it remains commonplace for widows to return to their original homes only to find them occupied by members of the deceased husband's family – brothers, uncles, cousins – who claim rights over the property in question based on prevailing inheritance regimes. Such practices have severe consequences on women and can lead to homelessness and landlessness, general housing and food insecurity, increased vulnerability to violence and social isolation. Many dozens of countries maintain both formal and customary laws, as well as practices which entrench unequal inheritance rights for men and women. It is important for users of the Handbook to be conscious of the impact of the existing inheritance regimes in areas where restitution

efforts are underway. The *Principles* can be used as a guiding tool to promote rights-based approaches to the question of inheritance.

In which legal sectors are discriminatory inheritance regimes most likely to be regulated?

While unfair inheritance (or succession) rights can often manifest in the form of widows being unable to effectively exercise restitution rights over an original home or land parcel, the types of statutory and customary laws regulating these practices can vary considerably from country to country. In terms of legal domains, these include laws regulating marriage, succession, family codes, personal laws, civil codes, laws on estates and wills, customary marriage arrangements and others. Users of the Handbook should aim to familiarise themselves which these and other legal sectors in their countries where they are working to determine the extent of any inequitable inheritance rights provisions.

Are unfair inheritance rights ever changed in favour of more equitable approaches?

Global awareness of the problems associated with inequitable inheritance rights is growing and as a result, changes are slowly taking place in a range of countries. In terms of restitution following conflict, a notable example is Rwanda where several years following the 1994 genocide and the widespread emergence of serious housing and land problems facing widows unable to reclaim their original homes, a new law on inheritance and succession was adopted. While the implementation of the new law has been slower than many had initially hoped, the legislation was monumental in recognising equal inheritance rights to male and female children, creating a choice of property regimes upon marriage and allowing a wife to inherit her deceased husband's property. These changes will take time to implement, but it is important to point out that changes have occurred, and to a large degree these changes were brought about by a lengthy joint effort by local women's organisations together with the international community, and eventually legislators in the country.

Useful Guidance

- COHRE, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women – A Survey of Law and Practice in Sub-Saharan Africa*, COHRE, Geneva, 2004.
- Commission on Human Rights resolution 2005/25 on *Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing*, 2005.
- Human Rights Committee, *General Recommendation No. 28 on Equality of Rights Between Men and Women*, 29 March 2000.
- Office of the Special Adviser on Gender Issues and Advancement of Women *Gender Mainstreaming – An Overview*, 2002.
- Office for the Coordination of Humanitarian Affairs *OCHA Tool Kit – Tools to support implementation of OCHA's policy on gender equality*, August 2005.
- Security Council Resolution 1325 on *Women and Peace and Security*, 2000.
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 'Women and Adequate housing', (UN Doc. E/CN.4/2006/118), February 2006.
- Women's Commission for Refugee Women and Children, *Displaced Women and Girls at Risk: Risk Factors, Protection Solutions and Resource Tools*, (February 2006).

Principle 5. The right to be protected from displacement

5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.

5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.

5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

While several rights are relevant at all times *during* displacement, a number of human rights safeguards are of particular significance in terms of *preventing* displacement from taking place. Whereas the Handbook focuses mainly on the issue of providing a remedy (i.e. restitution) to those persons already arbitrarily displaced, efforts are also needed to ensure that displacement, including through forced evictions, is itself prevented. This is consistent with the spirit and word of a number of international instruments and guidelines, notably of the *Guiding Principles on Internal Displacement*, which note in Guiding Principle 5 that 'All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.'

After encouraging States to incorporate protection and preventative measures against displacement in domestic law in *Principle 5.2*, *Principle 5.3* then makes reference to the prohibition of the practice of forced eviction, the demolition of homes and agricultural areas and the confiscation or expropriation of land as a punitive measure. Additional human rights safeguards are also included in *Principle 5.4* to protect people from both State-sanctioned and non-State or privately-driven displacement. This would apply to a range of different actors, including armed groups, private landlords, corporations intent on gaining control over a land parcel currently occupied by housing and any number of other persons and institutions liable for displacing individuals and communities.

The practice of forced eviction deserves special consideration here, as one of the underlying causes of displacement. The right to be free from forced eviction is implicit in the right to adequate housing, as well as in the right to privacy and respect for the home. According to authoritative interpretations of the right to adequate housing, forced evictions can only be justified in exceptional circumstances, in which case they must be undertaken in accordance with the relevant principles of international law. (See *Principle 17* below).

Typical Scenarios for Applying Principle 5

Analysing the causes of displacement – Users of the Handbook can refer to *Principle 5* when exploring the causes of displacement and confirming the legitimacy of the restitution claims of the refugees and displaced persons concerned. Because restitution is effectively the process by which arbitrary or unlawful displacement can be reversed and the original situation returned to its previous state, understanding the causes of displacement will be vital in establishing the potential scope and modalities of any restitution process. If it can be concluded that refugees and displaced persons were forced to flee their original homes and lands because of forced evictions, this will ultimately strengthen any eventual restitution claims.

Carrying out protection measures – Protecting people, including refugees and displaced persons (who are often subjected to forced eviction *during* displacement), from arbitrary forced eviction, the destruction of their homes or the confiscation of their land is a key function of those engaged in refugee or IDP protection activities. *Principle 5* refers to protection against forced eviction and resulting displacement, and users of the Handbook can refer to its provisions when assisting States, in accordance with *Principle 5.2*, to bring national laws into conformity with international standards regulating these practices and as a tool for resisting planned forced evictions.

Implementing restitution rights – In contrast to the general prohibition on arbitrary and unlawful forced evictions that inevitably lead to mass displacement, non-arbitrary and/or lawful evictions can sometimes be necessary to enforce certain restitution claims particularly when homes or lands belonging to refugees or displaced persons are illegally occupied by secondary occupants. While lawful evictions should only be carried out as a last resort, it needs to be recognised that enforcing the restitution rights of a refugee or displaced person with a legitimate restitution claim, confirmed by an impartial body, may require the eviction of the current occupant of the home or land concerned. This would be the case when a secondary occupant of a refugee home, for instance, is found to have no rights over the refugee's home, and either has access to another home or land plot or is assisted in finding some form of adequate alternative accommodation. This type of eviction is not prohibited under international human rights law, as long as all the necessary legal and procedural safeguards protecting the housing rights and other human rights of the secondary occupant are fully met.

Common Questions

What positive measures can be proposed to strengthen protection against forced evictions?

Users of the Handbook can attempt to generate support for expanding national legislative recognition of housing, land and property rights by ensuring explicit protections against arbitrary or unlawful forced evictions are included within domestic law. A range of national Constitutions and laws throughout the world recognise such rights. Further efforts can be made to encourage Governments to support national moratoriums on forced evictions and to issue instructions to municipal governments to undertake eviction prevention measures at the local level.

What is security of tenure and how does it relate to restitution rights?

Security of tenure is the central regulatory means by which people can be protected against displacement (including forced evictions), harassment or other threats. As one of the core contents of the right to adequate housing, security of tenure – whether formal, informal, customary or in other forms – should be sufficiently strong to protect people against any form of arbitrary or unlawful displacement. Although security of tenure is most commonly associated with the ownership of property or land, it can include a wide variety of tenure arrangements where security of tenure rights are, in fact, recognised. These include, for instance, rental (public and private) accommodation, cooperative housing, long-term possession or occupation of land or property, *de facto* recognition of security of tenure, (but without legal status), recognition of security of tenure, but without any form of tenure regularization; temporary occupancy permits; temporary non-transferable leases; long-term leases; and other forms of provisional tenure. Users of the Handbook can advocate flexible interpretations of security of tenure rights, and seek to ensure that all those who successfully enforce restitution rights are also accorded appropriate tenure protection upon repossession.

Useful Guidance

- Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.
- COHRE, *Sources No. 3 Forced Evictions and Human Rights: A Manual for Action*, Geneva, 1999.
- 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.
- 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), 2006.
- Stavropoulou, M., 'The Question of the Right Not to be Displaced', in Proceedings of the 90th Annual Meeting of the American Society of International Law, ASIL, Washington, D.C., 27-30 March 1996.
- UN Committee on Economic, Social and Cultural Rights, *General Comment No. 7 on the right to adequate housing (1997): forced evictions*, 1997.
- Office of the High Commissioner for Human Rights, *Fact Sheet No. 25: Forced Evictions and Human Rights*, 1996.
- *UN Guiding Principles on Internal Displacement*, 1998.

Principle 6. The right to privacy and respect for the home

6.1 Everyone has the right to be protected against arbitrary or unlawful interference with his or her privacy and his or her home.

6.2 States shall ensure that everyone is provided with safeguards of due process against arbitrary or unlawful interference with his or her privacy and his or her home.

The widely recognised rights to privacy and respect for the home are fundamental human rights protections that can be linked directly to both the prevention of displacement and to the restoration of these rights should they be subject to violation. The safeguards against arbitrary and unlawful interference with the home found in Article 8 of the European Convention on Human Rights, for instance, have been frequently relied on by claimants before the European Court on Human Rights in cases seeking housing and property restitution. Closely related to the practice of forced eviction, the right not to be arbitrarily deprived of one's property means that housing, land and property can only be expropriated or compulsorily acquired if this is carried out in accordance with law, pursuing a legitimate social aim in the public interest and subject to the payment of just and satisfactory compensation.

Typical Scenarios for Applying Principle 6

Analysing the causes of displacement – As with the other rights re-affirmed in Section III of the *Principles*, the right to be protected against the arbitrary or unlawful interference with one's home constitutes both a means for preventing displacement and as a grounds for securing restitution if this right is abused either in an individual or collective context. Users of the Handbook, when analysing the causes of displacement and the forces responsible for it, can aim to determine if violations of *Principle 6* have taken place and identify measures that may be required to remedy such infringements. Particular attention in this regard should be paid to determining: 1) whether a fair balance was struck in justifying the displacement in question; 2) whether such interference was in accordance with law; 3) whether the rationale behind the displacement pursued a legitimate social aim in the public interest; 4) whether due process rights were available and accessible; and 5) whether just and satisfactory compensation was paid. If any of these elements is missing, (as they invariably will be in the context of forced displacement), the pursuit of restitution rights on behalf of those displaced on these grounds will be fully justified.

Monitoring the enforcement of restitution decisions – The privacy rights provisions of *Principle 6* should also be borne in mind by users of the Handbook when engaging in monitoring the enforcement of restitution decisions issued by restitution bodies or local courts. *Principle 6.2* protects due process rights and, as such, all refugees or displaced persons with legitimate restitution claims must be able to put their claims before an independent and impartial adjudicating body as a means to securing the enforcement of these rights.

Common Questions

How do the principles of proportionality and fair balance relate to housing and property restitution rights?

The legal doctrines of *proportionality* and *fair balance* are vital in determining whether interferences with housing, land or property rights can be justified under human rights law, and whether the *Principles* are applicable in such instances. If States revoke privacy rights and respect for the home guarantees in an arbitrary manner or apply the law based upon racial, ethnic or national origin or other forms of discrimination, this would necessarily be classified as *disproportionate*, and thus a violation of international law. Similarly, what is known as the *fair balance doctrine* stipulates that in determining the compatibility of a certain act by a State with regard to housing and property issues, any interference in the exercise of these rights must strike a *fair balance* between the aim sought to be achieved and the nature of the act. The European Court on Human Rights has issued a number of judgments on this question, including the following pronouncement in the *Lithgow Case* (1986) which considered the legitimacy of actions by the State resulting in the deprivation of property: 'In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the aim employed and the aim sought to be realized....The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden....Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions.'

Useful Guidance

- Human Rights Committee, *General Comment No. 16 of Human Rights Committee on Article 17 of the Covenant on Civil and Political Rights (1988) (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)*, 1988.
- *Lithgow and others v. U.K* - European Court on Human Rights Judgment, 8 July 1986.

Principle 7. The right to peaceful enjoyment of possessions

7.1 Everyone has the right to the peaceful enjoyment of his or her possessions.

7.2 States shall only subordinate the use and enjoyment of possessions in the public interest and subject to the conditions provided for by law and by the general Principles of international law. Whenever possible, the "interest of society" should be read restrictively, so as to mean only a temporary or limited interference with the right to peaceful enjoyment of possessions.

The right to the peaceful enjoyment of possessions is one of the most frequently violated rights when forced displacement occurs. This right is found within the European Convention on Human Rights (Art. 1, Protocol One), while 'property rights' provisions can be found in the Universal Declaration on Human Rights (art. 17), the Convention on the Elimination of All Forms of Racial Discrimination (art. 5(d)(v), the Convention on the Elimination of All Forms of Discrimination Against Women (art. 16(1)(h)) and other international standards. Principle 21 of the IDP Guiding Principles pursues comparable approaches, by recognising that 'No one shall be arbitrarily deprived of their property and possessions. The property and possessions of all internally displaced persons shall in all circumstances be protected, in particular, against the following acts: pillage; direct or indiscriminate attacks or other acts of violence; being used to shield military operations or objectives; being made the object of reprisal; and being destroyed or appropriated as a form of collective punishment. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.' In a related manner, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provides that 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised…[and that] whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist'.

