

Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges

Edited by Walter Kälin, Rhodri C. Williams,
Khalid Koser, and Andrew Solomon

BROOKINGS

u^b

UNIVERSITÄT
BERN

Brookings-Bern Project on Internal Displacement

THE AMERICAN SOCIETY OF INTERNATIONAL LAW



Chapter 10

Property

Rhodri C. Williams*

INTRODUCTION

This chapter focuses on remedies for violations against internally displaced persons' (IDP) rights to the housing, land, and property they occupied and used prior to their displacement. The most well-known remedy for such violations is restitution, an approach popularized through successful implementation programs in Bosnia and elsewhere, as well as the recent adoption by the UN Sub-Commission on Human Rights of *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (often referred to as the *Pinheiro Principles* in honor of the Special Rapporteur who drafted them).¹ However, under some circumstances, alternative or mixed approaches including elements such as compensation and provision of alternative land or housing can also provide an effective remedy for IDPs.

Violations and abuses of rights in housing, property, and land often accompany displacement. One of the key contributions of the 1998 *Guiding Principles on Internal Displacement* (the *Guiding Principles*) to the protection of IDPs involved the recognition that a wide range of practices commonly leading to displacement were “arbitrary,” in the sense of being inconsistent with states’ obligations under international law. The obligation to avoid arbitrary displacement identified in the *Guiding Principles* is broad, protecting all persons whether they face displacement within their own countries or abroad, and implying affirmative obligations on the part of states to prevent circumstances that could result in displacement.

* Rhodri C. Williams is a consultant and researcher on human rights and forced migration issues.

¹ U.N. Commission on Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) [hereinafter *Pinheiro Principles*].

Recent practice and scholarship reflect a growing recognition that a central sub-category of acts constituting arbitrary displacement involve the physical removal of individuals and groups from homes and land they occupy and depend upon for shelter and livelihood. These acts are most clearly arbitrary where they strip their victims of recognized property rights without adequate process or compensation. However, human rights law is also increasingly cognizant of rights to privacy and tenure security in homes (as well as in land, at least as a guarantee for the right to an adequate standard of living) that are not contingent on outright ownership. In fact, recent emphasis on such rights has come about partly in response to the clearly documented vulnerability of individuals and communities deprived of access to their settled homes and lands, regardless of whether they formally owned them.

Where removal of people from homes and lands they occupy are undertaken in a manner that violates international law, they have come to be referred to as “forced evictions” in violation of the right to adequate housing (see “Legal Framework,” below). Like arbitrary displacement, forced evictions can affect individuals or groups and can take place in a wide variety of contexts ranging from ethnic conflict to development projects.² In fact, the similarity between the two concepts is striking, given that both essentially consist of the involuntary removal of people from their places of habitual residence in violation of international law. However, the relationship between arbitrary displacement and forced evictions remains largely undefined. Recognition of the significance of rights to homes and land is a development that has come to the fore since the 1998 adoption of the *Guiding Principles*, based on separate and parallel standard-setting processes.³ However, given that such rights are widely recognized, well-supported in international law, and directly significant to the prevention of internal displacement, failure to respect them (and, in

² See Chapter 15 in this volume on development-induced displacement.

³ The U.N. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context has been particularly active in this area. See <http://www2.ohchr.org/english/issues/housing/index.htm>.

particular, forced evictions) should be seen as equivalent to arbitrary displacement in the sense of the *Guiding Principles*.⁴

Involuntary removal of people from their homes and deprivation of their property rights are not always illegal under international law. Governments can (and often do) expropriate property, restrict its value through regulations, carry out evictions, and relocate communities. However, as long as governments' motivations and methods in undertaking such acts are not arbitrary or discriminatory, these acts will not be seen as violations of human rights. In the terminology of human rights jurisprudence, such acts unquestionably interfere with the rights of those affected, but do so in accordance with law and in order to further legitimate public aims. Although affected individuals and groups suffer unquestionable harm as a result of such interferences, safeguards such as fair procedures and adequate compensation can render this harm proportional to the broader aims such measures serve, preventing a violation from occurring.

Even in the case of large-scale planned expropriations or relocations affecting significant populations, respect for human rights standards can prevent interferences with the rights of those affected from rising to violations.⁵ Such

⁴ A first step in this direction has been taken in the form of the *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, ¶ 19, U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006).

⁵ See U.N. Commission on Human Rights, *Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006). The World Bank, the Organization for Economic Co-operation and Development, and the Asian Development Bank have also developed policies for the resettlement of development-affected populations meant to ensure that their livelihoods and standard of living are restored to at least their pre-displacement levels. See World Bank Operational Policy 4.12—Involuntary Resettlement (Jan. 2001), available at <http://wbIn0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/CA2D01A4D1BDF58085256B19008197F6>; Organization for Economic Co-operation and Development, *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects* (1991), available at [http://www.oilis.oecd.org/olis/1991doc.nsf/ENGDATCORPLOOK/NT000009A6/\\$FILE/DCE1443.PDF](http://www.oilis.oecd.org/olis/1991doc.nsf/ENGDATCORPLOOK/NT000009A6/$FILE/DCE1443.PDF); Asian Development Bank, *Policy on Involuntary Resettlement*

affirmative measures in scenarios ranging from development to planned evacuations are discussed in the chapter in this volume on development-induced displacement. The focus of this chapter, by contrast, is on the measures states are obliged to take with respect to IDPs who have suffered imminent or actual violation of their rights to property, housing, and land. Such violations generally take two forms, with the first being those that are planned and manifestly illegal, such as ethnic cleansing. In cases where states directly breach their international law obligations through engaging in such acts or culpably failing to prevent them or to mitigate foreseeable harm resulting from them, they are required to provide a remedy to those affected.

A second category of violations can arise where states are not directly responsible for events that have taken place on their territory, but fail to fulfill their primary responsibility for resolving any resulting displacement in a manner consistent with the victims' human rights. Unplanned events that give rise to interferences with housing and property rights are one example. For instance, even if the government is not directly responsible for natural disaster-related displacement, it is responsible for preventing or remedying resulting human rights violations. As set out in Guiding Principle 21, competent authorities remain responsible for protecting property left behind by IDPs against "destruction and arbitrary and illegal appropriation, occupation and use" regardless of the cause of displacement.

In traditional international law, the preferred remedy for wrongful acts is restitution, or the physical restoration of what the victim lost by virtue of the breach. Where restitution is not feasible, alternative remedies include financial or in-kind compensation for damages incurred. In the context of human rights, restitution may not be a relevant response to violations causing intangible harms such as torture or wrongful imprisonment, with regard to which compensation and rehabilitation are typically more practical means of providing a remedy to victims. However, violations of rights to property, homes, and lands provide an important exception to this state of affairs. It is often feasible (though rarely easy) to restore victims' possession of real property, housing, or land with the full rights they enjoyed before the violation

occurred. As a result, restitution has become a common component of peace negotiations to end conflict characterized by mass-displacement or ethnic cleansing. In several cases, post-displacement restitution programs have been implemented on a mass scale.

The attraction of restitution programs in the wake of arbitrary displacement is not limited to their utility as a remedy. In light of states' responsibility to end internal displacement, restitution and other remedies can contribute to the creation of durable solutions for IDPs. Restitution is often intuitively associated with the durable solution of return to homes of origin; in cases where forced evictions are used to carry out displacement, restitution is typically portrayed as a way of undoing its effects. However, restitution can also facilitate voluntary resettlement or local integration when beneficiaries choose to sell, exchange, or rent reinstated properties. In fact, the attraction of restitution should not necessarily be that it facilitates return but that it facilitates choice, giving IDPs a basis for either returning or resettling should they so choose. Alternate approaches to restitution, such as compensation, provide a legal remedy but involve the *a priori* exclusion of return as a durable solution.

LEGAL FRAMEWORK

The issue of remedies for housing, property, and land is an area where significant developments have occurred in international law and practice since the adoption of the *Guiding Principles* in 1998. As a result, where property restitution and the closely associated right to return to homes of origin were viewed as gray areas in international law in the course of drafting the *Guiding Principles*, they may broadly be viewed now as emerging rights.⁶

⁶ Simon Bagshaw, *Property Restitution for Internally Displaced Persons: Developments in the Normative Framework*, in HOUSING AND PROPERTY RESTITUTION RIGHTS FOR REFUGEES AND DISPLACED PERSONS 376 (Scott Leckie ed., 2003).

Relevant Guiding Principles

The most relevant of the *Guiding Principles* to remedies for violations of rights in property, housing, and land is that set out in Principle 29(2). However, the uncertain state of international law in this area at the time dictated that such remedies were framed as a matter of state responsibility rather than individual right:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

In justifying inclusion of this provision, the first edition of the *Guiding Principles on Internal Displacement: Annotations (Annotations)* noted a “certain trend in general human rights instruments, along with the progressive development of international law” to provide restitution of property to IDPs or compensation for its loss.⁷ Many of the instruments subsequently quoted related to the general right to a remedy or specific awards of remedies in judicial proceedings.⁸ As a result, it is reasonable to conclude that Principle 29(2) is properly viewed as setting out a remedy in the event of violations involving failure to respect the general right “to be protected against being arbitrarily displaced from [one’s] home or place of habitual residence” (Principle 6); the state obligation to “protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands” (Principle 9); and the prohibition on arbitrary destruction, appropriation, occupation or use of IDPs’ property and possessions (Principle 21).

⁷ Walter KÄLIN, *GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS* 72 (1st ed. 2000) [hereinafter *ANNOTATIONS*].

⁸ *Id.* at 72-3.

The obligation to provide remedies under Principle 29 (2) is closely related to the obligation to facilitate durable solutions and permit return of IDPs under Principle 28(1). Inclusion of the latter provision was quite explicitly based on the right to a remedy for arbitrary displacement. “As states have a duty not only to avoid but to redress violations of international human rights and humanitarian law, the party responsible for illegal displacement is obliged to allow and facilitate the return of displaced persons in all situations.”⁹ Restitution of property is clearly likely to be an indispensable element of any such “facilitation” of return, especially where such property has been adversely occupied.

Relevant International Law

Right to Remedy

Remedies for violations of housing and property rights derive from a long international law tradition according to which states are required to make good breaches of their international obligations. While such obligations were seen as adhering only to other states prior to World War II, the rise of international human rights law saw states take on obligations with respect to other states to provide effective remedies to those individuals within their jurisdiction whose human rights had been violated.

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ... such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”¹⁰

⁹ *Id.* at 70.

¹⁰ *Factory at Chorzow*, (Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 47 (Sept. 1928). See also the advisory opinion of the International Court of Justice (ICJ) on the

Article 8 of the Universal Declaration of Human Rights (UDHR) provides that an individual has “...the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹¹

Article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the

Israeli “security fence” in the Occupied Palestinian Territories. After finding that seizures of land and property related to construction of the fence violated international law, the court explicitly relied on the Permanent Court of International Justice’s conclusions in *Factory at Chorzow* in describing Israel’s obligation to make reparations: “Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, at 152 (July 9). *See also*, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc A/56/10, chapter II.

¹¹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67th plen. mtg., art. 25(1), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR].

competent authorities shall enforce such remedies when granted.¹²

Article 25 of the American Convention on Human Rights (ACHR),¹³ Article 26 of the African Charter on Human and Peoples' Rights (ACHPR),¹⁴ and Article 13 of the European Convention on Human Rights (ECHR)¹⁵ similarly provide for a person's right to a remedy before a competent authority.

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that:

[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICCPR]. See also Articles 9(5) and 14(6) (setting out a right to compensation for persons unlawfully arrested or detained, as well as persons convicted of a criminal offense on the basis of a miscarriage of justice).

¹³ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

¹⁴ The African Charter on Human and Peoples' Rights [ACHPR] is less explicit, though Article 26 calls for states-parties to "guarantee the independence of the Courts and ... allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter ACHPR].

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁶

Paragraph 18 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*¹⁷ provides that:

[i]n accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Principle 2.2 of the *Pinheiro Principles* provides that “States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice.”

¹⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), U.N. Doc. A/6316, 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]. The UN Committee on Economic, Social and Cultural Rights [CESCR] has repeatedly found that the obligation to realize economic and social rights “by all appropriate means” entails the domestic provision of “judicial or other effective remedies.” CESCR, General Comment 3, (Fifth Session, 1990), ¶ 5. *See also*, CESCR, General Comment 9 (Nineteenth Session, 1998).

¹⁷ U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005).

Right to Property

Under traditional international law, restitution came to the fore as a remedy for nationalizations of property owned by foreigners that did not meet minimum procedural standards.¹⁸ Under contemporary human rights law, an individual right to property has been asserted but tends to be accorded relatively weak and conditional protection, leaving states broad discretion to expropriate property and regulate its use.¹⁹

Article 17 of the UDHR provides that “(1) [e]veryone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.” Article 21 of the ACHR, Article 14 of the ACHPR, and Article 1 of the First Protocol to the ECHR also provide for the right to property. Articles 16 and 23 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) provide for women’s equal rights to own and dispose over property and Article 5(d)(v) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) provides for the right to own property without discrimination on the basis of race.

International humanitarian law sets out specific obligations on the parties to armed conflict not to subject civilian property and possessions to pillage; direct or indiscriminate attacks; use in order to shield military operations or objectives; or destruction or appropriation as reprisal or collective punishment.²⁰ Persons evacuated from their homes in the context of armed

¹⁸ PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 235 (7th ed. 1997).

¹⁹ Catarina Krause, *The Right to Property*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* (Asbjørn et al. eds., 1995).

²⁰ *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287, arts. 28, 33(2) and (3), 53 [hereinafter Fourth Geneva Convention]; First Additional Protocol to the Geneva Conventions, arts. 51(4), (7), 52; Second Additional Protocol to the Geneva Conventions, art. 4(2)(g); Rome Statute for the ICC, art. 8, ¶ 2(b)(xvi). ICRC,

conflict must be transferred back to their homes and allowed to recover their property as soon as hostilities have ceased.²¹

Right to Housing

Although remedies such as restitution are often intuitively associated with the right to property, rights to housing are typically less conditionally framed and more broadly accepted. As a result, housing rights have played a significant role in defining contemporary understandings of restitution in displacement settings. The concept of inherently illegal “forced evictions” derives from housing rights. Such evictions result from states’ failure to uphold legal security of tenure, a key element of the right to adequate housing. While housing rights are primarily economic and social in nature, they are reinforced by the right to privacy, a civil and political rights concept that includes the right to be free from interference in one’s home. Where restitution is justified as a remedy for violations of housing rights, the implication is that victims will be reinstated in their rights over the homes from which they were displaced, whether they owned them or not.

Article 12 of the UDHR provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.” Article 25 (1) provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.”

Article 17 of the ICCPR provides for the right to freedom from interference with the home. Article 11 of the ACHR and Article 8 of the ECHR also provide for this right.

Customary International Humanitarian Law, Volume I: Rules, Rules 52, 133; *see also* Rules 7, 8, 9, 11, 12.

²¹ Fourth Geneva Convention, art. 49(2); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, Rule 133 (Jean-Marie Henckaerts & Loise Doswald-Beck eds., 2005).

Article 11(1) of the ICESCR provides for the right to adequate housing. CERD Article 5(e)(iii) prohibits racial discrimination in the enjoyment of the right to housing. CEDAW Article 14(2)(h) prohibits discrimination against women in rural areas in the enjoyment of “adequate living conditions, particularly in relation to housing.” Article 27 of the Convention on the Rights of the Child (CRC) requires parties to take appropriate measures to ensure the right of every child to an adequate standard of living, including with regard to housing. Article 26 of the ACHR incorporates by reference the goal of “[a]dequate housing for all sectors of the population” in Article 31(k) of the 1970 Buenos Aires Protocol to the Charter of the Organization of American States. Article 31(1) of the European Social Charter (revised) provides for the right to adequate housing.

The UN Committee on Economic, Social and Cultural Rights’ (CESCR) General Comment 4: The Right to Adequate Housing (Art. 11(1) of the Covenant) (sixth session, 13 Dec. 1991) sets out seven criteria for whether housing is “adequate” in the sense of the ICESCR, including legal security of tenure against forced evictions.²² Paragraphs 1 and 4 of the UN Commission on Human Rights Resolution 1993/77 (1993) define forced evictions as a “gross violation of human rights” and call for “immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted.” UN CESCR General Comment 7: The Right to Adequate Housing (Art. 11(1) of the Covenant): Forced Evictions (sixteenth session, 20 May 1997), paragraph 3, provides that “[t]he term ‘forced evictions’ ... is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” Paragraph 19 in *Basic Principles and Guidelines on Development-Based Evictions and Displacement*,²³ provides that “States

²² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing* (art. 11(1) of the Covenant), Dec. 13, 1991, U.N. Doc. E/1992/23, available at <http://www.unhcr.org/refworld/docid/47a7079a1.html>.

²³ U.N. Doc. E/CN.4/2006/41 (Mar. 21, 2006).

must recognize that the prohibition of forced evictions includes arbitrary displacement that results in altering the ethnic, religious or racial composition of the affected population.”

Right to Land

Although a general right to land is not recognized as such, there are strong arguments that such a right may be implicitly situated within the right to an adequate standard of living, at least with regard to agriculturalists, pastoralists, and others with a special dependency on, or attachment to, their land. For such groups, access to sufficient land to be able to carry out their livelihoods may be essential to securing an adequate standard of living and even a fundamental condition for survival.²⁴ More broadly, the right to self-determination accords all “peoples” the right to dispose over their natural resources and not to be deprived of the means of their subsistence.²⁵ Rights to traditional lands are also explicitly granted to indigenous and tribal groups.²⁶

²⁴ Similar arguments have supported reading a right to adequate water into Article 11 of the CESCR. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, *The Right to Water*, ¶ 3 (2002). See also UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, ¶8(e) (1991): “Within many States parties increasing access to land by landless or impover-ished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to sub-stantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement[.]”

²⁵ CCPR, art. 1(2); CESCR, art. 1(2).

²⁶ See *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Sept. 5, 1989, art 13, 1 [hereinafter ILO Convention 169]; see also U.N. Declaration on the Rights of Indigenous People, Sept. 13, 2007, art. 10, U.N. Doc. A/RES/61/295.

Right to Return

The right to return in international human rights law has traditionally been paired with the right of individuals to leave their countries; as a result, it has pertained only to countries of origin not homes of origin.²⁷ Nevertheless, given the post-Cold War trends toward repatriation of refugees and internal displacement, return as a right to homes of origin is increasingly seen as a necessary category of durable solutions.²⁸ It is also inherent in the right to freedom of movement and choice of residence within a country.²⁹

OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES

While sporadic or isolated interferences with property rights can be dealt with through ordinary administrative or judicial dispute resolution mechanisms, a fundamental challenge arises where hundreds or thousands of claimants depend on quick determination of their claims as a first step in ending their displacement. Such so-called “mass claims” situations threaten to overwhelm normal domestic fact-finding and dispute-resolution procedures, particularly where the latter are primarily based on time-intensive judicial evaluation of individual cases. On the other hand, few countries have experience with setting up provisional determination processes that can expedite such processes without compromising their fairness and accuracy. As a result, one of the fundamental obstacles to providing a remedy for violations of property and possessory rights is the logistical challenge of addressing large numbers of claims in mass-displacement settings.

²⁷ See UDHR, art. 13(2) (guaranteeing the right of every person “to leave any country, including his own, and to return to his country”); ICCPR, art. 12(4) (guaranteeing that “[n]o one shall be arbitrarily deprived of the right to enter his own country”); ACHPR, art. 12(2); ACHR, art. 22(5); Fourth Protocol to the ECHR, art. 3(2).

²⁸ See Pinheiro Principles, *supra* note 1, § IV.

²⁹ See UDHR, art. 13 (1); ICCPR, art. 12 (1); ACHPR, art. 12 (1); ACHR, art. 22 (1); Fourth Protocol to the ECHR, art. 2(1).