Users of the Handbook need to be aware of the subtle distinctions between the peaceful enjoyment of possessions and property rights. The 'right to private property' is very explicitly absent from a number of the most central international treaties – both of the Covenants among them - because, historically this right was viewed as reflecting certain, largely, western, liberal social values that did not (and still do not) find resonance in many parts of the world. The formulation of a 'right to the peaceful enjoyment of possessions' rather than 'the right to property' as such, within the European Convention on Human Rights was therefore anything but accidental. These differing views on the question is one of the reasons why the term "housing, land and property rights' is increasingly used to describe these issues in a way that is appropriate for and relevant to all legal systems and, ultimately, all countries. While the right to adequate housing and land are intended to ensure that *all* persons have a safe and secure place to live in peace and dignity, including non-owners of property, the right to property is particularly important in terms of protecting the rights of persons who already own property, in particular, against the arbitrary deprivation of one's property or home. The jurisprudence under the European Convention of Human Rights on Article 1 of Protocol No. 1 ('the right to the peaceful enjoyment of possessions') provides a valuable source of case law supporting housing and property restitution rights. In the case of *Loizidou v. Turkey*, (to cite just one of numerous relevant cases) which involved the impossibility of return to one's property, the European Court

noted that: '...the complaint is not limited to access to property but is much wider and concerns a factual situation: because of the continuous denial of access the applicant had effectively lost all control, as well as all possibilities to use, to sell, to bequeath, to mortgage, to develop and to enjoy her land....The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1'.

Users of the Handbook should note that sometimes restitution of housing, land or property to those that were originally granted 'property' or ownership rights may be neither practical because of major historical developments, desirable because patterns of ownership at the time of flight were previously completely inequitable, nor fair or just. For example, today restoring all land in Afghanistan to those who held it prior to the entirely legitimate (even if improperly carried out) land reform measures of the 1970s would mean returning the country to virtual feudalism, as well as ignoring the formal, accrued or customary rights of all those who lived on such lands in the intervening period. To cite another related theme, many of the countries in which restitution programmes are being implemented recognise forms of ownership, distinct from western notions of 'private property', which may be more social in nature, including collective, customary and common ownership, or regard land as being held in 'stewardship'. These issues are often extremely complex and should be constantly borne in mind by users of the Handbook

Typical Scenarios for Applying Principle 7

Advocacy efforts in support of restitution measures – *Principle 7* can act as an important basis for supporting the inclusion of housing and property restitution measures and institutions within the context of implementing peace agreements, voluntary repatriation arrangements and domestic legal frameworks. Because forced displacement is so often based on unlawful and arbitrary actions leading to the removal of people from their homes and lands, including the attempted confiscation of dwellings and apartments, the provisions of *Principle 7* are particularly well suited as a normative source in support of housing and property restitution.

Determining the legitimacy of requisition/expropriation measures – States responsible for forced displacement frequently carry out requisition/expropriation proceedings against the original homes, lands and properties of refugees and displaced persons; often in an effort to legitimise unlawful actions that precipitated the displacement concerned. While expropriation is not in and of itself a prohibited act, under human rights law it is subject to increasingly strict criteria against which all such measures must be judged to determine their lawfulness. In accordance with the general principles of reasonableness, fair balance, and proportionality, the right to peaceful enjoyment of possessions should only be limited: 1) subject to law; 2) subject to the general principles of international law, and; 3) in the interest of society. If any of these criteria are not met, those displaced by such expropriation proceedings have a full right to the restitution of their original homes and lands. Principle 7 elaborates further on the concept of "interest of society". It adds to the existing norms above that in certain cases when the right to the peaceful enjoyment of possessions is subordinated the interest of society, this should be read restrictively. Depending on the circumstances this could mean that only a temporary or limited interference with the right to peaceful enjoyment of possessions would be a possible solution, including to enable future return and restitution.

Common Questions

How did the implementation of property rights assist in the implementation of the peace accords in Bosnia-Herzegovina?

The Property Law Implementation Programme (PLIP) played a key role in assisting in the restitution process in post-war Bosnia-Herzegovina. The PLIP describes the nature of its work in the following terms: "The right of displaced persons and refugees to repossess and return to their pre-war property has long been one of the central concerns of the PLIP agencies and is guaranteed in Annex 7 of the GFAP. This is based on the recognition that the failure to return properties to their rightful owners represents a violation of the right to property inter alia under Article 1 of Protocol 1 to the ECHR. Return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else" (See: Office of the High Representative, *A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing International Community Resources* (2002)).

How do property and privacy rights overlap?

Housing destruction during armed conflict is widespread. Frequently, refugee and displaced persons homes are intentionally destroyed as a means of attempting to prevent eventual return and restitution by those with rights over those homes and lands. The European Court on Human Rights' judgment in the case of *Akdivar and others v. Turkey* addresses the crucial link between property and privacy rights in a manner clearly relevant to restitution cases everywhere. In this case the Court held that: '[T]here can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of possessions. No justification for these interferences being proffered by the respondent Government - which confined their response to denying involvement of the security forces in the incident -, the Court must conclude that there has been a violation of both [respect of the home] and [the right to the peaceful enjoyment of possessions].'

Does the fair balance doctrine also apply to property rights cases?

Yes. In determining the existence of *fair balance*, the European human rights bodies have noted there had been a violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights when no fair balance had been struck between the interest of protecting the right to property and the demands of the general interest as a result of the length of expropriation proceedings, the difficulties encountered by the applicants to obtain full payment of the compensation awarded and the deterioration of the plots eventually returned to them (See: *Zubani v. Italy* (ECHR Judgment, 7 August 1996). However, in the European Court's jurisprudence, the examination of proportionality between individual and public interest may also lead to less than full compensation.

Useful Guidance

- ECHR Cases on restitution themes: See *Akdivar v. Turkey* (ECHR Judgment 16 September 1996); *Cyprus v. Turkey* (ECHR Judgment 10 May 2001); and *Loizidou v. Turkey* (ECHR Judgment 18 December 1996).
- Englbrecht, W., 'Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber Towards Their Protection' in *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (Scott Leckie, editor), Transnational Publishers, 83, 2003.
- FAO, *Access to Rural Land and Land Administration After Violent Conflicts*, FAO Land Tenure Studies, 2005.
- Office of the High Representative *A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing International Community Resources*, Sarajevo, 2002.

Principle 8. The right to adequate housing

8.1 Everyone has the right to adequate housing.

8.2 States should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing.

The right to adequate housing was first recognized within Article 25(1) of the Universal Declaration on Human Rights, and subsequently included in various human rights standards, most notably Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. Beneficiaries of this right are entitled to housing that is 'adequate'. Adequacy includes: security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. Governmental obligations derived from this right include duties to take measures to confer security of tenure (and consequent protection against arbitrary or forced eviction and/or arbitrary confiscation or expropriation of housing), to prevent discrimination in the housing sphere, to equality of treatment and access vis-à-vis housing and protection against racial discrimination, guaranteeing housing affordability, regulating landlord-tenant relations and securing access to and provision of housing resources suited to the needs of marginalized and/or vulnerable groups, such as women-headed households, persons with disabilities, the chronically ill, migrant workers, the elderly and refugees and internally displaced persons.

While the right to adequate housing is a human right which applies to all persons, specific statements have been made at the international level with respect to refugees and internally displaced persons and their access to adequate housing. For example, the Executive Committee of UNHCR in Conclusion No. 101 on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, encourages countries of origin to provide homeless returning refugees with access to land and/or adequate housing, comparable to local standards. Similarly, Principle 18 of the Guiding Principles on Internal Displacement provides that 'All internally displaced persons have the right to an adequate standard of living' and that 'At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: … basic shelter and housing.'

Typical Scenarios for Applying Principle 8

Monitoring current refugee and IDP housing circumstances – While *Principle 8* is relevant at all stages of the displacement cycle – prior to, during and after displacement – users of the Handbook should pay particularly close attention to the application of this principle *during displacement*. A considerable majority of the world's refugees and displaced persons – all of whom are potential restitution claimants – reside during their displacement in conditions which fall far short of basic international minimum standards in terms of access to water and services, basic criteria on habitability, security of tenure and others.

Developing and implementing comprehensive rebuilding programmes linked to return and restitution – While there are exceptions, successful restitution programmes will generally combine legal and other measures enabling refugees and displaced persons to return to their

original homes, with rebuilding and housing improvement programmes in which these same returnees can also participate. Only in this way can the entire basket of housing, land and property rights of returning refugees be fully accessible. To the maximum possible extent, rebuilding activities should be formally linked with restitution programmes.

Common Questions

How do housing rights differ from land rights and property rights, and how are they synonymous with one another?

While housing, land and property rights are each unique legal and human rights concepts, they are at the same time closely related to one another and to a certain degree overlap with one another. In general terms, housing rights are those rights of 'everyone' to have access to a safe, secure, affordable and habitable home. Land rights refer to both rural and urban areas and cover those rights related directly to the land itself, as distinct from purely the structure built on the land in question. While property rights concern the exclusive user and ownership rights over a particular dwelling or land parcel. Each of these terms are important, but none of them capture in their entirety the full spectrum of 'rights to the home' that is envisaged under restitution law. For the purposes of the restitution process, therefore, and because historical, political, cultural and other distinctions between countries with respect to what have also more broadly been called 'residential' rights are so extensive, increasingly the term 'housing, land and property rights' or HLP rights, is used to describe the numerous *residential* dimensions of these questions from the perspective of human rights law. What people in one country label as 'land rights' may be precisely the same thing as what citizens of another country call 'housing rights'. 'Property rights' in one area may greatly assist in protecting the rights of tenants, while in another place property rights are used to justify mass forced evictions. Many more examples could be given, but the important point here is simply that the composite term 'housing, land and property rights' probably captures the notion of 'original home' or 'place of habitual residence' better than other possible terms.

Do housing rights require the State to build housing for everyone?

Human rights law does not require States to build housing for everyone who may request it or need it. Rather, housing rights provisions require States to create conditions within society - through law, policy, budgetary allocations and so forth – to ensure that everyone can access housing that is affordable, habitable and fully 'adequate' in accordance with international standards. This can – and should – include the direct financing for the construction of new housing stock and budgetary allocations towards this end, to the maximum of a country's resources, in accordance with international housing rights provisions such as those enshrined in article 11(1) of the Covenant on Economic, Social and Cultural Rights.

Useful Guidance

- COHRE, *Sources No. 4 – Legal Resources for Housing Rights – International and National Standards*, COHRE, Geneva, 2000.
- COHRE, *The Human Right to Adequate Housing 1945-1999: Chronology of United Nations Activity*, COHRE, Geneva, 2000.
- Leckie, S., *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional Policy Framework*, UNHCR, 2005.
- United Nations Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (Art.11 (1))*1991.
- United Nations Housing Rights Programme, *Report No.1 Housing Rights Legislation – Review of International and National Legal Instruments,* Nairobi, 2002.

Principle 9. The right to freedom of movement

9.1 Everyone has the right to freedom of movement and the right to choose his or her residence. No one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one shall be arbitrarily or unlawfully forced to leave a certain territory, area or region.

9.2 States shall ensure that freedom of movement and the right to choose one's residence are not subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with international human rights, refugee and humanitarian law and related standards.

The right to freedom of movement and residence is recognised in a range of human rights standards, including Article 13(1) of the Universal Declaration of Human Rights, Article 12 (1) of the International Covenant on Civil and Political Rights, Article VIII of the American Declaration of the Rights and Duties of Man, Article 22(1) of the American Convention on Human Rights, and Article 12(1) of the African [Banjul] Charter on Human and Peoples' Rights. General Comment No. 27 of the Human Rights Committee on freedom of movement notes that 'Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence…..The right to move freely relates to the whole territory of a State, including all parts of federal States. According to Article 12, paragraph 1 [of the Covenant on Civil and Political Rights], persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. … Subject to the provisions of Article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.'

Typical Scenarios for Applying Principle 9

Prior to and during return and repatriation programmes – Freedom of movement is vital as a measure to prevent the forced relocation of persons leading to displacement and the generation of refugees and displaced persons. It is equally critical as a tool against the forced return of both refugees and displaced persons against their will. Freedom of movement and the concomitant right to choose one's residence form useful reference points upon which to construct return and repatriation plans.

During the implementation of restitution rights – *Principle 9* is also directly relevant to the exercise of housing and property restitution rights by refugees and displaced persons. These rights presume the ability of returnees to literally 'move freely' back to their places of origin and, once again, literally to 'choose their place of residence', including their original homes. Any restrictions placed on the exercise of these rights, and by inference restitution rights, would be incompatible with the *Principles.* At the same time, users the Handbook should guard against attempted forced movement couched in terms of freedom of movement, particularly when repatriation is under discussion.

Common Questions

Are the right to freedom of movement, the right to return and the right to housing and property restitution mutually dependent rights?

General Comment No. 27 (1999) of the Human Rights Committee on freedom of movement is as clear as any statement on this linkage, stating that '[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.' In effect, therefore, these three rights effectively triangulate with one another with respect of each right strengthening the likelihood of respect for the others.

Is freedom of movement only relevant in countries of origin as far as restitution rights are concerned?

No. Freedom of movement applies when refugees are resident in a host country, as well as when refugees seek to exercise restitution rights in their own country upon return.

Useful Guidance

United Nations Human Rights Committee, *General Comment 27: Freedom of Movement (Art.12)*, 1999.

Section IV: The Right to Voluntary Return in Safety and Dignity

Nigeria: Rebuilding destroyed houses (IDMC, McGoldrick)

Principle 10. The right to voluntary return in safety and dignity

10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin.

10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.

10.4 States should, when necessary, request from other States or international organisations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons.

Section IV of the *Principles* reaffirms the right to voluntary return in safety and dignity, underscoring the essential importance and intimate relationship between this right and the right to housing, land and property restitution. The right to return to one's country or one's city or region for IDPs is well established under international law, including in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights; the Geneva Convention relative to the Protection of Civilian Persons in Time of War; the African Charter on Human and Peoples' Rights and many others. Numerous UN Security Council and UN General Assembly resolutions have reaffirmed this principle when addressing specific cases of displacement.

As noted, the idea of voluntary repatriation/return has in recent years expanded into a concept involving not simply the return to one's country or region, but to one's *original home, land or property*. The UNHCR *Handbook on Voluntary Repatriation* notes that UNHCR's mandate includes promoting 'the creation of conditions that are conducive to voluntary return in safety and with dignity' and promoting 'the voluntary repatriation of refugees once conditions are conducive to return'. In addition, the annexure in the UNHCR Handbook affirm that the recovery and restitution to returnees of their land or other immovable and movable property which they may have lost or left behind are to be included in any tripartite agreement or any declaration of amnesties and guarantees. The Executive Committee of UNHCR, in its Conclusion No. 18 (1980), called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected and of returning refugees not being penalised for having left their country of origin for reasons giving rise to refugee situations. In Conclusion No. 40 (1985), the Executive Committee reaffirmed 'the basic rights of persons to return voluntarily to the country of origin' and affirmed 'the need for [repatriation] to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his [or her] country of origin.'

UNHCR's growing involvement in restitution questions is grounded in its experience that voluntary repatriation operations are likely to be *less successful* if housing and property issues are ignored or are left to be considered only after significant numbers of persons return. In this regard UNHCR has noted that 'Recovery of refugees' homes and property in their countries of origin needs to be addressed consistently to ensure that effective solutions to refugee displacement are found….Human rights law in relation to the right to adequate housing has evolved significantly over the past decade. The *right of a refugee to return to her/his country* is now increasingly coupled with her/his *right to adequate housing.* In this context, the right to adequate housing has developed to extend to the right not to be arbitrarily deprived of housing and property in the first place. As corollary to this, refugees have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted (restitution). If this is not possible, then the right to adequate compensation for any loss suffered comes into play.' (See: UNHCR Inter-Office Memorandum No. 104/2001 and UNHCR Field Office Memorandum No. 101/2001). Similarly, UNHCR's *Agenda for Protection* expressly highlights the importance of effective measures for the restitution of housing and property within the context of voluntary repatriation, the need for effective information to refugees regarding restitution procedures, and the crucial nature of equal rights for returnee women in access to housing, property and land restitution (See: Goal 5, Objectives 2 & 3). The Agenda was the consensus product of a Global Consultations process undertaken by UNHCR and States from 2000 to 2002, and was endorsed by the UN General Assembly in 2002.

Typical Scenarios for Applying Principle 10

During the preparation of voluntary repatriation/return plans – Those entrusted with preparing voluntary repatriation/return plans should explicitly address restitution considerations within such plans and outline specific restitution rights and restitution responsibilities in this regard. Refugees and displaced persons who have expressed a willingness and desire to return should be closely involved themselves in shaping the eventual housing and property restitution arrangements. UN and other agencies responsible for facilitating voluntary return and repatriation, in particular UNHCR, should consider preparing and distributing restitution information packets to all returnees which outline precisely which existing restitution rights and procedures in place to facilitate access to their original homes and lands, and how these rights can be enforced in the event of a housing, land or property dispute with a secondary occupant.

Contingency planning for eventual return – UNHCR and other agencies could also apply *Principle 10* when undertaking contingency planning for eventual return by current refugees and displaced persons. This would apply, in particular, to cases of medium- to long-term displacement where voluntary return has been either resisted by the State of origin or where security and other conditions continue to make immediate restitution unlikely. In principle, agencies supporting the restitution rights of refugees and displaced persons can strengthen support for these rights by developing contingency plans well before this even appears to be likely to take place. Such plans should address the voluntary and informed choices of the refugee or displaced person population in question, combined with legal analyses of the situation in the country of origin with respect to housing and property restitution rights and survey's of the current physical and legal status of refugee and displaced person's original housing, land and property. Having this information available in a consolidated document will clarify a range of questions concerning restitution, and can be of use during negotiations with

officials in the State of origin who are opposed to return. Such a document may assist in softening views of those hesitant to accept the return of those currently displaced.

Common Questions

Does restitution necessarily mean physical return and repossession of one's original home or lands or are other intermediate outcomes also considered as durable solutions?

This remains one of the more complex questions concerning restitution. The restoration of possession of one's original home is the preferred solution to displacement, and great care is necessary when alternatives to physical repossession are systematically considered or implemented, be these from States of origin, UN agencies, NGOs or from refugees or the displaced themselves.

First and foremost, it must be recognised that the right to return – whether for refugees or displaced persons – is not an obligation to return. Return cannot be restricted, and conversely it cannot be imposed. The right to housing and property restitution should not be made conditional on the physical return of someone who has been displaced from their home or place of habitual residence, and that these rights remain valid notwithstanding whether return actually takes place. In some settings, return may be impossible, irresponsible or illegal due to the security situation or potential threats, but a person with a restitution right may wish to exercise rights over that property without physically returning there. Particularly crucial in these contexts, of course, are the expressed wishes of those holding restitution rights; beneficiaries of these rights can neither be forced to return, nor forced to accept a resolution of their restitution claims unless this is fully consistent with the terms of the *Principles*. In South Africa's restitution experience, the concept of *equitable redress* was one important form of restitution which allowed many beneficiaries to access restitution rights without necessarily reinhabiting their former homes and lands.

It is important to note that in some cases, only a small fraction of those with successful restitution claims – in Kosovo, some 12% - actually chose to seek physical repossession of their properties; in this instance because of serious security threats were they to return to their legitimate homes. More than 40% of those making restitution claims in Kosovo settled their cases with the current secondary occupant through mediation, which involved either selling, leasing or renting the properties in question. When return is simply not possible or is not desired, the displaced can benefit from restitution programmes that enable them to re-assert control over their homes and lands by selling, leasing or renting out their houses or lands. But it must again be emphasised that such wishes must emanate from refugees and displaced persons themselves, not imposed upon them as the lesser of two possible bad choices.

Who pays for voluntary repatriation and restitution programmes?

Under *Principle 10.4*, States that are obligated to enforce the housing and property restitution rights of returning refugees and displaced persons and should, as needed, request financial assistance from the international community to facilitate return if national resources are insufficient to achieve this. Where States are unable to shoulder the weight of implementing restitution programmes themselves, the *Principles* suggest an avenue for sharing of critical expertise and capacity. Because restitution procedures often need to be

implemented in highly charged political situations, the *Principles* recognise that States should - where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the restitution process in a just and timely manner - request the technical assistance and cooperation of other States and relevant international agencies to establish provisional regimes to provide refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

Given the reluctance of some States to fully embrace the prospects of return, combined with frequently unstable law and order situations and the poor economic and political conditions in many countries of origin, the resources required for return – which can be considerable –often must be provided by the international community. It is important to note, however, that under the *Principles*, States are expected to finance these programmes and only if they are unable to find the resources required should they then formally request assistance from the international community. Financing measures for restitution and related return processes can be made considerably more efficient and effective if these issues are addressed at the earliest possible stages of any repatriation programme. Donor countries and UN and other agencies should consider earmarking funds for these purposes within their various funding strategies. Ideally, funding arrangements should be explicitly included within the relevant peace agreements or voluntary repatriation agreements.

Useful Guidance

- Committee on the Elimination of Racial Discrimination, *General Recommendation XXII on Article 5 and refugees and displaced persons* (forty-ninth session), A/51/18 1996.
- Goodwin-Gill, G.S. 'Voluntary Repatriation; Legal and Policy Issues', in Refugees and International Relations (Loescher and Manahan, eds.), Clarendon Press, Oxford, 1990.
- Leckie, S., 'Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return, Key Considerations for UNHCR Policy and Practice' in Refugee Survey Quarterly, vol. 19, no. 3, Oxford Univ. Press, Oxford, 2000.
- Rosand, E., 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' in Michigan Journal of International Law, vol. 35, 1091, Summer 1998.
- UNHCR, *Agenda for Protection*, Third Edition, Geneva, 2003.
- UNHCR, *Excom Conclusion No. 101 on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees – 2004*.
- UNHCR, *Excom Conclusion No. 40 on Voluntary Repatriation – 1985*
- UNHCR, *Excom Conclusion No. 18 on Voluntary repatriation – 1980.*
- UNHCR, Handbook: Voluntary Repatriation/International Protection, UNHCR Division of Int'l Protection publication, Geneva, 1996. (Note: a substantially revised Handbook is under preparation).
- *UNHCR Inter-Office Memorandum No. 104/2001 and UNHCR Field Office Memorandum No. 101/2001*.
- Zieck, M., *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis,* Martinus Nijhoff Publishers, The Hague, 1997.

Section V: Legal, Policy, Procedural and Institutional Implementation Mechanisms

Destroyed Roma settlement in Kosovo (IDMC, McCallin)

Section V of the *Principles* provides specific guidance regarding how best to ensure the right to housing, land and property restitution in practice. The principles articulated in this section are based, in part, on the findings of the Special Rapporteur in his 2002-2005 reports, which analysed some of the common obstacles to restitution, including secondary occupation, property destruction, loss or destruction of property records, ineffectual institutions and discriminatory restitution programmes. Section V was developed bearing in mind some of the "best practices" which have been devised at the level of policy to overcome these common obstacles to effective restitution. *Principles 11-22* will be particularly relevant to users of the Handbook responsible for the implementation of restitution programmes in the field.

Principle 11. Compatibility with international human rights, refugee and humanitarian law and related standards

11.1 States should ensure that all housing, land and property restitution procedures, institutions, mechanisms and legal frameworks are fully compatible with international human rights, refugee and humanitarian law and related standards, and that the right to voluntary return in safety and dignity is recognised therein.

In broad terms, *Principle 11* sets out the baseline for determining the adequacy of whatever national restitution procedures, institutions, mechanisms and legal frameworks may exist, by urging States to ensure that these are compatible with international human rights, refugee and humanitarian law and related standards. To do so will require intensive national legislative reviews to be undertaken, combined with the development of expertise in the country of origin of the meaning and stature of housing and property restitution rights within these various legal regimes. Importantly, *Principle 11* re-affirms through its reference to 'other standards' the necessity of streamlining national restitution rules and regulations with those found in international human rights, refugee and humanitarian law as reflected in the *Principles*.

Typical Scenarios for Applying Principle 11

When countries of origin are committed to return – *Principle 11* can be used as springboard for national level analysis of the consistency of existing laws, procedures, judicial competencies and so forth with the relevant international standards, and as a basis for ensuring that if any new restitution measures are undertaken by countries committed to return, these too are compatible with international perspectives on these issues, including the *Principles*.

Providing legislative drafting assistance – Should users of the Handbook be requested by States of origin to assist in the drafting of amendments to existing law or proposed new restitution or related laws, a range of national legislative sectors will need to be scrutinised as to their compatibility with international standards, including: constitutional housing rights and relevant human rights provisions; abandonment laws; housing, land or property laws adopted during the armed conflict; landlord and tenant law; land laws; laws regulating eviction; laws regulating security of tenure; laws on adverse possession; laws concerning housing repairs and improvements; laws addressing housing credit and finance; laws governing State property including social housing resources; laws on public health and housing; laws concerning the restoration of housing or property rights; laws governing property sales, exchanges and leases;

housing and land expropriation laws; laws determining succession rights to land and housing, particularly the rights of women; laws governing communal ownership of land or housing; and the position of formal law vis-à-vis customary land titles and ownership.

Common Questions

What if domestic restitution laws or procedures are incompatible with the Principles?

Although the *Principles* do not constitute a treaty, they are based upon a wide range of existing rights and regulations that do find recognition within treaties and other binding laws. Most, if not all, States have ratified human rights, humanitarian law and other treaties, and maintain domestic legislation on these and related areas. There is, therefore, a clear basis upon which to build a view that States cannot intentionally develop restitution laws or procedures that are incompatible with international standards, nor can they justify their violations of international law based on the content of domestic law. This view is bolstered, of course, by the *Vienna Convention on the Law of Treaties* which clearly provides for the principle of *pacta sunt servanda* : Every treaty in force is binding upon the parties to it and must be performed by them in good faith (Article 26) and the perspective in Article 27 that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Is the conformity of national and international law ever imposed?

While the imposition of law upon governments unwilling to accept or enforce the housing and property restitution rights of returning refugees or displaced persons is uncommon and rarely desirable where it is even possible, this has occurred on several occasions, most notably in Bosnia-Herzegovina. In several instances when local authorities initially refused to amend discriminatory housing and property laws, the Office of the High Representative was forced to impose new laws that were fully compatible with international standards.

How are customary laws viewed in this regard?

The application of customary laws to areas of ownership, land use, inheritance and other areas relevant to restitution is common throughout much of the developing world. Users of the Handbook will need to familiarise themselves with the scope and meaning given customary law and, where appropriate and consistent with international standards, utilise it as a potentially useful tool in resolving housing, land and property disputes and ultimately securing restitution rights. In many countries, land relations are regulated on the basis of customary law and such forms of regulation can provide fair, unbiased and equitable solutions to a range of land disputes. When existing national legal systems are not effectively functioning in a timely, accessible and fair manner, customary law may provide effective alternative remedies, either as an interim measure, or in a manner that complements the existing official system. When customary mechanisms are relied on to play a constructive role they must be: legitimate in the eyes of the population concerned; accessible to poor (and sometimes illiterate) people; timely in their decision-making; transparent in their functioning; non-discriminatory; fair in their decisions; and compatible with both the national legal system and international human rights law.