In contemporary post-displacement practice, restitution continues to be preferred over alternate remedies because it uniquely facilitates choice between all three possible durable solutions (return, local integration where displaced, or resettlement elsewhere in the country or abroad). However, the fact that restitution opens the possibility of mass return also tends to make it politically controversial in the wake of conflicts where the parties have a vested interest in consolidating territorial gains achieved through ethnic cleansing. As a result, the greatest challenges in implementation of Guiding Principle 29(2) commonly involve overcoming obstacles to restitution of housing, land, or property (rather than obstacles to compensation or other remedies).

The primary obstacle to restitution is the fact that housing, land, and property are inherently valuable assets and therefore rarely remain unoccupied after being abandoned by their rightful owners or users. In fact, in some cases, the violent acquisition of homes and land is one of the central objectives of conflicts giving rise to displacement. In obstructing restitution, one of the simplest ways to proceed is to deny the existence of a prior, cognizable possessory right on the part of the claimant. Where IDPs' rights were relatively weak or not recognized under domestic law, those opposed to restitution (or, indeed, any remedy at all) may argue that they never existed in the first place. Such arguments are of particular concern where indigenous or tribal people have been displaced from their lands; such lands are often held in informal, collective forms of tenure (including access rights) that do not easily lend themselves to recognition and protection under conventional statutory law. For instance, the denial of traditional access rights to Kuchi pastoralists in post-Taliban Afghanistan has become a significant displacement issue and a political flashpoint.³⁰ Marginalized ethnic minorities and women or unaccompanied children are also disproportionately likely to suffer from non-recognition of rights to housing, land, or property that were weak or ambiguous, if defined at all, prior to their displacement.

³⁰ Internal Displacement Monitoring Centre [IDMC], Afghanistan, *Fighting in the South sets off New Wave of Displacement* (Dec. 22, 2006).

Where the rights at stake were unambiguous and well-recognized, a common obstructive tactic involves assertions that such rights were legitimately canceled under domestic law during the period of displacement. One of the most common variations on this tactic has been the abuse of “laws on abandonment.” Such laws typically take the form of statutes of limitation or prescription that condition rights to certain types of property on their active use or continual possession by the rights-holder. The policy behind such statutes is usually to ensure the rational distribution of scarce or valuable properties (whether arable land or urban apartments) by allocating them away from those who manifestly do not need them. In conflict situations, the same local authorities that have induced or condoned the displacement of ethnic minorities often go on to pass or apply abandonment laws, effectively appropriating the property of those displaced without taking into account the reasons that they fled.

Abandonment laws stand in contrast to eminent domain proceedings, such as those used in slum clearance programs, where the explicit intent of the authorities is to expropriate property and displacement can be a side-effect. While such expropriations involve affirmative government intervention of a nature that often renders any underlying discriminatory intent obvious, the application of abandonment laws in the wake of accomplished displacement allows government authorities to achieve the same ends while maintaining that they are simply upholding the law.³¹ However, discriminatory intent becomes increasingly apparent where, as in Sri Lanka, prescription might be tolled by such statutorily-defined circumstances as temporary insanity, but is not suspended under conditions of outright internal conflict and mass-displacement.³²

³¹ For instance, expropriation of the land of people belonging to the Iranian Arab minority in Khuzestan has raised questions of discrimination in light of available alternative land that could have been used without causing displacement. U.N. Commission on Human Rights, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, Addendum: Mission to the Islamic Republic of Iran, ¶¶ 79-80, U.N. Doc. E/CN.4/2006/41/Add.2 (Mar. 21, 2006).

³² UNHCR and Sri Lanka Human Rights Commission, *Land, Housing and Property, Proposals to the Parties for Comprehensively Addressing Land, Housing and*

Another common obstacle to property restitution, and one that often accompanies the use of abandonment laws to terminate the rights of those displaced, is the allocation of abandoned properties to be used or occupied by third parties. In some cases, such “secondary occupants” are accorded ostensibly *de jure* legal rights to abandoned properties. However, whether such competing rights are asserted or not, the mere physical presence of secondary occupants in claimed property presents a *de facto* obstacle to restitution and return. Even in the absence of official reallocation of properties, secondary occupants may take over abandoned properties on their own initiative or even coerce the owners or residents to sign their rights over in ostensibly voluntary private contracts, which are often relied on later in asserting that those displaced bargained away their restitution claims.

In cases where the right to restitution is conceded in principle, implementation may pose huge challenges. Claims procedures are often inherently complex and give rise to plentiful opportunities for legalistic obstruction and delay. Bureaucratic resistance can come at the beginning of the process, with imposition of fees and excessive documentation requirements and may continue with attempts to narrowly limit claims or slow processing. However, the most challenging aspect of restitution programs is typically enforcement, as the need to give effect to displaced persons claims often implies the requirement that secondary occupants who refuse to vacate face the credible threat of forcible eviction from claimed properties. Evictions can be a trigger for destabilizing protests, which, whether spontaneous or manipulated, often become an excuse for inaction by reluctant local authorities.

While restitution programs face formidable legal and practical challenges, however, the alternatives are no less problematic. The most fundamental problem with compensation (whether financial compensation or “in kind” via the provision of alternate land or property) is that it forecloses the option of return, abridging the right of displaced persons to free choice among durable solutions. Cash compensation, in particular, is often seen as a means of thwarting return movements by simply buying them out and studies indicate that one-time lump sum compensation payments are not particularly effective

ways of promoting lasting durable solutions for victims of displacement.³³ As a result, cash compensation alone is generally not even seen as a viable means of promoting sustainable resettlement.

Compensation may...be seen as a means of legitimizing ethnic cleansing and other human rights violations. Moreover, the payment of cash compensation may only serve to compound the situation of those displaced. Throwing money at displaced persons whose livelihoods are dependent on access to land, such as farmers and pastoralists will not necessarily solve their problems in the same way as would allocation of equivalent land elsewhere in the region or country.³⁴

While restitution may require mobilization of considerable political capital in order to see through unpopular evictions of secondary occupants, compensation programs compete directly with other post-crisis budgetary priorities, imposing a significant and measurable cost on society. As a result, compensation obligations are often honored in the breach or subject to delays.

However, even “in kind” compensation does not provide a panacea. In many post-conflict settings, available land is in no less demand than budgetary funds, complicating resettlement efforts. Pursuant to the 1991 peace settlement in Cambodia, for instance, alternative land was offered (on application, rather than as a matter of right) to ease the repatriation of some 360,000 refugees who were not accorded any legal remedy for the previous loss of their homes and lands.³⁵ However, this effort was largely unsuccessful due to the fact that

³³ International Crisis Group [ICG], *Blood and Soil: Land, Politics and Conflict Prevention in Zimbabwe and South Africa* 163-164 (International Crisis Group Press, 2004).

³⁴ Bagshaw, *supra* note 7, at 381.

³⁵ See Rhodri C. Williams, *Stability, Justice and Rights in the Wake of the Cold War: The Housing, Land and Property Rights Legacy of the UN Transitional Authority in Cambodia*, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED

even ostensibly available land was in fact subject to claims by powerful speculators. Donor funded allocation of land to returning indigenous refugees in early 1990s Guatemala was seen as initially more successful, but reports indicate that many beneficiaries effectively became displaced again, either because of the poor quality of the land they received or because of lack of infrastructural support promised by the government.³⁶

REGULATORY FRAMEWORK

Attempts to deal systematically with violations involving housing, land, and property are complicated by the fact that a great deal of variety exists both between states and within states regarding how property is recognized, protected, and regulated. Moreover, there has been a gradual but important change over time related to the nature of this problem. Specifically, while early attempts to respond to the post-Cold War re-emergence of ethnic conflict were complicated primarily by disparities between capitalist and socialist property regimes, contemporary displacement is increasingly concentrated in developing countries and even failed states, presenting an urgent need to take into account customary and informal property systems.

Until the end of the Cold War, formal property law regimes in developed countries could roughly be divided into capitalist and socialist systems. In practice, most socialist countries tolerated some degree of private ownership, and blanket nationalization of property remained the preserve of only the most radical communist regimes such as the Khmer Rouge in Cambodia. However, socialist property law did proceed from the assumption of superiority of social ownership, according to which the state freely expropriated and held property on behalf of the people and made it available to individuals and groups for socially useful purposes.³⁷

NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM (S. Leckie ed., 2008).

³⁶ See Yodit Fitigu, *Guatemalan Refugees Return to a Hard Life*, REFUGEES INT'L REPORT (Jan. 5, 2002).

³⁷ Andrzej K. Kosminski, *Restitution of Private Property: Re-Privatization in Central and Eastern Europe*, 30(1) *Communist and Post-Communist Studies* (1997).

In much of Eastern Europe and the Soviet Union, socialist property relations were characterized by three Cold War trends relevant to contemporary restitution. First, many communist governments engaged in extensive nationalization of categories of private property such as agricultural land, apartment buildings, and industrial complexes in the decades following World War II, in many cases perpetuating property confiscations previously imposed by the Nazis.³⁸ By the 1960s, many socialist countries began mass-producing new housing in an attempt to support planned industrialization of urban areas and socialist new towns. Finally, as these efforts failed to keep up with demand, many regimes allowed public bodies such as socially owned enterprises to construct apartment buildings on state-owned land and allocate apartments to their members or employees. With the general collapse of communist regimes in the 1990s, socialist property relations were abandoned. However, in the context of remedies for property violations, they left several important legacies.

First, the manner in which social property was privatized in the early 1990s created an important precedent for later post-conflict restitution processes. Many states chose to convert socially-owned property through a combination of modalities, including sale by open tender, more restricted purchase by voucher, and restitution of older properties to their pre-nationalization owners. Restitution, which also came to be known in this context as “re-privatization,” was seen as reflecting an inter-generational commitment to upholding property rights unjustly curtailed up to four decades previously. However, in contrast to contemporary ethnic cleansing, post-World War II nationalizations were not necessarily illegal at the time they were undertaken. Re-privatization was therefore primarily a matter of political discretion rather than international obligation. Moreover, many re-privatization programs were framed in terms that excluded large classes of potential beneficiaries, raising an inference that

³⁸ See U.S. Department of State, Bureau of European and Eurasian Affairs, *Property Restitution in Central and Eastern Europe* (Oct. 3, 2007), available at <http://www.state.gov/p/eur/rls/or/93062.htm>.

they were based more on ethnic or political consolidation than genuine transitional justice concerns.³⁹

Whatever the merits of national re-privatization programs in the former Soviet bloc, the conditions under which they flourished also supported less problematic efforts to redress intergenerational harms that generated important mass-claims processing techniques. The easing of Cold War tensions and the opening of archives throughout Eastern Europe created an opportunity for victims of crimes by the Nazis and allied regimes during World War II to seek redress.⁴⁰ The compensation programs eventually crafted for victims of German forced labor programs and dispossessed Swiss bank deposit holders built on the experiences of other contemporary bodies (such as the UN Compensation Commission formed after the first Gulf War) in crafting procedures for fairly and expeditiously processing tens of thousands of claims.