Reliance on customary can be extremely complex and sometimes difficult to understand by those from other countries or regions. For example, in South Sudan issues relating to land and property and restitution are heavily influenced by customary law, especially in rural areas. Restitution of land and property through customary norms and practices in areas of origin can have several advantages; local land administration is functional up to a certain extent, local dispute resolution mechanisms are functional under certain conditions, and local management can be effective and at a marginal cost to the state. On the other hand, there are also weaknesses of using customary systems such as: it is applicable only when not in conflict with statutory law; it contains weaker rights for women than men; areas of jurisdiction are often doubtful; it can be poorly documented; and the capacity of local authorities to deal with new values can prove difficult.

Useful Guidance

- Norwegian Refugee Council, *A Guide to Property Law in Afghanistan*, NRC and UNHCR Afghanistan, 2005.
- Marks, S. and Clapham, A., International Human Rights Lexicon, Oxford, 2006.
- UN Housing Rights Programme, *Housing Rights Legislation*, UN Habitat Programme and the Office of the UN High Commissioner for Human Rights, 2002.

Principle 12. National procedures, institutions and mechanisms

12.1 States should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner.

12.2 States should ensure that housing, land and property restitution procedures, institutions and mechanisms are age and gender sensitive, and recognise the equal rights of men and women, as well as the equal rights of boys and girls, and reflect the overarching principle of the "best interests of the child".

12.3 States should take all appropriate administrative, legislative and judicial measures to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner.

12.4 States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms, including guidelines pertaining to institutional organisation, staff training and caseloads, investigation and complaints procedures, verification of property ownership or other rights of possession, as well as decision-making, enforcement and appeals mechanisms. States may integrate alternative or informal dispute resolution mechanisms into these processes, insofar as all such mechanisms act in accordance with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

12.5 Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

12.6 States should include housing, land and property restitution procedures, institutions and mechanisms in peace agreements and voluntary repatriation agreements. Peace agreements should include specific undertakings by the parties to appropriately address any housing, land and property issues that require remedies under international law or threaten to undermine the peace process if left unaddressed, while demonstrably prioritising the right to restitution as the preferred remedy in this regard.

Principle 12 recognises that effective and competent judicial and administrative procedures for considering restitution claims - sometimes in conjunction or with the support of international institutions - can be critical cornerstones in efforts supporting the implementation of housing and property restitution rights. Though the precise form that this will take may differ between countries, such measures will be required for any restitution programme to be carried out in an orderly, legally-consistent and comprehensive manner. The absence of effective, impartial and

accessible judicial or other effective remedies can severely compromise the restitution process. Judicial bodies play a special role in upholding the credibility and fairness of the entire restitution process. This is particularly the case in post-conflict situations where internal political divisions render domestic institutions incapable of effectively administering restitution programmes, either due to institutional bias, or due to a lack of capacity and resources. Indeed, conflict often results in a non-existent, mal-functioning or seriously over-burdened judicial system where fair and impartial procedures for resolving housing, land or property disputes are unavailable.

Even where the local judicial institutions function normally, however, the particular circumstances and caseload involved in restitution efforts following large-scale displacement will often be such that resolving housing, land and property disputes through the courts is not a viable option. In Iraq, for example, the Commission for the Resolution of Real Property Disputes has so far received more than 130,000 restitution and compensation claims, with the filing deadline still one year away. Leaving the courts to deal with such a caseload would not only result in unacceptable delays for the claimants, but would also risk having a serious impact on the normal work of the court system thus endangering the return to the rule of law. While judicial proceedings are good in dealing with isolated cases of property restitution, they are usually much less well-equipped to deal with tens or hundred thousands of such cases, which requires a more flexible and pragmatic approach.

Creating new mechanisms – both judicial and quasi-judicial in nature – to find ways of resolving such disputes is increasingly commonplace, as the experiences in Afghanistan, Bosnia and Herzegovina, Kosovo, Tajikistan, Iraq and elsewhere attest. These mechanisms can be purely local, as is the case for example in Iraq, international, as for example in Bosnia and Herzegovina, or a mixture of both. What is most suited in any given case will depend on the particular national and international context. But in many settings, competing claims on a dwelling or land parcel have no formal means of resolution or of being officially recognised and eventually registered by the governing authorities unless a special body is established to address these concerns.

At the same time, such bodies also have a range of possible drawbacks that need to be taken into account. In Afghanistan, for instance, a Special Court was established to deal with property disputes concerning refugees. However, the Court was widely seen as ineffective and is about to be shut down with its case-load being handed over to the ordinary courts. In Bosnia and Herzegovina, decisions issued by the Commission on Real Property Claims were not immediately enforceable by local authorities, and it took some five years for a law on implementation of CRPC decisions to be introduced. In addition, CRPC decisions were limited to determination of property ownership and included no reference to the rights of secondary occupants. As a consequence, holders of CRPC decisions had to go through the local administrative process to have their decision implemented which made them dependant on the functioning of the domestic housing office system.

Typical Scenarios for Applying Principle 12

Resolving ongoing housing, land and property disputes – In situations of mass return, as refugees and displaced persons begin to return to their original homes, as secondary occupants are faced with the need to find alternative accommodation, and as opportunists attempt to take advantage of the breakdown in law and order, housing and property restitution disputes are

commonplace. Such disputes – which can result in violence and serious insecurity – can take numerous forms. These include: attempts by displaced persons and refugees to physically reclaim their former homes which are occupied by members of other ethnic groups; housing, land and property claims by persons without documentation to prove their claims but who do hold legitimate rights; determining rights in instances where current occupants hold 'lawful titles', but where returnees do not; determining rights following unregistered or unofficial transfers of property; claims by *bona fide* purchasers of property after it was initially expropriated; claims for improvements made on homes, lands and property legally owned by returning refugees and displaced persons; claims on the determination of boundaries; claims of tenancy rights and cultivation rights; and many others. Restitution processes provide a means for developing fair, rights-based mechanisms to address such disputes in a consistent and equitable manner.

During the process of establishing ad hoc international or national restitution bodies during post-conflict peace operations – If national or local judiciaries or other dispute resolution bodies in countries where restitution issues are prevalent are either unable due to capacity constraints, a lack of independence, histories of corruption, or unwilling to be involved in facilitating the enforcement of restitution claims, it may be necessary to support the establishment of international bodies to carry out these tasks.

Despite clear limitations, the CRPC in Bosnia- Herzegovina and the Housing and Property Directorate in Kosovo provide examples of how problems of objectivity and competence within local judicial systems can at least partially be overcome through a reliance on independent international bodies. Clearly where the courts lack capacity, or are perceived as biased or corrupt, then more consideration needs to be given to the development of other mechanisms. Internationally-led mechanisms may also be necessary in order to protect the rights of unpopular minorities but it should also be acknowledged that such bodies are often extremely slow, inefficient and expensive and that ill-conceived efforts can sometimes make things worse. To be effective, these institutions must also have external support in order to meet their heavy caseloads and to overcome the many formidable challenges encountered during the restitution process. Resolving restitution claims requires the institutions concerned to have at their disposal an array of flexible remedies that can be deployed, and the equally important need for refugees to have the right to choose the remedy that is best suited for them and consistent with their rights and wishes. One challenge involved with the establishment of a national, local or international special purpose body will be to ensure that its procedures are adapted to deal with a large number of property restitution and compensation cases from refugees and IDPs, who will very often have limited access to evidence to support their claims. This may require, for example, allowing for more relaxed standards of evidence than are usual before civil courts; limiting oral dispositions as they may slow down the process; and generally ensuring that procedures are as light and flexible as possible of course with reducing the claimants' rights.

Local or traditional dispute resolution processes should be examined, as should possible non-judicial remedies such as arbitration and mediation. However, to allow effective restitution remedies it will be crucial to ensure that the position of a national or local restitution body within the wider local legal framework is clear. This may involve specifying its relations with local enforcement agencies if the body itself is not responsible for enforcement, as is for example the case with the Iraq Commission for the Resolution of Real Property Disputes. Finally, to be effective these institutions may also need external support in order to meet their heavy caseloads and to overcome the many formidable challenges encountered during the restitution process. One

particular type of support in this respect may be to sensitise and inform staff of such national or local bodies of prior international and national practices in the area of large-scale reparation mechanisms, so that they can benefit from these earlier experiences. It is in this vein, for example, that IOM shares its own experience in implementing large-scale reparation programmes with, amongst others, the Iraq Commission for the Resolution of Real Property Disputes and the Colombian National Commission for Reparation and Reconciliation.

During peace negotiations - *Principle 12.6* underscores the importance of integrating restitution rights and mechanisms directly into peace agreements in order to expedite the creation of restitution institutions. In none of the documents outlining the authority and competencies of the various operations that have functioned in the Balkans, East Timor and elsewhere have housing, land and property rights concerns figured as prominently as they might have. Even in the case of the Dayton Agreements which, in Annex 7, clearly enshrined the rights of refugees and displaced persons to return to their original homes, most of the activities pursued by the international community were not envisaged when Dayton was signed in 1995. Indeed, in response to the security, stability, legal, economic, social and other problems that invariably emerge in all post-conflict settings when housing, land and property rights concerns are not addressed, some important peace operations did, *ex post facto*, begin to take at least some steps to face the more severe challenges. Were these competencies written directly into the agreements establishing peace operations, these attempts at creating a stable peace and assisting countries with reconstruction efforts would arguably have had more success at much earlier stages in the process.

Common Questions

Which issues should be examined to monitor the effectiveness of restitution measures?

States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms. In order to develop these comprehensive guidelines, several issues will need to be clarified, including: the jurisdiction of the restitution body; the types of claims which can be submitted to a given mechanism; who can present such claims; how far back in time the claims can go; how to ensure that an independent appeals institution will address errors in law and fact without considerably delaying the restitution process; what role, if any, will be played by traditional or non-judicial methods of conflict resolution especially in countries without an independent or functioning judiciary; to what extent the international community is required to assist the process; whether decisions are temporary or permanent in nature; to what extent can administrative procedures achieve justice; and how to ensure the enforceability of decisions if secondary occupants are not willing to vacate voluntarily the home or land they occupy. These decisions should be tailored to address the particulars of the situation, while at the same time, they should be consistent with the *Principles* themselves.

What is the role of local courts in restitution processes?

Ideally, the conferral of housing and property restitution rights and their enforcement should be a function of local decision-making bodies and courts in countries of origin. However, even where local courts are fair, impartial, competent and adequately resourced to deal with potentially large numbers of restitution claims, practice has shown that a

combination of judicial mechanisms together with administrative processes, community mediation, reliance on customary law when appropriate and the provision of legal aid may yield the most successful restitution outcomes. It also needs to be borne in mind that it will often remain up to local courts to enforce any decisions on restitution claims issued by international restitution bodies.

Can non-judicial remedies achieve housing and property restitution?

Non-judicial remedies can sometimes have more far-reaching effects and provide restitution to larger numbers of people in a shorter time-frame than purely judicially-based restitution procedures. South Africa's restitution programme, for instance, moved from a judicially-based system to a more administrative process once it become clear that a purely judicial approach would be overly burdensome, result in serious delays in enforcing restitution rights and ultimately not be in the best interests of those entitled to housing and property restitution rights. In other countries, alternative dispute resolution mechanisms sometimes based on customary law may achieve better restitution results than judicial remedies given the lack of capacity and judicial backlogs which are common throughout many refugee- and displaced person-generating countries.

Useful Guidance

For examples of restitution rights and institutions established by the international community, see:

- *Annex 7, Chapter II of the General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995.
- Philpott, C., 'Though the Dog is Dead, the Pig Must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees' in Journal of Refugee Studies, vol. 18, no.1, pp 1-24, 2005.
- UN Centre on Human Settlements (Habitat), *Housing and Property in Kosovo: Rights, Law & Justice: Proposals for a Comprehensive Plan of Action for the Promotion and Protection of Housing and Property Rights in Kosovo*, 30 August 1999.
- *UNMIK Regulation No. 1999/23 (on the establishing of the Housing and Property Directorate and the Housing and Property Claims Commission),* 15 November 1999.

Principle 13. Accessibility of restitution claims procedures

13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination. States should not establish any preconditions for filing a restitution claim.

13.2 States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive. States should adopt positive measures to ensure that women are able to participate on a fully equal basis in this process.

13.3 States should ensure that separated and unaccompanied children are able to participate and are fully represented in the restitution claims process, and that any decision in relation to the restitution claim of separated and unaccompanied children is in compliance with the overarching principle of the "best interests of the child".

13.4 States should ensure that the restitution claims process is accessible for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum or countries to which they have fled. States should ensure that all affected persons are made aware of the restitution claims process, and that information about this process is made readily available, including in countries of origin, countries of asylum or countries to which they have fled.

13.5 States should seek to establish restitution claims-processing centres and offices throughout affected areas where potential claimants currently reside. In order to facilitate the greatest access to those affected, it should be possible to submit restitution claims by post or by proxy, as well as in person. States should also consider establishing mobile units in order to ensure accessibility to all potential claimants.

13.6 States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims.

13.7 States should develop restitution claims forms that are simple and easy to understand and use and make them available in the main language or languages of the groups affected. Competent assistance should be made available to help persons complete and file any necessary restitution claims forms, and such assistance should be provided in a manner that is age and gender sensitive.

13.8 Where restitution claims forms cannot be sufficiently simplified owing to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner that is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf.

13.9 States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for

potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin.

13.10 States should ensure that persons needing special assistance, including illiterate and disabled persons, are provided with such assistance in order to ensure that they are not denied access to the restitution claims process.

13.11 States should ensure that adequate legal aid is provided, if possible free of charge, to those seeking to make a restitution claim. While legal aid may be provided by either governmental or non-governmental sources (whether national or international), such legal aid should meet adequate standards of quality, non-discrimination, fairness and impartiality so as not to prejudice the restitution claims process.

13.12 States should ensure that no one is persecuted or punished for making a restitution claim.

While *Principle 12* speaks of the necessity of having effective restitution procedures, mechanisms and institutions in place, *Principle 13* recognises that not only must measures be effective in their work to implement restitution policies, but they must also be accessible to those constituencies they are designed to benefit. Claims procedures must be physically, linguistically and economically accessible, and special measures should be taken to ensure that marginalized groups and vulnerable persons are able to benefit from such institutions in an equitable and just manner.

Restitution procedures designed to restore the housing, land and property rights of persons displaced during conflict are invariably based on claims processes – whether formal or informal - which allow for all assertions of restitution rights to be considered by bodies entrusted to do so. In some countries, national and local judicial bodies have collected, assessed and adjudicated claims, while in others international bodies carried out this vital task. Sometimes, a combined effort is involved. Given the sensitivity around these issues and the need to create an environment allowing the development of sustainable solutions to restitution rights, such a process should be a national one, supported by the international community, unless another solution is warranted. Ultimately, restitution claims procedures must be free, simple, accessible and enforceable, and must be designed to ensure that all claims are resolved in a fair and efficient manner.

Typical Scenarios for Applying Principle 13

Ensuring equal access to all potential restitution claimants – All restitution claims processes should be structured to provide permanent housing (or land or property) solutions for all returnees, including owners, tenants and others with recognised restitution rights, preferably in one's original home. This perspective should be built directly into the design of every restitution programme. Claims forms and simple instructions on how to complete and submit them should be available in languages understood by those likely to submit claims. Claims processing centres and offices should be established throughout the areas where claimants currently reside, such that it is easy to reach the nearest office or, if needed, mobile teams should be deployed to such areas. This may include neighbourhing countries where refugees may be currently resident in settlements awaiting return. Independent legal aid centres providing expert legal assistance to

returnees seeking to invoke their rights to housing and property restitution can also prove a useful feature of an independent claims process. Restitution bodies must have free access to all property records and be required to accept many types of evidence. Special measures should be developed to consider collective restitution claims that may be submitted to the bodies concerned.

Out-of-country processing – A restitution programme following a period of conflict can bring a sustainable solution and thus contribute to the reconciliation within a country only if it provides a meaningful opportunity to participate in the process for all victims, including refugees. Often, meaningful access can only be given by allowing claimants to file a claim in the country where they are currently residing. The implementation of such an out-of-country process poses significant logistical and financial burdens on a programme and adds complexity to the claims resolution process. While equal treatment between in-country and out-of-country claimants has to be ensured, there might be need for separate outreach campaigns and additional assistance to out-of-country claimants who lack access to evidence, such as property registries. At the peak of its work in 1999, seven of the 23 Regional Offices supporting the CRPC's Executive Office were located in Western European countries which hosted large number of refugees. Similarly, the German Forced Labour Compensation Programme relied on IOM's global network of Regional offices for its public outreach campaigns and the collection of claims in over 60 countries.

Legal standing of current occupants and other third parties - In order to achieve fair and sustainable solutions, access to restitution claims procedures needs to be given to all parties concerned, including those who are currently occupying or using the claimed property. The notification of current occupants and other third parties about pending claims poses a large administrative burden on programmes and the consideration of their respective rights to the property adds considerable complexity to the decision-making process. It is crucial that claims restitution procedures are designed to deal with third party participation in a fair and efficient manner. Property claims programmes have chosen different approaches to the problem of legal standing of third parties: Under the rules governing the claims resolution process of the Housing and Property Claims Commission in Kosovo, the current occupant had the possibility to file a counter-claim upon notification that a claim had been filed to the property he/she was occupying. Similarly, the CRRPD in Iraq notifies current occupants and other identified interested parties about a claim that has been filed – if personal notification is not possible through public notification - and invites them to respond to the claim in order to protect their own rights to the property. In Bosnia-Herzegovina, the current occupier was not notified about a claim and could thus not respond to a claim in the first instance process. The current occupant could however submit a request for reconsideration to the CRPC once he/she had been notified about a decision. It should be noted that notification procedures are increasingly difficult the less urban and more rural a restitution process becomes. Rural notifications are notoriously complex and often effectively impossible exercises given the lack of recognised, easy-to-find addresses, the often customary land arrangements in place and the difficulties in actually finding those requiring notification.

Common Questions

What types of evidence of housing and property rights can be put forward by those making restitution claims?

A variety of evidence types, in addition to formal property records, may be admissible in restitution procedures. These include, for instance: verified sale contracts, verified gift contracts, inheritance decisions with legal validity, court decisions on ownership, valid decisions made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, construction licenses or building permits, usage permits, contracts on use of an apartment, excerpts from official records, decisions on the allocation of an apartment, decisions on apartment rent or rent levels, apartment rent slips, decisions by which apartments are declared abandoned, certificates of place of residence, bills (utility, phone, gas, etc.), pre-war phonebooks, eyewitness testimony, personal identity cards, car registration, census records, personal contracts, dismissal records, photographs, valuer reports, voting records, and others. Given the frequent difficulties in collecting and presenting evidence for these purposes, users of the Handbook may consider developing projects and capacities to assist restitution claimants in this regard. The type of evidence that can be put forward depends on the standard of proof adopted for a reparation programme. Property claims programmes have applied lower standards of proof than national courts such as "credibility" or "plausibility", acknowledging the fact that claimants had to leave documents behind when fleeing their homes or that documents had been lost or were destroyed during the conflict.

How can legal aid facilitate the claims process?

Legal aid programmes designed to assist individual restitution claimants are increasingly seen as major contributors to the implementation of restitution rights. Such programmes increase the accessibility of restitution claims procedures, and ensure that persons are not deterred from benefiting from such procedures due to barriers associated with navigating complex or intimidating legal systems. The Norwegian Refugee Council's Information, Counselling and Legal Assistance (ICLA) programme has helped tens of thousands (if not more) of displaced people to obtain the restitution of their housing, land and property rights. ICLA programmes operate in Sudan, Uganda, the Democratic Republic of Congo, Burundi, Georgia, Azerbaijan, Afghanistan, Pakistan, Sri Lanka and Colombia. In the Balkans, NRC implemented ICLA Programmes in Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Kosovo. While NRC closed down the ICLA-activity in the Balkan region in January 2005, local NGOs which arose out of NRC's Programmes, are continuing the work. It should be noted however, that in addition to having clear and easily understandable claim forms, assistance to claimants can take many forms and the type of assistance provided will ultimately depend on the demographics of the claimant community as well as on the funding available. Assistance in past programmes has ranged from printed material that explains the restitution process and contains detailed instructions on how to fill out the form, call centers or hotline numbers where claimants can turn to with their questions, to a personal interview of each claimant by programme staff at the claim intake stage. Furthermore, a "Training the trainers" approach might limit the burden on a programme and could be considered in order to have victim interest groups provide effective assistance to individual claimants.

Useful Guidance

- Fitzpatrick, D., *Land Claims in East Timor*, Asia Pacific Press, Canberra, 2002.
- Van Houte, H., 'Mass Property Claims Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina', in 481 International and Comparative Law Quarterly 625, 1999.

Principle 14. Adequate consultation and participation in decision-making

14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities.

14.2 States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively. The needs of vulnerable individuals including the elderly, single female heads of households, separated and unaccompanied children, and the disabled should be given particular

Principle 14 recognises the importance of involving potential beneficiaries of restitution rights in the process as participants and not solely as the subjects of such measures. This *Principle* identifies specific marginalized groups and vulnerable individuals who should be included in restitution decision-making processes and empowered to make their participation effective and meaningful. The right to adequate consultation and representation in decision-making has been articulated by many bodies including the Committee on Economic, Social and Cultural Rights within the context of forced evictions. In its General Comment No. 7, the Committee observed that affected communities should have a right to 'an opportunity for genuine consultation.' These sentiments are echoed by Guiding Principle 28(2) of the Guiding Principles on Internal Displacement which provides that 'special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.'

Typical Scenarios for Applying Principle 14

Collect land and property information during refugee and displaced persons' registration and opinion surveys – Principle 14 is designed to ensure that those entitled to assert housing and property restitution rights are active participants in this process and that they are fully consulted *and* able to put forth their views on these questions prior to the completion of the design of restitution laws, procedures or mechanisms. It will be important for users of the Handbook to gauge perspectives on all elements of the restitution question, and to determine how groups of refugees and displaced persons envisage the restitution process working in practice. At the same time, care must be exercised to ensure that false expectations associated with restitution are not encouraged. Those with restitution rights should be encouraged to provide concrete ideas concerning the design and implementation of the restitution process.

Collecting such views can be done formally through meetings and other exercises, as well as during registration and opinion surveys carried out in settlements and other areas where the displaced are concentrated. It may not be possible, however, to implement each group's views of the restitution process. Consequently, each participant presenting a view should be provided with feedback as to the constraints that may impede the implementation of those views. Without an attempt to manage expectations, soliciting participation might undermine the restitution process by building claimant expectations towards the restitution process and then failing to meet those expectations. Failing to meet claimant expectations might ultimately undermine rather than strengthen acceptance of the process and its outcome.

Monitoring gender-sensitivity in restitution processes – Assurances should be in place to ensure that women refugees and displaced persons that decide to exercise their restitution rights make such decisions in a truly voluntary manner and not forced or otherwise coerced into making such choices. Women's views on restitution may place emphasis on different aspects of the process than those prioritised by men, and every effort should be made to determine what these views are and how they can best be facilitated and taken into account throughout the entire restitution process.

Common Questions

How can participation best be facilitated?

Refugee and displaced persons can play a vital role in developing programmes and institutions designed to protect restitution rights if the local authorities and international organisations involved understand the importance of incorporating these views into the restitution process and recognise that restitution measures are far more likely to succeed when the beneficiaries are involved as equal partners in a consultative process. Those entrusted with implementing restitution rights should take whatever measures are necessary to facilitate the participation of the displaced by, for instance, assisting in the establishment of refugee/displaced person organisations which can speak on behalf of the communities in question, engaging these groups and inviting to participate in meetings on restitution issues and by encouraging the development or use of informal community-based dispute settlement mechanisms which can be a particularly important tool to ensure effective and legitimate adjudication of restitution disputes and to promote greater equity in property relationships at the community level.

Useful Guidance

- Allen & Morsink (eds.), *When Refugees Go Home*, James Currey, London, 1994.
- Black, R. and Koser, K. (eds.), *The End of the Refugee Cycle? Refugee Repatriation & Reconstruction*, Berghahn Books, New York, 1999.
- Hammon, L., 'Examining the Discourse of Repatriation: Towards a More Proactive Theory of Return Migration', in *The End of the Refugee Cycle*, Berghahn Books, New York, 1999.
- ICRC, *Going Home: A Guidebook for Refugees*, ICRC Publication, Sarajevo, 1997.

Principle 15. Housing, land and property records and documentation

15.1 States should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution Programme, respecting the rights of refugees and displaced persons when doing so.

15.2 States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure. These determinations shall comply with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

15.3 States should ensure, where appropriate, that registration systems record and/or recognise the rights of possession of traditional and indigenous communities to collective lands.

15.4 States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection in situ or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognising the authenticity of said copies.

15.5 States and other responsible authorities or institutions should provide, at the request of a claimant or his or her proxy, copies of any documentary evidence in their possession required to make and/or support a restitution claim. Such documentary evidence should be provided free of charge, or for a minimal fee.

15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property or place of habitual residence. Such information should be sought whenever information is gathered from refugees and displaced persons, including at the time of flight.

15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.

15.8 States shall not recognise as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried out contrary to international human rights standards.

Principle 15 addresses the question of formalising housing, land and property rights through the registration of relevant records and decisions and related documentation linked to restitution processes. It is meant to facilitate, from a logistical point of view, restitution processes through the establishment, preservation or re-construction of property registration systems. *Principle 15.1* encourages States to develop 'multipurpose' cadastral or other systems for officially registering such rights following pronouncements conferring housing and property restitution rights to refugees and displaced persons. *Principle 15.2* links pronouncements of rights to the subsequent registration of those rights for purposes of ensuring tenure security. In instances where displacement is widespread, states should encourage the judicial or administrative bodies pronouncing on ownership rights to coordinate with the institution or institutions responsible for the registration of such rights in the tenure system thus ensuring that efficient information exchanges are possible. *Principle15.3* notes the importance of developing appropriate registration systems to register rights over lands which are often not contained in official cadastres, such as the land of indigenous peoples and rights of possession of collectively held lands.

Damage or destruction of housing belonging to refugees or displaced persons, particularly when this occurs in connection with crimes such as 'ethnic cleansing', is often carried out in conjunction with the confiscation or destruction of housing and property cadastres, property registries and other official records giving proof of ownership and residence rights. In many conflict situations, housing and property cadastres and records are consciously destroyed or confiscated by one of the warring parties with the aim of extinguishing the rights of members of another group. In Kosovo, for instance, more than half of these records disappeared. Consequently, the protection or re-establishment of housing and property records after conflicts have ended can greatly facilitate the restitution process by providing (what should be) an independent source of evidence proving restitution claims. These points form the core of *Principle 15.4*. In some situations, the creation or maintenance of a land registry or database may be necessary. Where land registries and other forms of registration exist, records should be made publicly available at the local level and subject to inspection without unreasonable expense or administrative barriers. Access to such records is crucial for transparent and accountable functioning of restitution processes.