A second and more problematic legacy of socialist property relations was the ambiguous nature of the “occupancy rights” that residents held to “socially owned” apartments commonly built by the state or public bodies during the communist period. Such occupancy rights were typically protected by law and permanent in duration, provided that the legal beneficiaries continued to use the apartment for their own residential needs. In the numerous ethnic conflicts that flared up in Europe during the transition from communism, those displaced often saw their rights cancelled on the cynical justification that they had, by virtue of fleeing, failed to meet this use requirement without justified grounds. This form of confiscation of the homes and possessions of displaced persons was consolidated in some countries by the reallocation of “abandoned” apartments to others who were allowed to purchase them in the context of general privatization programs. Although this process was arrested in some countries, such as Bosnia and Kosovo, tens of thousands of displaced victims of apartment confiscations from other post-communist countries such

³⁹ ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTIONS AND NEGOTIATION HISTORICAL INJUSTICES* 118 (2000).

⁴⁰ Jonathan Steinberg, *Reflections on Intergenerational Justice*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE* (Alice H. Henkin ed., 2002).

as Croatia, Georgia, and Azerbaijan have been denied any legal remedy to date.

While conflict in many post-communist countries has been addressed or at least stabilized into a “frozen conflict” footing, conflict and disaster-related displacement continues to occur on a mass scale in much of the developing world, raising the need to understand and recognize less formalized property systems in order to provide aggrieved groups and individuals with redress. In less developed contexts characterized by small populations or plentiful land, property is typically held in common by the groups that use it. Such “customary” tenure forms are the starting point from which many of the world’s modern codified property regimes evolved. In accordance with such systems, individuals’ relations to specific plots of land tend to be based on their ongoing use of them, whether through clearance and sedentary cultivation or regular access. In the context of such systems, individuals typically have no right to make transactions regarding the land they use without the consent of the broader community.

According to a well-known economic formulation, transitions from customary tenure to formal individualized systems of land ownership tend to occur “when the benefits from doing so exceed the costs,” in the context of increased population growth and land scarcity.⁴¹ In theory, as development occurs, state recognition and protection of individual rights to property encourages owners to make long-term investments in land, increasing its productivity in ways that benefit society as a whole. In countries where such transitions occurred organically, individualized property rights have increased tenure security and optimized land use. In colonial settings, however, the arbitrary imposition of individualized property rights—including the right to exclude others from accessing property and the right to sell property without consulting the broader community—often resulted in continuing legacies of inequality, dispossession, and conflict.⁴²

⁴¹ Klaus Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank Policy Research Report 9 (2003).

⁴² *Id.* at 11-15.

As a result, while much of the developed world has completed the transition to formal and individualized property rights and by and large benefit from their existence, many developing countries have only partially adopted such systems, with the resulting pluralistic land administration framework fostering ongoing legal uncertainty and, in some cases, conflict. In post-colonial settings, formal property rights tend to extend only to urban areas and agricultural land under commercial cultivation, while much of the countryside typically remains held in informal and often unrecognized collective tenure forms. This gives rise to a number of problems in providing both retrospective remedies and prospective tenure security where rights in such formally unrecognized or unregulated possessory rights have been violated. In countries with fully statutory property administration systems as well, failure to provide the possibility of legal recognition or protection for informal rights to housing and land can worsen the situation of vulnerable minorities, such as Roma in informal settlements in many European countries.

In summary, much of the existing contemporary practice in redressing violations of property and possessory rights is related to the end of the Cold War, privatization of socialist property frameworks, intergenerational redress for World War II crimes, and the resurgence of ethnic conflict in Eastern Europe and the Caucasus. Post-Cold War efforts to provide reparations and redress have led to notable successes ranging from the compensation program for World War II forced labor victims to accomplished property restitution programs in Bosnia and Kosovo. However, such programs tend by their nature to presume the existence of sophisticated and unitary regulatory frameworks for property relations and high levels of domestic capacity to implement them. They have also tended to be expensive and resource intensive. The challenge for the future in redressing violations of property rights is therefore likely to revolve around what lessons such models can realistically provide in development contexts with plural legal regimes, low domestic capacity, and fewer resources.

SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

Prior to displacement

Many measures can be taken to preemptively safeguard rights in property and possessions, both as a means of preventing property disputes from giving rise to conflict and displacement and, should displacement occur, as a way to clearly demarcate such rights, facilitating their eventual restoration. While a great deal has been written on this subject, most prescriptions for avoiding conflict over housing, land, and property involve general measures necessary to ensure respect for human rights and facilitate equitable access to housing and land for all parts of the population.⁴³ Given that such measures, whether substantive, procedural, or institutional in nature, do not involve specific responses to displacement, they fall outside the general scope of this study.

Provisional Suspension of Transfers of Property in High-Risk Areas

A very specific element of regulation for preventing displacement is the imposition of provisional bans on transfer of property rights in areas under threat of ethnic cleansing or conflict. Such measures may be of assistance in protecting legal rights to, if not possession of, homes and properties. For instance, in Colombia, attempts to place temporary liens on property transactions in areas threatened with displacement have been attempted within the framework of a broader set of early warning systems adopted by the authorities.⁴⁴ This system begins with Colombia's 1997 law on internal displacement, which stipulates that the Colombian authorities responsible for agrarian reform "shall maintain a registry of the rural properties abandoned by

⁴³ See, e.g., Nicolas Pons-Vignon & Henri-Bernard Solignac Lecomte, *Land, Violent Conflict and Development*, (OECD Development Centre, Working Paper No. 23, 2004); USAID Office of Conflict Management and Mitigation, *Land and Conflict: A Toolkit for Intervention* (2004).

⁴⁴ Human Rights Council, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Mission to Colombia, ¶¶ 42-43, U.N. Doc. A/HRC/4/38/Add.3 (Jan. 24, 2007).

those displaced by violence and it shall inform the competent authorities in order that they prevent any alienation or transfer of property titles of these assets when such action is carried out against the will of the title holders of the respective rights.”⁴⁵ This general rule was more closely regulated in a 2001 decree that required local committees dealing with internal displacement to compile comprehensive reports on the existing legal tenure over properties in areas deemed at risk of violence and displacement, and pass these reports on to authorities competent to prevent any transfers of title as well as to deny title to persons claiming to have acquired such land through possession.⁴⁶ Although these measures were later given the force of law through inclusion in an amended statute on agrarian reform, they appear not to have been consistently implemented in practice, with one report finding that they may have only been applied with regard to about 5 percent of the officially registered displaced population of Colombia.⁴⁷

During displacement

Prevention of Destruction and Arbitrary Occupation of Abandoned Property

As a general matter, states should prevent destruction of abandoned property in accordance with international humanitarian law and ensure that it is not destroyed, appropriated, or altered by other persons. In particular, all security forces remaining in the affected area should be instructed to take all reasonable steps to maintain civil order; protect abandoned properties from destruction, looting, unlawful occupation, or appropriation; and to refrain from damaging or arbitrarily appropriating such property themselves. Any use or

⁴⁵ Law 387 of 1997 by means of which measures are adopted for the prevention of forced displacement, and for the assistance, protection, socioeconomic consolidation, and stabilization of persons internally displaced by violence in the Republic of Colombia, *Diario Oficial* No. 43,091 of July 24, 1997, art. 19(1).

⁴⁶ Decreto Numero 2007 de 2001 (Sept. 24, 2001), art. 1.

⁴⁷ Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, VI Informe a la Corte Constitucional: La restitución como parte de la reparación integral de las víctimas del desplazamiento en Colombia—Diagnóstico y propuesta de líneas de acción, 27 (June 2008).

requisitioning of private property by the security forces should be based on legal regulations requiring the rights-holders to such properties to be informed of the approximate duration of time that they would be unable to access their property and paid just compensation.

Regulation of Temporary Humanitarian Re-allocation of Abandoned Property

In cases in which it is necessary to use abandoned property to meet the urgent humanitarian needs of other displaced populations, such use should be based on written regulations set out in a law or decree. In order to safeguard the rights of displaced owners, residents and users, these regulations should specify the following:

- Allocations are explicitly temporary in nature, lasting no longer than necessary under the circumstances and with specific provisions regarding the procedures for the pre-displacement occupants of the abandoned properties to be reinstated with their full legal rights to the property.
- Allocations must be in the public interest. In the case of displacement, this means that allocation of abandoned homes to displaced persons must be based on strict criteria of humanitarian need, excluding applicants who have other means to house themselves and their families. Abandoned homes should not be allocated to public officials charged with upholding the law, such as politicians, civil servants, military officials, judges, or police officers.
- Allocations must be necessary. In the case of displacement, this implies that (1) such allocations may only proceed based on specific findings that no other means of sheltering displaced persons exist; and (2) that such allocations must explicitly be temporary and should immediately be terminated when the humanitarian need no longer exists (e.g., when beneficiaries can repossess their own property or when other more appropriate forms of temporary shelter become available).
- Looting of personal possessions or damage to or alteration of temporarily allocated abandoned properties should be expressly

forbidden and sanctioned, with the responsible authorities bearing ultimate responsibility for resulting damage.

In Bosnia, most wartime occupation of abandoned property was based on local regulations and decrees allowing allocation for use. Although such allocations were usually formally temporary, the lack of effective procedures allowing return of such properties to their rightful owners rendered the resulting occupations potentially permanent. In Kosovo, the international community has administered abandoned property at the request of claimants, according to detailed regulations. In the case of Bosnia, such arrangements were deemed to have been a proportionate response to the wartime displacement crisis, but subject to the requirement that they not be perpetuated beyond the crisis period in a manner that would interfere with the rights of the displaced.