Principle 15.7 builds a necessary degree of flexibility into questions surrounding the registration of housing and property rights by recognising that due to the circumstances of flight, refugees and displaced persons frequently do not possess documentary evidence of their rights to their original homes and, consequently, that this does not limit their rights to restitution. Because displacement often occurs in situations of conflict, *Principle 15.8* is designed to make invalid any transfer of rights carried out under duress.

In applying *Principle 15*, users of the Handbook need to be aware of the many different views on the question of registering housing and property rights, and why great care must be exercised in pursuing these questions. For instance, the process of constructing or reconstructing official records can be abused by corrupt officials and can equally be used as a motivation to economically or politically strong groups to illegally grab land belonging to refugees and displaced persons and registering it as their own. In such cases, users of the Handbook should support efforts to improve housing and property registration systems as a preventative tool against housing and property rights violations such as illegal confiscation of land, and establish or re-establish cadastral and housing registration systems as a means of first and foremost protecting the rights of economically weaker segments of society.

Typical Scenarios for Applying Principle 15

At the time of flight - The loss and/or destruction of housing and property records and documentation in countries where public records of housing and property rights were routinely registered in pre-conflict settings - housing, land and property titles, local housing, land and property cadastres, property registries and other official records giving proof of ownership, occupancy, tenancy and other residential or land rights, etc. - is a problem which significantly complicates restitution processes because it removes a key, independent source of information to verify restitution claims. As a result, peace operations in Bosnia-Herzegovina, Kosovo, East Timor and elsewhere have developed programmes to restore and consolidate housing and property registration systems as a crucial link in the restitution chain.

To help reduce the impact of such losses, and to build documentary evidence for use in the event of return and restitution, users of the Handbook and their agencies can attempt to collect whatever information and evidence of refugee and displaced person housing, land or property rights may be available, at the time of flight or as near to the time of flight as possible. In emergency situations, integrating housing and property restitution protections into registration procedures for the provision of humanitarian aid to the displaced, can be feasible as a means to amplify the data-collection component of these registration processes, to record information regarding the housing and property situation of refugees and displaced persons at the time they fled their homes, including *inter alia* address, length of residency, estimated value, tenure status, ownership records and any other relevant personal information related to residency, ownership, possession or use and loss of property rights. Asking the right questions and storing this information during refugee and IDP registration procedures can make a big difference when voluntary repatriation takes place, as this information, in turn, can be provided to restitution institutions following the end of the conflict generating the displacement.

During the registration of refugees at the time of flight, the institution or organization conducting the registration should anticipate that a restitution institution might also use the information it captures. The type of information captured and the format of the information are some of the issues that the designers of such a registration system should bear in mind. Conversely, the restitution institution must conduct an audit of all possible data sources that might facilitate the restitution process including information captured at the time of flight. Once identified, the restitution institution must determine the accuracy, completeness and usability of the information contained in the identified data sources. After such an audit, the information contained in these data sources may prove to be one of the sources for the restitution institution to independently establish the facts related to undocumented restitution claims.

Prior to the submission of restitution claims – Users of the Handbook can assist those making restitution claims to access whatever official information concerning their claim may be available within existing property cadastres or other residential registration systems. If official documentation is not available (either because the rights in question were never formally registered or because the records concerned have been destroyed or gone missing) restitution claimants can be assisted with collecting documentation and building strong restitution claims. For instance, determining who are the legitimate owners of land and property in Afghanistan is made more difficult due to the lack of a complete set of official cadastral records and a multiplicity of ownership documents, both customary and official, and is further complicated by Afghanistan's plural legal system, in which State, religious and customary law often overlap.

Following the issuing of decisions on restitution claims – A key outcome of any fair and equitable restitution process where the housing and property rights of refugees and displaced persons are confirmed, will involve the recognition of these rights through official, but *appropriate,* forms of registration and the provision of formal titles or other records assuring adequate levels of security of tenure, notwithstanding the type of housing or property rights concerned. Users of the Handbook will need to be careful to monitor the precise way by which such rights are formalised and seek to ensure that such registration does not result in encouraging protracted disputes over the housing, land and property concerned. Care should also be taken to ensure that registration systems that are providing legal recognition to customary or informal rights following successful restitution claims, do not necessarily attempt to assimilate these rights into formal State law without considering all the implications – both positive and negative – that this could have. Above all, users of the Handbook should be fully cognizant of the fact that the registration of rights is but one element of a much broader restitution process; it is neither a panacea for the myriad of complex challenges facing refugees and displaced persons with restitution claims, nor necessarily a value-free or non-ideological process that will benefit all groups equally.

Common Questions

How did the Kosovo Cadastre Support Programme work?

One of the main priorities of the United Nations Mission in Kosovo (UNMIK) was re-establishing efficient mechanisms of governance by re-introducing a functioning cadastral system which was seen as a pre-requisite for implementing reconstruction activities, upholding the rule of law, promoting economic development, and resolving long-standing conflicts and uncertainties. The UN Habitat Programme began to compile a detailed survey of the extent of damage and loss of cadastre documentation in October 1999 and developed the Cadastre Support Programme shortly thereafter. The main objective of the programme was to restore a well functioning land and property market which will contribute to economic growth, and democratic and sustainable development and to render proper land and property services to the beneficiaries. The cadastre system, in addition to assisting in the restoration of housing and property rights and security of tenure, will play a key role, even if not immediately, in: supporting future taxation on immovable property and the functioning of mortgage systems; improving urban planning and infrastructure development; supporting environmental management and protection; and producing statistical data to assist in economic and development planning.

Can the provision of 'interim rights' to housing or property be a useful tool in providing temporary protection and a degree of security of tenure?

Yes, but this needs to be done with great care. The granting of interim (or 'qualified') rights under which the rights of current secondary occupants are temporarily vested if no restitution claims filed over the housing or property in question within a set time-period, can be a useful means of providing a degree of tenure security in situations of large-scale housing insecurity. Such protection measures can be a means of buying time until a formal restitution process is able to begin its work in assessing claims and determining or confirming rights. It can also provide an impetus on the authorities concerned to identify appropriate alternative housing or property that can be allocated to those whose interim titles lapse or who are otherwise found to have no formal rights over the current place of residence.

Are there dangers in registering formerly unregistered lands?

Yes, and these can be considerable. Attempts to register currently unregistered lands can cause serious problems if the adjudication process is not well designed or overly rushed. In many agrarian societies, the most difficult restitution disputes often revolve around common property resources which have never been subject to formal registration, but which are clearly used in accordance with customary or traditional arrangements. Common property can be comprised of a mix of individual rights and small or larger social units, such as access to grazing or forest land, land reserves for agricultural use, or lineage estate property that is held by descent groups or tribal segments. Innovative legal constructs are often necessary in order to allow the registration of collective ownership and to define overlapping rights in commons such as distinguishing group or individual ownership rights, as opposed to rights of long-term or periodic access to such land. The more vulnerable, in particular women, notably suffer from registration in countries without a long rule of law tradition, as illustrated by the claim of women in Kenya: "titling is the curse of women". Additionally, communities should not be encouraged to begin registering individual title until the common property of the community has been demarcated in a mutually-agreeable fashion. At the same time, while great care is needed in any land registration process, it must be reiterated that without an effective land administration system, including a registry appropriate for local conditions and widely supported by the population concerned, any work in providing titles will not succeed if the information in the registries is not properly managed or updated by those who acquire rights, whether by market transactions, inheritance or through other means.

Useful Guidance

- Grimsted, P.K., 'Displaced Archives and Restitution Problems on the Eastern Front in the Aftermath of the Second World War' in Contemporary European History, vol. 6, pp. 27-74, 1997.
- Payne, G., and Majale, M., *The Urban Housing Manual – Making Regulatory Frameworks Work for the Poor*, Earthscan, 2004.
- UN Habitat, *Land Administration – Handbook for Planning Immediate Measures from Emergency to Reconstruction*, Nairobi, 2005.

Principle 16. The rights of tenants and other non-owners

16.1 States should ensure that the rights of tenants, social-occupancy rights holders and other legitimate occupants or users of housing, land and property are recognised within restitution programmes. To the maximum extent possible, States should ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.

Protecting the rights of tenants and other non-owners is often overlooked in restitution programmes, and yet it is of particular importance in situations of repatriation and restitution where often only a minority of the affected displaced population held formal ownership rights at the time of flight. Under all legal systems, of course, tenants and other non-owners do possess varying degrees of housing and property rights, tenancy rights, condominium rights, co-operative rights, rights of adverse possession (including security of tenure), customary rights and others and which protect them from forced eviction and displacement and assure them in practice a degree of security over their original homes and places of habitual residence. As with other legal issues preventing housing and property restitution, failing to rectify unjust and arbitrary applications of law in countries of return, particularly when these are used against tenants and non-owners, can act as a contributing factor in preventing successful measures of restitution and even to future instability and conflict.

Typical Scenarios for Applying Principle 16

During the initial stages of the restitution process – During discussions leading to the development of restitution plans and processes, users of the Handbook should seek to ensure that the restitution laws, procedures and institutions that may emerge do not intentionally or by default discriminate against or otherwise treat non-owners inequitably vis-à-vis owners. As noted in *Principle 16*, three distinct groups - tenants, social-occupancy rights holders and other legitimate occupants – should be ensured explicit rights under restitution programmes. Users of the Handbook should make a concerted effort to ensure that these perspectives are incorporated into any national restitution process, as well as related return and voluntary repatriation plans.

Providing protection for vulnerable groups – Any UN or other agencies entrusted with assisting particularly vulnerable groups could consider developing the capacity to include landless families as a distinct group in need of protection. Doing so would focus necessary attention to the plight of such groups and hopefully result in the development of concrete plans to give them access to affordable land and/or housing upon return.

Common Questions

Have restitution programmes been obstructed because of bias in favour of owners and against tenants?

In the Republic of Georgia, the legacy of discriminatory applications of the 1983 *Housing Code* by the judiciary against Ossetians who fled their homes during the 1990-1992 has prevented large-scale return for several years. Georgian courts have routinely argued that the abandonment of an apartment by a refugee did not constitute a 'valid reason' for departure,

and thus many flats belonging to Ossetians were subsequently allocated to ethnic Georgians. Similarly, in Kosovo as a result of the application of the *Law on Changes and Supplements on the Limitations of Real-Estate Transactions (Official Gazette of RS 22/91 of 18 April 1991)*, the housing and occupancy rights of the ethnic Albanian population were arbitrarily annulled and housing and property transactions were severely restricted. When housing was bought or sold between 1989-1999, this was generally carried out on an irregular basis, and never officially registered thus complicating an already difficult restitution process. Similar processes played out in Croatia where over 30,000 occupancy rights overwhelmingly affecting Croatian Serbs were annulled.

Are there any examples of past restitution programmes that have afforded equality of treatment to non-owners?

Yes. The procedures under the Commission on Real Property Claims (CRPC) which emerged from the Dayton Peace Accords in Bosnia-Herzegovina gave fully equal rights to both formal property owners and those holding social-occupancy rights to their original homes, as did the Kosovo restitution regulations. The Commission for the Resolution of Real Property Disputes in Iraq as well as the South African Land Reform Program for Restitution of Land Rights can serve as examples of national restitution programmes that also recognize and address the losses of rights in real property other than ownership. When determining the parties' rights to property, the Iraqi Commission's mandate includes the consideration of certain rights of possession and rights of use as known in the Iraqi Civil Law. The South Africa programme included the restitution of labour tenant and sharecropper rights, customary law interests such as the right to extract water and minerals from the land, to plough, to graze, to gather wood and soil etc. as well as rights arising out of beneficial occupation.

Do squatters have restitution rights?

In principle, yes, but this depends on the circumstances of their forced displacement and the rights they may have accrued in their countries or places of origin. If a person or community is forcibly displaced and this is deemed either unlawful or arbitrary, their insecure tenure status (which may, in fact, provide for far greater human rights protections than is commonly thought through rights of adverse possession and other accrued rights) should not prevent them from enjoying housing and property restitution rights. Restitution programmes have often not adequately benefited refugees and displaced persons who were landless or homeless at the time of displacement, and *Principle 16* provides a basis for ensuring that these most vulnerable of groups also are able to access durable solutions upon return.

Useful Guidance

On the human rights of squatters, the landless and other non-owners, see:

- Davis, M., *Planet of Slums*, Verso, 2006.
- Durand-Lasserve, A. and Royston, L., (eds) *Holding Their Ground –Secure Land Tenure for the Urban poor in Developing Countries*, Earthscan, 2002.
- Neuwirth, R., *Shadow Cities – A Billion Squatters, A New Urban World*, Routledge, 2005.

Principle 17. Secondary occupants

17.1 States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, that evictions are carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.

17.2 States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.

17.3 In cases where evictions of secondary occupants are justifiable and unavoidable, States should take positive measures to protect those who do not have the means to access any other adequate housing other than that which they are currently occupying from homelessness and other violations of their right to adequate housing. States should undertake to identify and provide alternative housing and/or land for such occupants, including on a temporary basis, as a means of facilitating the timely restitution of refugee and displaced persons' housing, land and property. Lack of such alternatives, however, should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution.

17.4 In cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, States may consider establishing mechanisms to provide compensation to injured third parties. The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.

Secondary occupants are persons who take up residence in a home or on land after the legitimate owners or users have fled due to, *inter alia*, forced displacement, forced eviction, violence or threat of violence, natural or human-made disasters. The *Principles* address this phenomenon with the understanding that secondary occupation of displaced persons' homes often presents itself as an impediment to return. Indeed, large-scale secondary occupation has hampered return efforts in Azerbaijan, Armenia, Rwanda, Bhutan, Bosnia-Herzegovina, Croatia, Georgia, Kosovo and elsewhere. The unauthorised possession of refugee and displaced person housing, land and property is common to all post-conflict situations. While some manifestations of secondary occupation clearly require reversal (particularly if the occupation in question took place during an ethnic conflict as an element of 'ethnic cleansing' or where clear cases of opportunism, discrimination, fraud or corruption are involved), care always needs to be taken to protect secondary occupants against homelessness, unreasonable eviction or any other human rights violations. While restitution rights need to be enforced, peace operations and restitution institutions should ensure that people do not become homeless due to the recovery of refugee housing, land or property rights from a secondary occupant. Mechanisms need to be developed which ensure the provision of alternative accommodation to those who are legally required to vacate homes over which they do not hold legitimate rights. At the same time, holders of

legitimate rights should not be continually prevented from re-possessing their homes because of the failure of the State concerned to find alternative accommodation for current occupants.

It is important to realise that while secondary occupation may at times occur when the perpetrators of human rights abuses forcibly evict residents and subsequently loot property and move into the abandoned homes themselves, more often, secondary occupiers are themselves also displaced persons. They themselves may have fled conflict, leaving behind their own homes and communities. In many cases, secondary occupation is enforced, encouraged, and/or facilitated by the forces that caused the initial displacement, and the secondary occupiers themselves may have had little or no choice in relocating to the housing in question. It is, thus, often innocent persons, acting in good faith, who occupy homes belonging to refugees or other displaced persons.

Typical Scenarios for Applying Principle 17

Instituting measures to alleviate hardships facing secondary occupants – Even in cases where full restitution rights are clearly relevant for displaced persons and refugees, the eventual removal of secondary occupiers from these homes and lands raises several difficulties. The legal eviction of secondary occupiers in order to facilitate return may have the result of inciting local resistance to these evictions and may further deepen ethnic or other social divisions, as was the case in Bosnia-Herzegovina. In all cases, however, secondary occupants must be protected against arbitrary or unlawful forced evictions and must benefit from the procedural protections outlined in General Comment No. 7 of the Committee on Economic, Social and Cultural Rights. Similarly, secondary occupants have a right to adequate housing under international human rights laws and standards. States should adopt adequate measures to protect secondary occupiers against homelessness, unreasonable relocation and other violations of their human rights. Due process guarantees, and access to fair and impartial legal institutions, must also be assured for secondary occupants.

Finding interim housing and land solutions - Clearly, secondary occupation creates challenges to housing and property restitution that require a coherent policy response, based on human rights and other legal principles which clearly recognise the pre--eminence of the right to housing and property restitution of legitimate rights holders. A thorough examination and analysis of existing and potential policies designed to address secondary occupation should thus be part of a comprehensive study of housing and property restitution for refugees and displaced persons. In order to ensure that all parties receive fair treatment, institutional strength and political will are inevitably crucial factors, and restitution programmes may succeed or fail solely on the strength and capacity of existing institutions. Like many countries struggling to implement restitution processes, the issue of secondary occupation has proven to be a volatile issue within Rwanda. National authorities attempted to reduce the conflicts surrounding secondary occupations by entrusting abandoned land to the municipalities, who were in turn empowered to administer and manage these lands. While secondary occupants were allowed to occupy abandoned lands, so long as they made a written request to do so, the original inhabitant maintained the right to immediate restitution should they return home. If an original inhabitant returned to find her or his home occupied by a secondary occupant, the secondary occupant was then given two months to vacate the premises voluntarily. If the secondary occupant was unable to find alternative accommodations within that time period, the Government was entrusted with finding them another home or providing them with building materials.

Instituting measures to alleviate hardships facing third parties acting in good faith - Especially where property restitution mechanisms address situations of long-term internal or external displacement, housing, land and property will often have been sold multiple times – starting sometimes decades earlier with the secondary occupant selling the housing, land or property to the first third party acting in good faith. The Iraq Commission for the Resolution of Real Property Disputes, for example, has jurisdiction over claims for properties that were unlawfully seized or confiscated during the period from 17 July 1968 to 9 April 2003. As is the case in Iraq, many third parties will have paid the full market price for the properties that are now being reclaimed by the owners who were unlawfully deprived of their rights many years or decades ago. In such cases, it may be necessary to provide compensation to such third parties, as a mere eviction would be unreasonable and, arguably, a human rights violation. In the case of Iraq, for example, the Statute establishing the Commission provides that such bona fide third party will be compensated the equivalent value of the property at the time the claim is lodged and that the party that sold the property after the unlawful confiscation or seizure shall be liable to pay the compensation. In most cases this party will have been the Iraqi state.

Common Questions

If evictions are needed to enforce restitution rights, which procedural safeguards must be in place to ensure that human rights laws are complied with?

In General Comment No. 7 (1997), the UN Committee on Economic, Social and Cultural Rights states that 'forced evictions are *prima facie* incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.' When truly *exceptional circumstances* arise – such as in the case of enforcing a judicially-sanctioned restitution claim – evictions can be justified as long as they are also carried out in accordance with the relevant principles of international law. General Comment No. 7 considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

Should secondary occupants be guaranteed alternative accommodation?

Principle 17.3 is clear in requiring States to take positive measures to protect those secondary occupants that have no other means to access alternative housing or land. This is a perspective grounded in human rights law and one that constitutes a fair and sensible approach given the often delicate political and economic realities found in post-conflict environments. Conversely, if course, the failure to provide alternative accommodation for secondary occupants should never be used as a rationale for restricting or denying

legitimate restitution rights held by refugees and displaced persons wishing to exercise these rights. Users of the Handbook should be aware that the requirement of alternative accommodation has been used by government officials in several countries as a tool to delay restitution by alleging that such accommodation was unavailable and that they were unwillingness to make secondary occupants homeless. To limit this practice, practitioners may take measures such as checking the availability of other housing belonging to the occupant (double occupant) or linking the provision of alternative accommodation to the income of the occupant.

Useful Guidance

Garlick, M. & Cox, M., 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina' in Leckie, S. (ed.) *Returning Home: Housing and Property Restitution Rights of Refugees and Internally Displaced Persons (vol. 1)*, Transnational Publishers, New York, 65, 2003.

UNHCR, (Inspection and Evaluation Service), *The Problem of Access to Land and Ownership in Repatriation Operations*, 1998.

Principle 18. Legislative measures

18.1 States should ensure that the right of refugees and displaced persons to housing, land and property restitution is recognised as an essential component of the rule of law. States should ensure the right to housing, land and property restitution through all necessary legislative means, including through the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices. States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law.

18.2 States should ensure that all relevant laws clearly delineate every person and/or affected group that is legally entitled to the restitution of their housing, land and property, most notably refugees and displaced persons. Subsidiary claimants should similarly be recognised, including resident family members at the time of displacement, spouses, domestic partners, dependents, legal heirs and others who should be entitled to claim on the same basis as primary claimants.

18.3 States should ensure that national legislation related to housing, land and property restitution is internally consistent, as well as compatible with pre-existing relevant agreements, such as peace agreements and voluntary repatriation agreements, so long as these agreements are themselves compatible with international human rights, refugee and humanitarian law and related standards.

The legislative recognition of the right to housing, land and property restitution for refugees and other displaced persons is indispensable to the implementation of restitution programmes and policies and to their enforcement. Legal protections should be clearly articulated in an internally consistent manner and should also be consistent with international human rights, refugee and humanitarian law and related standards. In order to establish an adequate legal regime for the protection of the rights articulated in these *Principles*, States will need to pursue a range of legislative measures, including the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices.

Typical Scenarios for Applying Principle 18

Immediately following changes of Government and/or during the consolidation of peace agreements - Re-establishing the rule of law in countries devastated by war and destruction is as key element in successful peace-building. Providing people with a clear statement of their housing and property restitution rights and a concrete legal remedy for the violations that they have suffered is one of the most concrete steps to building a functioning justice system and a society built on the rule of law. Countries seeking to ensure that restitution rights are protected in a consistent and practical manner are increasingly incorporating explicit housing and property restitution rights directly into new legislation. In Colombia, for instance, various laws (Law 387/97) and decrees (Decrees 951/2001 and 2007/2001) specifically outline measures designed to protect the rights of persons displaced by the ongoing conflict in the country. The Land and Property Protection Project (LPPP) was designed to implement Law 387 and Decree 2007 and has benefited some 14,000 IDP families and protected over 200,000 ha of land over which these IDPs hold restitution rights.

During periods of legislative review, particularly when UN or related transitional administrations are in place – Increasingly, compilations of relevant national housing, land and property laws are one of the first activities undertaken by rule of law and restitution rights advisors working in UN peace operations. This sometimes straight-forward, but more often daunting task, when completed provides a consolidated picture of the state of current law, which can then be compared to texts such the *Principles* with a view to finding any discrepancies and suggesting ways to overcome these.

Common Questions

Has the international community been involved in legislative drafting efforts?

The international community has been an active participant in a range of legislative drafting efforts in support of housing and property restitution rights ranging from Albania, Bosnia-Herzegovina, Georgia and Kosovo. This involvement has ensured that a balanced, neutral and fair approach pervades these processes. When closely allied with national legal experts, such legislative efforts can provide a good opportunity for ensuring that the relevant international legal principles are included within new national laws and that such laws are in full conformity with international best practice on the *Principles*.

Do heirs of refugees and displaced persons 'inherit' restitution rights?

In cases of long-term displacement where the original and legitimate holders of housing and property restitution rights have died, heirs do maintain and 'inherit' these restitution rights if they themselves have not accessed any other durable solution and as long as they expressly indicate their continued assertion over the rights associated with the housing or property under consideration.

Useful Guidance

- Foley, C., 'Legal Aid for Returnees: The NRC Programme in Afghanistan', in *Humanitarian Exchange*, No. 26, March 2004.
- Government of Colombia, *Land and Property Protection Project*, 2002.
- Hastings, L., 'Implementation of the Property Legislation in Bosnia Herzegovina', in 37 Stanford J. Int'l L. 221, 2001.
- Leckie, S., *Housing and Property Restitution Rights for Refugees and Displaced Persons: International, Regional and National Standards* (editor), Cambridge University Press, 2007.
- *Property Law Implementation Plan (PLIP) – Inter Agency Framework Document* (OSCE, UNMIB, OHR, UNHCR & CRPC), Sarajevo, October 2000.

Principle 19. Prohibition of arbitrary and discriminatory laws

19.1 States should neither adopt nor apply laws that prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations.

19.2 States should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution, and should ensure remedies for those wrongfully harmed by the prior application of such laws.

19.3 States should ensure that all national policies related to the right to housing, land and property restitution fully guarantee the rights of women and girls to be protected from discrimination and to equality in both law and practice.

Principle 19 prohibits the adoption and application of arbitrary and discriminatory laws that may prejudice the housing and property restitution process. While laws of this nature, such as abandonment laws, are not universally *ipso facto* arbitrary, (and can be an entirely legitimate means of preventing speculation and ensuring the rational use of limited supplies of housing stock), when such laws are selectively applied against particular ethnic groups as a pretext to prevent them from reclaiming their former homes and lands, this is clearly prohibited under *Principle 19*.

Typical Scenarios for Applying Principle 19

During periods of legislative analysis and review – Failing to rectify discriminatory, arbitrary or otherwise unjust application of law in countries of return prevents successful restitution and may even contribute to future instability and conflict. In Georgia, for example, the legacy of discriminatory application of the 1983 *Housing Code* against Ossetians who fled their homes during the 1990--1992 conflict has prevented large--scale return for many years. Likewise, the application in Kosovo of the *Law on Changes and Supplements to the Limitations on Real Estate Transactions*, as well as the persistent discrimination directed against the Albanian population of Kosovo, resulted in the arbitrary annulment of housing and occupancy rights, thus complicating the restitution process.

Pursuing the equitable application of restitution laws - Discriminatory restitution programmes further entrench social divisions and animosities, and are counter to post-conflict resolution, peace-building, as well as to fundamental human rights principles and international human rights legal obligations. It will be essential for users of the Handbook to assist States to bring their national legislation on housing and property restitution into compliance with non-discrimination standards. Discriminatory restitution programmes may also manifest themselves in unanticipated ways, especially in situations where the *status quo ante* itself discriminated against particular groups. In such cases, it may not be sufficient to simply restore the pre-displacement housing situation, and additional measures may be needed to ensure that housing rights are realised by all sectors of the population without discrimination.

Common Questions

Have countries repealed laws that were contrary to internationally recognised housing and property restitution rights?

As mentioned earlier, in Bosnia and Herzegovina all sides to the conflict enforced laws on abandoned property or applied existing abandonment provisions, seeking to legitimise the ethnic cleansing and housing and property confiscation that took place during the war. One of the international community's most widely hailed contributions in Bosnia and Herzegovina was the role it played in ensuring the repeal of these draconian laws. In Kosovo, also as already noted, UNMIK repealed a law that discriminated against the Albanian majority. South Africa, of course, repealed a series of discriminatory housing and land laws and replacing these with new laws recognising certain land restitution rights. Simply put, repeal is often a prerequisite for the effective implementation of restitution rights.