The Constitutional Court considers that [a wartime law temporarily reallocating abandoned homes] initially served a legitimate aim The relevant aim was the protection of the rights of others, i.e. the rights of persons who were forced to leave their homes because of the war. Indeed, the war in Bosnia ... caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities...at the time ... enacted a law which temporarily solved the housing problems caused by the great number of [IDPs].

However in the present case, the appellant has still not been able to realize his rights. Therefore, the ‘interference’, which initially could have been justified and in compliance with the principle of ‘necessity’, can no longer, five years after the end of the war, represent a necessary “interference in a democratic society” with the appellant’s right to return to his home.⁴⁸

⁴⁸ Constitutional Court of Bosnia, Case No. U-14-00, ¶¶ 24, 25.

Inventory of Condition and Contents of Abandoned Property

Where abandoned property is under the protection of local authorities, and particularly where it is to be temporarily reallocated, inventories should be taken of significant personal possessions left in each property as well as the general state of the property and the fixtures therein at the time of allocation. Such inventories should be signed by those temporarily allocated the property for use and the latter should be informed of their responsibility for the contents and condition of the property as well as any sanctions for theft or damage to the property. In Bosnia, wartime regulations on allocation of abandoned property often required inventories to be taken, but this was rarely done in practice.

Safeguarding Registration Information and Documentation

Records establishing legal rights in property should not be altered or tampered with in cases of displacement and abandonment of property. Such records should be secured and safeguarded from theft or destruction in all displacement situations.

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 recognizing the authenticity of said copies.⁴⁹

⁴⁹ Pinheiro Principles, *supra* note 1, Principle 15.4.

Creation or Facilitation of a Survey of Property and Possessions Subject to Claims

As set out above, inventories of abandoned properties should be a routine part of any temporary allocation regime or post-disaster planning process. Where such a survey is organized by victims of displacement, it should be facilitated. The authorities in Georgia are currently carrying out a survey of property subject to claims by IDPs from the breakaway regions of Abkhazia and South Ossetia.⁵⁰ Although this survey is somewhat belated in relation to the early 1990s secessionist conflicts that gave rise to displacement there and comes during a time of high political tension, it does seek to address an issue that will have to be resolved in order for any resolution of the conflict to be made in a manner that respects the rights of the displaced. Other surveys of claimed properties in frozen or unresolved conflicts include those made by displaced Palestinians, displaced Muslims in Sri Lanka, and Bhutanese refugees in Nepal.⁵¹ According to Principle 15.6 of the *Pinheiro Principles*:

[s]tates 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

⁵⁰ Presidential Decree No. 124 of Feb. 14, 2006, on Measures to be Taken with Respect to Recording of Rights to Immovable Property existing in the Autonomous Republic of Abkhazia and the Tskhinvali Region; *see also* Presidential Decree No. 255 of Apr. 8, 2006, on Approval of the Procedure for Preliminary Registration of Immovable Property Existing in the Autonomous Republic of Abkhazia and the Tskhinvali Region (Georgia).

⁵¹ *See* Centre On Housing Rights and Evictions [COHRE], *Hoping to Return Home: Housing, Land and Property Restitution Rights for Bhutanese Refugees and Displaced Persons*, COHRE Country Report 38-39 (Mar. 2008).

gathered from refugees and displaced persons, including at the time of flight.

Suspension of Prescription and Use Requirements

In cases of conflict, natural disaster, or other serious crises causing displacement, requirements related to the use or possession of property in affected areas should be waived in favor of those displaced in order to avoid any deprivation of their rights in the property as a result of their involuntary absence. Such requirements should not be re-imposed until such time as it is manifestly possible for those displaced to safely resume possession and use of the properties in question. In Colombia, the law on internal displacement states that “disruption of possession or abandonment of real or personal property due to a situation of violence that compels forced displacement of the possessor shall not interrupt the term of prescription in his favor.”⁵²

In the Context of Durable Solutions

Establishment of a Right to Restitution and Other Remedies

As the conditions that caused displacement recede, all competent authorities should undertake concrete commitments to provide appropriate remedies for the loss of rights, value, use, and/or access to housing, land, and property. Where displacement resulted from conflict, it is particularly important that any ceasefire or peace agreement include provisions explicitly entitling those displaced to redress for the loss of their homes and lands. In the wake of natural disasters, a commitment should be made to uphold rights and facilitate return to housing, land, and property wherever possible and to provide adequate compensation and relocation assistance in all other cases.

In terms of peace treaties, the strong individual rights to return and property restitution set out in Annex 7 of the 1995 Dayton Peace Accords (DPA) that ended the conflict in Bosnia stand out as a watershed. “All refugees and displaced persons have the right freely to return to their homes of origin. They

⁵² Law 387 of 1997, art. 27. *See also* Decreto 2007 de 2001, art. 7.

shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”⁵³

Prior to the DPA, remedies for property violations tended to be framed in ambiguous terms where they were included at all. For instance, a series of early 1990s agreements that ended a long-running conflict in Guatemala set out far more ambiguous rights (essentially requiring the government to do little more than request secondary occupants of confiscated land to vacate it) and included some guarantees that applied only to refugees, prejudicing the rights of IDPs.⁵⁴

The competent authorities in displacement settings should also explicitly recommit themselves to pre-existing domestic legal guarantees of housing and property rights, particularly where they protect marginalized groups. For instance, a 2005 Colombian law granting reduced criminal accountability to right-wing paramilitary groups in exchange for their demobilization has been criticized on numerous fronts, but not least because of its failure to create a clearly workable mechanism for return of the huge tracts of land confiscated by such groups in apparent violation of numerous legal and constitutional guarantees.⁵⁵

Revocation of Temporary Allocation Regimes and Cancellation of their Effects

Where the abandoned property of displaced persons has been subject to a temporary humanitarian allocation regime, beneficiaries should be required to move into other types of humanitarian shelter as soon as circumstances allow, allowing prior owners, residents, and users to resume the exercise of their pre-

⁵³ General Framework Agreement for Peace in Bosnia Herzegovina, 35 I.L.M. 75 (1995), Annex 7, ch. 1, art. I(1).

⁵⁴ Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, HARV. HUM. RTS. J. 9 (1996).

⁵⁵ Centre On Housing Rights and Evictions [COHRE], *Defending the Housing Rights of Displaced Persons in Colombia*, COHRE Fact Finding Mission Report (2005).

displacement rights over such properties. Where abandonment or prescription laws (see obstacles section, above) have been used to curtail the pre-displacement rights of property owners and users, the first step in providing a remedy is the revocation of such decisions in all cases during the period of involuntary displacement and the prospective tolling of any prescription provisions until the conditions have been created for safe return. This approach was taken in Bosnia where wartime abandonment laws had been used to temporarily allocate abandoned properties and threatened to permanently cancel occupancy rights to apartments due to displaced residents' ostensibly unjustified failure to use them. Restitution laws passed in Bosnia in 1998 began by canceling all wartime abandonment laws, setting the stage for restitution to reverse their effects.⁵⁶

Principle 19 of the *Pinheiro Principles* addresses the abuse of abandonment or prescription laws by asserting that states should not prejudice restitution processes through the application of "arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations." Principle 19 also asserts that states should provide remedies for those harmed by prior application of such laws.

Review of Private Property Transactions and Cancellation for Duress

In addition to situations such as the above where *de jure* or *de facto* government authorities have taken steps to dispossess displaced persons, the *Pinheiro Principles* also address private transactions of property that have taken place under duress in situations of generalized violence or ethnic persecution. In situations of mass displacement, and particularly where individuals were displaced based on their ethnic or religious identity, it may be possible to presume the existence of a general atmosphere of coercion during the time and in the places where conflict and forced evictions occurred. Such a

⁵⁶ Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37(3) N.Y.U. J. INT'L L. & POL. 486 (2006).

presumption can allow for the following:

- All cases of private transfers of homes and property that happened in the relevant time and place to be subject to systematic reexamination, with the possibility of voiding contracts found to be the result of coercion;
- Shifting of the burden to persons seeking to uphold contracts on sale or exchange undertaken in the relevant time and place to prove no coercion existed (particularly where the party that claims coercion received inadequate compensation for their property); and
- In cases where there is clear evidence of ethnic or sectarian cleansing, all contracts on sale or exchange undertaken in the relevant time or place might simply be voided *ex lege*.

During the war in Bosnia, the UN Security Council condemned coerced property exchanges, affirming its “endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so.”⁵⁷ After the conflict, the Bosnian Constitutional Court recognized that private wartime sales and exchanges of property were presumptively invalid due to the pervasive atmosphere of ethnic intimidation that prevailed at the time.

In the present case, the Constitutional Court finds it clearly established that the appellant concluded the exchange contract under the influence of her vulnerable position as a member of an ethnic minority at a time when a policy of ethnic cleansing was being pursued in large parts of Bosnia and Herzegovina. It is also clear that the contract was not in conformity with what would have been her wishes under normal conditions, and it must be assumed that [the party defending the contract] was, at least in a general way, well

⁵⁷ UN Security Council, Resolution 820 (1993), ¶ 7.

aware of the reasons which made her willing to accept the contract.⁵⁸

This determination was reflected in legal provisions shifting the burden to those seeking to uphold wartime contracts as a defense to restitution claims to prove that the transaction had been voluntary.

In case of a dispute as to the validity of the contract on exchange, the competent authority shall suspend proceedings and shall refer the parties to the competent court according to the provision of the Law on Administrative Procedures...regulating preliminary issues, in order to rule on the allegation. Notwithstanding the provisions of the Law on Civil Procedures...the burden of proof shall lie upon the party claiming to have acquired rights to the apartment through the contract on exchange to establish that the transaction was conducted voluntarily and in accordance with the law.⁵⁹

Similar practices have occurred in Colombia, where forced transfers of land and property have taken the guise of ostensibly voluntary contracts on sale, where the land has been deeded under duress to loyal but relatively unknown appointees (*testaferrato*) of notorious warlords.⁶⁰

The *Pinheiro Principles* set out a rule, well-supported in international practice, that states “shall not recognize 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

⁵⁸ Constitutional Court of Bosnia, Case No. U-15-99.

⁵⁹ Federation of Bosnia and Herzegovina, Law on Cessation of the Law on Abandoned Apartments, consolidated text as most recently amended in May 2003, art. 2a.

⁶⁰ Los señores de las tierras, *Semana* (May 28, 2004).

out contrary to international human rights standards.”⁶¹ In practice, states should repudiate such transactions at the first opportunity, ensuring that remedial programs extend to the victims of private land grabs as well as official reallocations of property.

Establishment of Procedures for Receipt, Processing, and Adjudication of Claims

Decisions regarding what type of system to entrust with handling claims for redress for property violations have important institutional implications that will be discussed in the corresponding section below. However, such decisions are also inherently substantive with important procedural implications, as they tend to revolve around the question of whether to affirm the application of existing laws to such claims or to develop new, special legislation—and procedures—for resolving them.

The most straightforward approach to resolving property-related claims is to simply affirm the competence of existing fact-finding and dispute-resolution bodies, typically courts, traditional councils, or competent administrative bodies to apply existing substantive and procedural rules in deciding such claims. However, displacement scenarios are often characterized by the temporary accretion of a large number of claims based on the same or similar events and circumstances. As a result, many of the most successful redress mechanisms have foreseen the creation of ad hoc bodies, or commissions, that apply provisional rules, constituting a temporary *lex specialis* exception to the generally applicable substantive and procedural laws of the country in question.

In post-conflict settings, in particular, the creation of ad hoc remedy mechanisms may be necessary due to broader breakdowns of the rule of law.⁶² In many cases, domestic adjudication systems are either non-functional or

⁶¹ Pinheiro Final Report, UN Restitution Principles, Principle 15.8.

⁶² Ingunn Sofie Aursnes & Conor Foley, *Property Restitution in Practice: The Norwegian Refugee Council's Experience* 27 (Apr. 2005).

perceived as unacceptably partial or compromised in the wake of conflict. As a result, Principle 12.5 of the *Pinheiro Principles* recommends that:

[w]here 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.

From a procedural viewpoint, one of the most important decisions in mass claims settings is whether to institute provisional programs that respond to the scale and temporary nature of such caseloads. In situations such as ethnic cleansing, where dispossession and displacement may temporarily constitute the norm rather than the exception, forcing claimants to individually prove the merits of their case in lengthy judicial proceedings may be both unnecessary and unfair. Where the facts of generalized dispossession are well-known, there is little justification for exposing claimants to the high evidentiary burdens, lengthy appeals processes, expenses, and uncertainty typically accompanying ordinary judicial redress. These considerations argue in favor of provisional, administrative remedies in the case of mass-claims settings involving violations of property-related rights.

The development of such rules—which can be applied either by existing institutions or by ad hoc “property commissions”—should be undertaken on the understanding that such provisions complement, rather than contradict or entirely bypass, the broader domestic legal framework. Where such rules have not been based on—or at least made compatible with—pre-existing rules, the effectiveness of the remedies provided can suffer.

For example, the regulations passed by the Coalition Provisional Authority (CPA) in Iraq authorizing the creation of an Iraqi Property Claims

Commission (IPCC) to restore property confiscated under the Baathist regime has been criticized for setting out substantive rules for restitution that bear little relationship to longstanding property rules in the Iraqi Civil Code.⁶³ As a result, the IPCC statute failed to provide explicit guidance on a number of significant issues and was initially perceived as competing with, rather than complementing, Iraq's struggling judicial system.⁶⁴ By contrast, the special laws providing for post-war property restitution in Bosnia were based on domestic legal constructs and explicitly invited the application of non-contradictory provisions from the laws on general administrative procedure, providing an important mechanism for addressing inadvertent gaps in the law. "The procedure for the return of apartments to the possession of the occupancy right holders determined by this Law shall be carried out in accordance with the Law on Administrative Procedures, unless otherwise stipulated by this Law."⁶⁵

A related challenge in setting up provisional property commission systems involves the need to ensure that compatibility with general principles of domestic law does not lead to the exclusion of classes of victims whose rights to property and possessions are cognizable under international law but were not recognized or regulated by domestic law prior to their displacement. This point applies with particular force in cases of unrecognized customary tenure forms. However, women or marginalized minorities are also liable to find their pre-displacement *de facto* rights ignored in remedial programs because they were not accorded *de jure* recognition. In practice, remedial programs for property-related violations have taken a multitude of forms, reflecting local circumstances and political conditions.

⁶³ Dan Stigall, *Courts, Confidence and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission* [IPCC], ARMY L. 33 (Mar. 2005).

⁶⁴ *Id.* at 30-41.

⁶⁵ Law on the Cessation of the Application of the Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, art. 18.

In the Czech Republic, special laws were passed in the early 1990s providing rules for restitution and compensation in favor of those whose property had been nationalized by the prior communist regime. However, no dedicated institution was created to oversee the process and the bulk of claims were ultimately resolved in ordinary courts.⁶⁶

In Turkey, where around one million people fled fighting in the early 1990s, so few abandoned properties were thought to have been occupied that the government advised returnees to seek to eject any secondary occupants through ordinary civil proceedings. However, because virtually all IDPs were deemed entitled to compensation for the time they had been denied access to their homes and lands, a special law was passed in 2004 providing for the creation of ad hoc provincial damage assessment committees to take and decide claims.

In South Africa, a 1994 law provided for remedies for tens of thousands of non-whites whose land had been confiscated during the Apartheid era. The law created a special Land Claims Court, served by an administrative commission, to rule on claims. However, amendments five years later sped the process up by shifting the resolution of the bulk of claims from the Court to the central and regional Land Claims Commissions.

In Bosnia, the Dayton Peace Accords (DPA) created a quasi-international body, the Commission for Real Property Claims (CRPC), to take and resolve restitution and compensation claims. However, the CRPC fit poorly into the domestic legislative framework and did not have the local investigative capacity necessary to address the over 200,000 claims it received. As a result, it was ultimately relegated to a secondary role in a decentralized restitution process in which ad hoc local administrative bodies applied special domestic restitution laws under the scrutiny of a large international field monitoring presence.

⁶⁶ Rhodri C. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, sec. II. A (*International Center for Transitional Justice, Occasional Paper*, 2007).

In Kosovo, exclusive jurisdiction for property claims was exercised by ad hoc, internationally-run bodies, the Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC). The HPD and HPCC applied rules for restitution and compensation set out in binding regulations by the UN Special Representative of the Secretary General (SRSG) in Kosovo.

In Afghanistan, no special laws or bodies were set up to assist the hundreds of thousands of IDPs and repatriating refugees with restoration of their property after the fall of the Taliban regime in 2001. As a result, remedies for property and land violations have been sought, with mixed results, through traditional dispute resolution bodies in informal proceedings in which customary norms have been given at least as much weight as statutory law. Current efforts to set up a Land Commission are likely to face significant challenges due to the weak role of the central government in Afghanistan's provinces.

Determination of the Geographic and Temporal Scope of Provisional Remedial Programs

Provisional remedial programs are typically developed in response to particular sets of events that caused displacement and dispossession, such as natural disasters or armed conflicts. In such cases, it is necessary to define the specific dates and locations within which alleged property violations must have taken place in order to be cognizable. Such clear jurisdictional rules can help prevent provisional mechanisms from being swamped with unrelated claims. In the case of natural disasters, such definition should typically be fairly straightforward. However, where displacement is related to conflict, there may be reluctance on the part of some parties to admit to having engaged in activities that led to displacement and temporal and/or geographic demarcation of the conflict may take on political sensitivities as a result.

The Turkish compensation law explicitly redresses property and other violations that took place in the southeastern provinces of the country, where conflict in the early 1990s led to large-scale displacement. While this geographic limitation is relatively uncontroversial, some observers have asserted that the temporal cut off date for claims under the same law is set too formalistically, excluding the claims of a significant number of persons

displaced after the conflict had begun but before a state of emergency was declared.⁶⁷

By contrast, the property restitution laws in Bosnia were set to cover the entire period during which displacement and dispossession could conceivably have taken place. The period covered starts with the date when hostilities began (well in advance of the formal declaration of a state of war) and ending on the date the laws themselves were passed, in recognition of the fact that low-intensity ethnic cleansing had continued even after the formal ceasefire and entry into force of the DPA.

Determination of the Substantive Scope of Remedial Programs

A fundamental substantive determination to be made in setting up remedial programs for property violations is precisely which categories of rights in housing, land, and property were sufficiently significant that they should, where abridged, be subject to a remedy. As a general rule, remedial programs should seek to restore rights to homes and lands that IDPs depended on for their shelter or livelihoods even in cases where they did not formally own them. While ownership rights are typically the starting point in defining the substantive scope of contemporary remedial programs, reinstatement of less perfected rights in homes and lands are often included in order to support sustainable return. Such rights can include forms of tenancy, access rights to grazing land or, as in Bosnia, Kosovo, and elsewhere, conditional rights under socialist law to occupy “socially-owned” property such as apartments. Customary forms of land tenure should be given effect for remedial purposes even if they have not been given full prior recognition in the broader domestic legal framework of the country involved.

⁶⁷ Internal Displacement Monitoring Centre of the Norwegian Refugee Council [IDMC/NRC] and Turkish Economic and Social Studies Foundation [TESEV], *Overcoming a Legacy of Mistrust: Toward Reconciliation between the State and the Displaced*, Update on the Implementation of the Recommendations Made by the UN Secretary-General's Representative on Internally Displaced Persons following his Visit to Turkey (June 2006).

As discussed in the “legal framework” section of this chapter, above, non-proprietary rights to housing and land are increasingly recognized under international law. As a result, the substantive scope of restitution rights is defined expansively in the recent *Pinheiro Principles*. According to Principle 2.1, this right applies with regard to three primary categories, comprising housing, land, and property. The inclusion of both housing and property as distinct categories indicates that displaced people are entitled to the restitution of their homes under the *Pinheiro Principles*, whether or not they formally owned them.⁶⁸ By extension, land subject to restitution might have either been owned outright or held under long-term lease or informal or customary arrangements.