Aren't abandonment laws generally reasonable as a legal means of preventing speculation and ensuring that existing housing stock is utilised?

In times of peace and prosperity, abandonment laws are generally seen as wholly reasonable and legitimate. However, in times of conflict, abandonment laws are often abused and utilised to punish displaced persons for fleeing. They may also be used to facilitate and entrench policies of ethnic cleansing or demographic manipulation. They are also responsible for much of the lack of confidence displaced persons may feel with respect to their ability realistically to return home in safety. Such laws not only impede the right to return, but often violate the principles of non--discrimination and equality, as they usually apply to or are enforced against specific racial, ethnic, religious or other groups. In Sri Lanka, for instance, the application of the *Prescription Ordinance* in conflict areas has meant that displaced persons who have been absent from their homes and lands for more than 10 years have effectively been forced to forfeit rights to those homes and lands. This is despite the fact that returning during the ten year period would have not been a safe or viable option given the nature of the armed conflict in the country.

Useful Guidance

- Garlick, M., 'Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina' in Refugee Survey Quarterly, vol. 19, no. 3, pp. 66-67, 2000.
- Roodt, M., Land Restitution in South Africa' in *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons – Volume 1* (Scott Leckie, ed.), Transnational Publishers, pp. 243-274, 2003.

Principle 20. Enforcement of restitution decisions and judgements

20.1 States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgements.

20.2 States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement and enforce decisions and judgements made by relevant bodies regarding housing, land and property restitution.

20.3 States should adopt specific measures to prevent the public obstruction of enforcement of housing, land and property restitution decisions and judgements. Threats or attacks against officials and agencies carrying out restitution programmes should be fully investigated and prosecuted.

20.4 States should adopt specific measures to prevent the destruction or looting of contested or abandoned housing, land and property. In order to minimise destruction and looting, States should develop procedures to inventory the contents of claimed housing, land and property within the context of housing, land and property restitution Programme.

20.5 States should implement public information campaigns aimed at informing secondary occupants and other relevant parties of their rights and of the legal consequences of non-compliance with housing, land and property restitution decisions and judgements, including failing to vacate occupied housing, land and property voluntarily and damaging and/or looting of occupied housing, land and property.

The re-establishment of the rule of law and the physical protection of people who wish to return to their homes are two of the most fundamental pre-requisites of successful restitution programmes. *Principle 20* recognises that the enforcement of judgments related to restitution is essential to the effective implementation of restitution policies and programmes, and are especially important in situations where persons have been displaced due to violence and/or conflict. Indeed, the importance of including an enforcement arm within any restitution institution or an external entity subject to its control, cannot be over emphasised. Restitution bodies should be given the powers necessary to enforce their decisions and to ensure that Governments and other relevant parties comply. Local and national Governments should be legally obliged to accept decisions by restitution bodies.

Typical Scenarios for Applying Principle 20

Prior to actual recovery and re-possession of homes - Because the restitution process is often complex and comprised of layers of laws, history and conflict, restitution mechanisms must also be given the necessary flexibility to deal effectively with the claims submitted to them. In South Africa, it was found that a primarily judicial approach to restitution in the early years of the restitution process proved very time and resource-intensive, and that it slowed the restitution process considerably. When more flexible, largely administrative, procedures were established, far more claims were able to be considered and cases were closed at a much more rapid rate. Courts still have final oversight under these procedures, but are only used when claimants feel they did not receive fair and equitable redress. In Kosovo, while a judicial body has been established to deal with restitution claims, the Housing and Property Directorate simultaneously provides assistance to claimants seeking mediated solutions to their dilemmas. As a result,

some 30,000 claims have been assessed. Overall, the more flexibility built into restitution systems, the greater the likelihood that they will succeed in their objectives. Obviously, safeguards need to be built into these systems to ensure that such flexibility does not result in a reduction of claimants rights.

Within the context of peace operation-driven land and property initiatives – While no formal restitution programme was established in East Timor in the run-up to independence, from the first days of its mandate, the UN Transitional Authority in East Timor (UNTAET) established a Land and Property Unit (LPU) which was responsible for a range of relevant issues, including advocacy efforts in support of restitution. The LPU was instrumental in exploring the prospects of restitution in the country, designing restitution laws and institutions and preparing draft regulations on housing and land restitution in East Timor.

Where multiple local or national authorities are involved in the enforcement of restitution decisions and judgements - The enforcement of restitution rights is almost invariably a difficult and complex undertaking notwithstanding local conditions, history or cultural values towards land, housing or property. While including an enforcement arm within a restitution institution or an external entity subject to its control is highly desirable, this will not always be possible. In Iraq, for example, the Commission for the Resolution of Real Property Disputes itself has no power to enforce the decisions it takes. For this, it needs to rely on the Enforcement Departments and the Property Registration Offices, which are both part of the Ministry of Justice. While these bodies are legally bound to implement the decisions taken by the Commission, the Commission has no control or oversight over their actions. In such circumstances, it will be important to ensure coordination and collaboration between the restitution institution and the authorities in charge of enforcement. Past experience has taught that even where a restitution institution does not have the legal power to enforce its decisions, it will be crucial for that institution to track and monitor such enforcement, especially in post-conflict contexts where the state apparatus is weakened and overburdened. In this way, the restitution institution can sensitise the state authorities to the problems encountered and put pressure on those authorities to take adequate measures so as to ensure the timely implementation and enforcement of its decisions.

Common Questions

What can be done if local or national authorities resist enforcing restitution decisions?

The reliance on civil authorities to enforce restitution decision should be the first and preferred option. However, where relevant and necessary, international police forces and peacekeeping forces can be formally involved in the enforcement and protection of housing, land and property rights, but care needs to be exercised that such involvement does not take on a repressive character, threatening the rights and perceptions of the local population. The civilian elements of peace operations may need to seek the support of the military in a range of housing, land and property rights matters, including preventing illegal forced evictions and arresting those responsible, stopping acts of violence against civilians, protecting housing against looting, damage or destruction and assisting in the enforcement of restitution rights by evicting secondary occupants deemed to be illegally occupying housing. The military can also play a positive role in mediating housing and property disputes, and should be provided with training to assist in building greater capacity to

assist in the implementation of restitution rights. It should be noted that the presence of international military forces during evictions to enforce restitution claims, if done, should be carried out with caution given that such a presence can raise the profile of the eviction concerned and thus raise tensions between ethnic communities in sensitive post-conflict environments.

Useful Guidance

- UNMIK, *Kosovo Housing and Property Directorate & Housing and Property Claims Commission – Annual Report 2004 (with Statistical Update June 2005)*, HPD, Pristina, 2005
- NRC, *Afghanistan's Special Property Disputes Resolution Court*, September 2005.
- NRC, *Land and Property Disputes in Eastern Afghanistan*, 2004.
- NRC Civil Rights Project, *Triumph of Form Over Substance: Judicial Termination of Occupancy Rights in the Republic of Croatia and Attempted Legal Remedies - Analysis of 586 Individual Cases*, Croatia, October 2002.

Principle 21. Compensation

21.1 All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

21.2 States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.

Understanding the relationship between compensation and restitution will be vital for restitution practitioners in the field. As mentioned above, compensation as understood within the *Principles* should be narrowly applied as a remedy and reserved only for specific cases. It should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement or other agreement provide for a combination of restitution and compensation. At the same time it is important to note that compensation and restitution should not be seen as an 'either/or' decision, and the *Principles* rightly acknowledge that in some cases, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.

Typical Scenarios for Applying Principle 21

When returnee housing is damaged or destroyed - Forced displacement caused by conflict is almost invariably accompanied by the widespread damage and destruction of housing and property. In Kosovo, 50% of entire housing stock was damaged or destroyed. In Bosnia-Herzegovina, 65% of housing was destroyed, and in East Timor perhaps as much as 80% of the housing stock was reduced to rubble. In such instances, a combination of restitution rights guaranteeing the claimant the right to recover their original homes and lands, *and* the provision of financial assistance in the form of compensation for the purposes of rebuilding or repairing the home concerned may be the most sustainable and equitable way of providing a durable solution. Because the destruction of property effectively precludes full restitution, the only adequate alternative is compensation in order to restore the value of the loss of the destroyed property. Compensation must be granted with the same intention as restitution, however, so that victims are returned as far as possible to their original pre-loss or pre-injury position (i.e. *status quo ante*). When compensation is provided it must be given in a manner that is *reasonable* in terms of its relationship with the value of the damage suffered by the victim.

In the provision of flexible durable solutions - Even in situations where compensation is the only possible remedy, due process guarantees, and access to fair and impartial legal institutions, must be assured to all refugees and displaced persons. The consensus regarding the remedies of restitution and compensation is that compensation should not be seen as an alternative to restitution, and should only be provided when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation *in lieu* of restitution. For example, an injured party should receive compensation to remedy the wrongful dispossession of housing only if that particular housing no longer exists or if the injured party knowingly and voluntarily decides it is in her or his interest not to return to her or his original home. The lack of political will cannot, therefore, be an excuse to favour compensation over restitution.

When displacement took place long before remedies are made available – Another situation where compensation may be the more appropriate remedy is one where the displacement happened many years before a remedy is made available and the victims or their heirs have rebuilt their lives elsewhere in such a way that they prefer to stay in this new place and to receive financial compensation for the loss of their house or land. This may be the case particularly in a situation where one or more generations have never lived in the property from which their parents or grandparents were displaced. In such a case, particular care must be taken that all those entitled to restitution or compensation are clearly informed of all their rights and that their choice is freely taken in the full knowledge of all these rights. Recent examples of mechanisms where such a choice is offered are the Commission for the Resolution of Real Property Disputes in Iraq and the procedures being set up pursuant to the Peace and Justice Law in Colombia by the National Reparations and Reconciliation Commission. Similar considerations may apply to former right holders or their descendants who had to leave behind property when they fled their country, and who have obtained status and have established themselves abroad in such a way that they do not wish restitution but prefer compensation.

Common Questions

Can compensation be offered without first attempting to secure restitution rights?

No. According to the *Principles*, restitution should be the primary remedy for reversing displacement, unless it is the expressed wish of refugees and displaced persons to receive compensation *in lieu* of restitution. Compensation cannot be imposed on refugees or displaced persons, and unless it is the remedy preferred by those displaced (on the understanding that the recovery of original housing and properties may be no longer possible), compensation should be reserved for instances where no other remedy is available, and in many other instances, it should be combined with restitution based on repossession as a means of strengthening the likelihood of sustainable repatriation.

Is cash the only form of acceptable compensation?

While cash compensation is often viewed as a simple means of settling land, housing and property restitution claims, cash compensation should be reserved only for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: physical and mental harm, lost opportunities (including education), material damages or loss of earnings, harm to reputation or dignity, costs required for legal or expert assistance, medicines and medical services, and psychological

and social services, and lost or destroyed immovable and/or movable assets, including the destruction or damage of one's original home. Even in those cases, cash compensation is generally to be avoided in countries without a functioning housing and land market or secure saving banks. When it is determined that those pre-conditions are met and a refugee or displaced person wishes to receive cash compensation *in lieu* restitution, but there are insufficient public funds to provide this, users of the Handbook should seek to assist the relevant authorities to find alternative means of providing compensation. The obvious first alternative to cash compensation would be the construction - by the State or subsidized by the State - of adequate, affordable and accessible housing which could be made available to returnees or displaced secondary occupants. Other housing-based or fair alternative solutions might be made accessible through a range of creative measures, including: the provision of alternative land plots, the establishment of a public housing fund which issues government housing bonds, vouchers or individual subsidies which can only be redeemed in relation to the construction of residences; Government assistance for returnees in finding an empty existing flat or in accessing new housing; tax reductions could be given to returnees for a fixed period; returnees could be placed at the head of the official housing waiting list; state land plots could be allocated to the returnees; government bonds in a substantial sum could be provided to returnees; or, returnees could be given favourable housing credits for building materials should they choose to build new housing themselves.

Is destroyed housing exempt from restitution claims?

There are numerous examples that could be noted, but suffice it to say that the destruction or alteration of a dwelling, property or land does not exempt it from restitution claims, nor does it exempt claimants from seeking and obtaining restitution or compensation. While the destruction or non-existence of claimed housing and property is a reality in many countries dealing with restitution, such situations cannot be used as a rationale for the payment of compensation in lieu of restitution. Rather, care must be taken to ensure that restitution remedies are interpreted in a broad and flexible manner (which may involve compensation), such that the factual status of a home or community as damaged or destroyed does not preclude claims on that home or community by refugees and displaced persons who were previous residents there. Restitution can be both claimed and awarded, even to buildings and villages or towns that physically no longer exist. Obviously, the remedy in such cases will differ from more traditional cases of restitution. But the right to have restored to them, the lands on which structures may have once stood or to be provided with other forms of restitution could constitute effective remedies, as could prompt and adequate financial compensation. The simple destruction of property does not and cannot extinguish such claims, even though such circumstances certainly complicate the restitution process.

Useful Guidance

- Lee, L., "The Right to Compensation: Refugees and Countries of Asylum", in The American Journal of International Law, vol. 80, no. 3, pp. 532-567, 1986.
- Rosand, E., 'The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law' in 33 Cornell Int'l L.J. 113, 1999.
- Shelton, D., *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2000.