Principle 13.6 affirms the rights of “users of housing, land and/or property, including tenants” to seek restitution and Principle 16.1 states that such claimants should be “able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.” However, depending on the nature of the right, it may be appropriate to attach conditions to its reinstatement. For instance, in situations where displaced persons had rights to access or cultivate land that were conditioned on their active exercise, it may be reasonable, in a situation of land-scarcity, to condition in-kind restitution on resumption of use of the land within a reasonable period, once other basic conditions for safe and dignified return have been met.

However, the need for caution in imposing such conditions is reflected by the case of Bosnia, where a number of restrictions were placed on the restitution of socially-owned housing that were not applicable to the restoration of private property. These included a preclusive claims deadline as well as time limits for returning to the apartment after it was vacated. However, most of these conditions were ultimately repealed as unfair to IDPs and refugees in a context

⁶⁸ *Id.* This understanding is supported by the fact that the “overarching principles” section of the text refers to the right to privacy and respect for the home (Principle 6) and the right to adequate housing (Principle 8), both of which protect possession rather than ownership. Protection of property interests is also referred to in Principle 7.

where those not displaced from their apartments had been allowed to privatize them after the conflict without any such requirements.⁶⁹

The recognition and inclusion of weaker residential rights in remedial programs is particularly important for marginalized groups. Where remedial programs are limited to full-fledged ownership rights, they risk exacerbating the effects of pre-displacement discrimination by restoring holders of recognized rights to their full pre-displacement status while leaving others bereft of even the minimal tenure security and shelter they previously enjoyed.

For example, although the Bosnian restitution program extended to contingent rights to use socially owned apartments, it did not go as far as reinstating weaker rights to occupy apartments previously administered as social housing by local Centers for Social Work. However, despite being subject to formal means-testing criteria, such apartments were disproportionately allocated to Roma families who tended to occupy them on an open-ended, if not permanent, basis. As a result, the failure to provide for the restitution of rights in such apartments effectively denied many Roma families the right to return to their pre-war homes.⁷⁰

Roma communities in the former Yugoslavia provide further example of how pre-displacement discrimination of vulnerable groups can lead to post-displacement exclusion. Many Roma communities had built up homes and infrastructure in informal settlements over the course of generations, but had never been recognized as having formal rights to their homes due to their social marginalization.⁷¹ As a result, despite relatively broad language on what type of property can be repossessed in the Bosnian restitution laws, Roma have faced particular difficulties repossessing and reconstructing their homes in informal settlements.

⁶⁹ Williams, *supra* note 56, at 518.

⁷⁰ Paul Prettitore, *Exercise of Fundamental Rights by the Roma of Bosnia and Herzegovina: Access to Personal Documents and the Right to Housing*, ROMA RIGHTS (Mar. 2003), available at http://lists.errc.org/rr_nr3_2003/noteb7.shtml.

⁷¹ *Id.*

However, where previously unrecognized or informal tenure rights are included in remedial programs, a great deal of caution needs to be exercised to ensure that any necessary equation of such informal prerogatives with existing statutory property rights systems does not adversely affect vulnerable sub-populations such as female-headed households.

For example, in Uganda, new provisions allowing the recognition of customary tenure in the 1998 Land Act would seem likely to facilitate return and recovery of property held by displaced ethnic groups in northern Uganda. However, in the event of return to land currently off-limits due to conflict, there are some concerns that the titling aspect of the Land Act—through distribution of certificates recognizing customary ownership—may introduce a zero-sum element to customary land tenure, leading to the exclusion of women, whose rights to access land were strong and recognized under customary rules but still weaker than those attributed to men.⁷²

Determination of the Nature of the Remedy to be Provided

One further substantive determination in remedial programs relates to the form that remedies should take in individual cases where a violation is found. As a general matter of both international law and recent practice, restitution is preferred over other remedies such as compensation or provision of alternative land. Restitution tends to be preferred in displacement settings because it provides displaced persons with maximum choice of durable solutions, facilitating actual return should the beneficiary so choose. This preference was most recently emphasized in the *Pinheiro Principles*, which deem compensation acceptable only in cases where restitution is “factually impossible,” where the claimant freely chooses compensation, or where “the terms of a negotiated peace settlement provide for a combination of restitution and compensation.”⁷³ The *Pinheiro Principles* go on to strictly define factual

⁷² Civil Society Organisations for Peace in Northern Uganda [CSOPNU], Land Matters in Displacement, *The Importance of Land Rights in Acholiland and What Threatens Them* (2004).

⁷³ *Pinheiro Principles*, *supra* note 1, Principle 21.1.

impossibility,⁷⁴ and to exhort parties to peace settlements to include provisions “demonstrably prioritizing the right to restitution as the preferred remedy.”⁷⁵

Based on practice, the definition of “impossibility” of restitution in the *Pinheiro Principles* may be excessively narrow. For instance, in some protracted displacement contexts, it may be deemed impossible to restore property that has been sold to bona fide third party purchasers. Moreover, in the wake of natural disasters, the likelihood that similar devastation could recur might render the restitution of properties in affected areas effectively impossible. However, in all such cases, consideration must be given to alternate remedies such as compensation or the provision of equivalent property or land.

As the *Pinheiro Principles* point out, restitution and compensation are not mutually exclusive. For instance, in cases where houses were confiscated and systematically destroyed in the course of conflict, victims should be entitled to restitution of their land as well as compensation for the destruction of their homes. In practice, however, such complete remedies are rare.

For example, in Bosnia, where up to a third of the housing stock was destroyed or damaged, payment of compensation was impossible for the cash-strapped postwar authorities and undesirable for international donors who feared being seen as “underwriting ethnic cleansing.”⁷⁶ As a result, legal

⁷⁴ *Id.* Principle 21.2. This provision reads as follows: “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.”

⁷⁵ *Id.* Principle 12.6.

⁷⁶ Charles Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18(1) INT’L J. REFUGEE L. (2006).

remedies for property violations were limited in Bosnia to restitution, which delivered properties to claimants in whatever condition the vicissitudes of war left them in. Donor-funded reconstruction was available upon application rather than as of right, and tended to be granted only to “minority” returnees to ethnically cleansed areas.⁷⁷

Bosnian restitution programming also generally excluded compensation for the period that displaced persons were prevented from reoccupying their homes due to the presence of secondary occupants.⁷⁸ In fact, although compensation of this nature is well-founded and might serve as a good incentive for speeding up restitution processes, it is rarely seen in practice. However, one prominent example is provided by the Turkish compensation law, which provides redress for lack of access to homes and properties during displacement as well as other material losses related to human rights abuses and displacement during the early 1990s.⁷⁹

The Turkish focus on compensation is facilitated by the fact that most abandoned properties were not taken over by secondary occupants, relieving local officials of the necessity of administering a full-fledged restitution program as well. However, this remedy also comports with recent rulings by the European Court of Human Rights, providing an insight into the interplay between regional human rights bodies and domestic practice.⁸⁰

⁷⁷ Marcus Cox & Madeline Garlick, *Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina*, in HOUSING AND PROPERTY RESTITUTION OF REFUGEES AND DISPLACED PERSONS (Scott Leckie ed., 2003).

⁷⁸ Philpott, *supra* note 76, at 69. The author notes that only those claimants who managed to have their case heard by the Human Rights Chamber, a human rights high court set up in Bosnia pursuant to the DPA, were accorded such compensation.

⁷⁹ Law 5233 on the Compensation of Damages that Occurred due to Terror and the Fight Against Terrorism (July 2004) (Turkey), *available at* <http://www.brookings.edu/projects/idp/Laws-and-Policies/turkey.aspx>.

⁸⁰ *See Dogan and Others v. Turkey*, App. No. 32270/96, 68 Eur. Ct. H.R. (2004).

In cases where long and unresolved histories involving waves of conflict and discriminatory property takings have led to multiple competing claims for properties, there may not be a clearly legitimate *status quo ante* on which to found a restitution program. For instance, centuries of land conflict in Afghanistan have led some observers to advocate general land reform as the key to resolving conflict.⁸¹ In situations where nearly everyone can credibly claim to be a victim of property-related violations, equitable prospective access to land and property may effectively be viewed as a remedy in addition to (or even in lieu of) retrospective restoration of rights.

In South Africa, a centuries-long history of colonial and Apartheid-era confiscations justified not only allowing restitution for violations as far back in time as 1913, but also promoting land reforms meant to increase overall black access to, and ownership of, land as an indirect means of countering the effects of pre-1913 discrimination.⁸² Such approaches to remedying historic injustices beyond living memory are not without controversy, as witnessed by the debate over compensation for slavery in the United States. The terms of this debate were touched on by the UN Sub-Commission on Human Rights, which proposed not only “solemn and formal recognition” of responsibility for historic injustices, but also “a concrete and material aspect” such as debt cancellation and return of cultural objects to groups affected by such injustice.⁸³

Determination of who is entitled to a Claim

Remedial programs should specify who is entitled to lay claims to property. While the titular holders of rights in confiscated property should clearly be entitled to claim, such rights should also be extended to “subsidiary claimants” such as spouses and family members. This is reflected in Principle 18.2 of the

⁸¹ See Liz Alden Wily, *Rural Land Relations in Conflict: A Way Forward* (Afghanistan Research and Evaluation Unit, Briefing Paper, 2004).

⁸² Ruth Hall, *Land Restitution in South Africa: Rights, Development and the Restrained State*, 38(3) CAN. J. AFR. ST. (2004).

⁸³ U.N. Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2001/1 (Aug. 6, 2001).

Pinheiro Principles, which sets out the right of subsidiary claimants such as family members, spouses, and legal heirs to claim their homes on the same basis as the formal holder of rights to such properties or “primary claimants.”

In cases of inter-generational restitution with relatively broad temporal parameters, direct descendants of injured rights-holders should explicitly be eligible to claim for remedies. For example, the heirs of early victims of Apartheid land confiscations were deemed entitled to claim restitution under South Africa’s program, which accepted claims going as far back as the passage of the discriminatory Natives Land Act in 1913.

Finally, where confiscated lands or properties were held collectively by members of groups, remedial programs should provide for groups to be able to lay collective claims. This principle is particularly important where indigenous groups or traditional agriculturalists have been dispossessed, as a general danger exists in such cases that the sudden introduction of individual rights concepts in the context of the provision of a remedy may lead to intra-group exclusion and disputes. The South African post-apartheid restitution framework allowed for ethnic groups to submit collective claims for land, a provision that necessitated labor-intensive processes of determining which people remained valid ancestors of ethnic groups dispossessed decades previously, as well as mediation between competing branches of such groups.⁸⁴ However, despite the efforts involved, the acceptance of group claims arguably bolstered the popular legitimacy of the process by recognizing the harm dispossessions incurred against the integrity of groups as well as the rights of individuals.

Determination of Administrative Conditions that may be imposed on Claims

As a general rule, displaced claimants should be exempted from administrative fees and other burdensome administrative requirements. Likewise, applications for remedies should not be rejected on the basis of formal errors or omissions.

⁸⁴ Ruth Hall, *Rural Restitution* (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, Sept. 2003).

The imposition of preclusive deadlines for submitting claims is an appropriate device, in principle, for ensuring legal certainty in situations where remedies are meant to be provided through a provisional mechanism applying procedures not foreseen in the ordinary law of a country. In order to ensure that such processes do not extend indefinitely and facilitate a rapid return to handling complaints through the ordinary channels in the domestic legal system, deadline regimes are a useful device for capturing a precise and finite universe of claims that will be addressed. However, in practice, the imposition of such deadlines is almost always controversial.

In South Africa, for instance, although an estimated 3.5 to 6 million people were affected by Apartheid era evictions, only about 80,000 claims (albeit with many on behalf of large dispossessed groups with many members) were received by the time a four-year deadline from the entry into force of the restitution law ran.⁸⁵ In Bosnia, deadlines to claim socially owned apartments were extended numerous times, but observers have noted that given the highly politicized atmosphere during the early days of restitution there, they may still have unnecessarily precluded many from claiming. Because no ordinary remedies for the loss of such apartments existed and no compensation was available for those who had not claimed, this group—comprising up to 9,000 families—arguably suffered the arbitrary denial of a legal remedy.⁸⁶

A clear precondition for the imposition of preclusive claims deadlines is the crafting of public information campaigns designed to reach all potential claimants and accessible procedures for making claims. However, states should also consider providing some form of appeal for time-barred claimants in order to allow them to present evidence that they were unaware of the deadline or unable to claim prior to its closure.

⁸⁵ *Id.*

⁸⁶ Williams, *supra* note 56, at 540.

Public Information, Legal Support, and Outreach to Disadvantaged Individuals or Groups

States should provide clear public information and outreach on property remedial programs to all parties affected by the process. In addition to the equitability concern that all persons should be aware of their rights, such outreach can serve pragmatic ends, increasing the effectiveness of remedial programming. For instance, clear information and targeted outreach can help to control popular expectations about what the program can achieve, ensure the submission of well-framed and documented claims, and discourage the submission of ineligible claims which the institutions administering such programs would otherwise have to spend time and resources ruling inadmissible.⁸⁷

In Bosnia, internationally funded public information campaigns targeted both claimants and secondary occupants. Information regarding deadlines for claiming was disseminated throughout the region as well as in many countries with sizeable Bosnian refugee populations. Later, the focus shifted to secondary occupants in an attempt to destabilize the sense of entitlement that many had developed to the properties they occupied but also inform them of their procedural rights in the process of vacating such properties.⁸⁸

Updated public information on property remedies may be helpful as well. In Bosnia, monthly updated statistics on the implementation of restitution claims in each municipality in the country were published, showing that the process was finite and accelerating a competitive dynamic between cities and regions to complete the process.⁸⁹

⁸⁷ Peter Van der Auweraert, presentation at Joint Training for Compensation Commissions organized by UNDP and Turkish Ministry of Interior, Mersin, Turkey, June 15-20, 2006.

⁸⁸ Williams, *supra* note 56, at 526.

⁸⁹ These statistics, as well as guidelines on how they were compiled, are available at: <http://www.ohr.int/plip>.

Generally speaking, remedial processes should be accessible to potential claimants. For instance, where such persons are displaced across a wide area or have sought shelter abroad, the deployment of regional or mobile claims collection centers should be considered, as well as the possibility of submission of claims by mail. The *Pinheiro Principles* advocate measures to relieve the burden on claimants by allowing submission of claims by proxy, for instance lawyers with powers of attorney.⁹⁰ In the case of the UN Claims Commissions, states hosting populations of people who fled Kuwait during or after the Iraqi invasion were invited to act as proxies, systematically collecting claims from such persons and submitting them on their behalf.⁹¹

In addition, outreach information and claims forms should be formulated in multiple languages, as necessary to ensure accessibility to displaced ethnic minority groups. Finally, assistance in filling out such forms should be provided for the disabled, illiterate, or unaccompanied minors. As set out in the *Pinheiro Principles*, remedial mechanisms should be available to displaced persons without adverse distinction on the basis of gender,⁹² age,⁹³ disability,⁹⁴ or conditions and location of displacement.⁹⁵

Finally, practice indicates that even the best remedial programs stand to benefit from the provision of legal aid to claimants and other affected parties throughout the process.⁹⁶ The *Pinheiro Principles* also urge the provision of

⁹⁰ Pinheiro Principles, *supra* note 1, Principle 13.5.

⁹¹ See Hans van Houtte, Hans Das & Bart Delmartino, *The United Nations Claims Commission*, in *THE HANDBOOK OF REPARATIONS* (P. DeGreiff ed., 2006).

⁹² Pinheiro Principles, *supra* note 1, Principles 3, 4.1-4.3, 12.2, 14.2.

⁹³ *Id.* Principles 3, 12.2, 13.3, 14.2.

⁹⁴ *Id.* Principles 3, 13.10, 14.2.

⁹⁵ *Id.* Principles 13.4, 13.5, 13.9.

⁹⁶ See Aursnes & Foley, *supra* note 62.

such assistance to claimants.⁹⁷ As discussed later in this chapter, considerable international expertise exists in supporting remedial programs though building the capacity of domestic legal aid and information centers.

Determination of what Evidence is required in Support of Claims

Chapter nine on the recovery of personal documentation in this volume provides more detailed guidance on how domestic authorities should implement their responsibilities, as identified in the *Guiding Principles*, to assist IDPs with recovering or receiving such documentation as is necessary to exercise their rights, including in the area of remedies for property-related violations. With specific regard to mass claims processes involving property rights, states should generally take an accommodating approach to the problems displaced persons will inevitably have in documenting their claims.

In practice, claims should generally be admitted for processing based on a fairly low evidentiary threshold. Claimants should establish their own identity and identify the property they are claiming, but should not necessarily be required to substantiate their claim fully in advance. Although any available documentation should be submitted in support of claims, adjudicators should be required to establish relevant facts *ex officio* where this documentation is insufficient to establish the validity of the claim. The *Pinheiro Principles* recommend that public bodies make documentation relevant to restitution claims available free of charge.⁹⁸ In Bosnia, claims adjudicators stood under an *ex officio* duty to establish the relevant facts where submitted documentation alone was not dispositive.⁹⁹ Likewise, in Kosovo, HPD caseworkers were expected to take initiative in establishing information relevant to claims.¹⁰⁰

⁹⁷ Pinheiro Principles, *supra* note 1, Principle 13.11.

⁹⁸ *Id.* Principle 15.5.

⁹⁹ Williams, *supra* note 56, at 504.

¹⁰⁰ See Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L & COMP. L.Q. (Apr. 2004).

In establishing the nature of claimants' pre-displacement rights to claimed properties, considerable leeway should be given to adjudicators to take into account non-standard documentation. For instance, in light of the fact that displaced persons are often forced to leave behind personal documentation in the course of flight, records such as electricity bills or rental receipts that link individual claimants to properties may be accepted in lieu of more formal documentation such as lease agreements or title deeds.

In the case of claims to property held in informal or customary tenure, no documentary evidence whatsoever may be available. In order to give effect to such rights, adjudicators in such situations should be provided with guidelines on the admissibility of witness statements in establishing claimants' links to claimed lands. In the case of groups displaced from the same area, it may be necessary to reconstruct local knowledge and attribution based distributions of land and resources through participatory "community-mapping" processes.

Finally, adjudicators should be given the ability to officially take into account well-known or well-documented circumstances and generalized patterns of displacement. Where facts related to claims are of a general nature and are generally known, it would not be fair to claimants to force them to demonstrate or document such facts in each individual case. Under normal circumstances, norm-breaking behavior such as the wrongful deprivation of property rights would be considered exceptional and a claimant alleging such an act would be required to make a specific and well-documented showing. However, in situations where such deprivations were undertaken in a widespread or systematic manner, the threshold of evidence may be lowered in order to reflect the fact that such acts were not exceptional, avoiding unnecessarily burdening claimants. In many cases, such as Bosnia or South Africa, restitution programs deem certain patterns of deprivations of rights to have been wrongful, meaning that individual claims for restitution are deemed valid where a claimant can show that they were the rights-holder to a specific property before such a deprivation occurred.

Where other individuals are alleged to have forced restitution claimants to sell or exchange their properties in the context of ethnic cleansing or persecution, consideration may be given to shifting the allocation of burdens in order to require the party seeking to uphold the exchange or sale to demonstrate that it

was not made under duress. As discussed above, this approach was taken in Bosnia based on constitutional court precedent.

Setting Presumptions in Favor of Claimants

The creation of presumptions in favor of claimants is closely related to considerations of evidentiary burdens. In Bosnia, for instance, claimants to socially owned apartments were initially required to demonstrate that they had left their apartments for reasons directly related to the conflict in order to qualify for restitution. Abuse of this provision led to an amendment creating a conclusive presumption that anyone in Bosnia who left their apartment after the outbreak of the conflict did so for reasons related to the conflict.¹⁰¹ The *Pinheiro Principles* have adopted this principle generally with regard to prescription or abandonment statutes, recommending that states adopt presumptions relieving claimants of the need to establish the specific reasons for their flight in order to qualify for restitution.¹⁰²

Establishment of Procedures for Receipt, Screening, and Registration of Claims

As claims are received, the competent authorities should be given clear instructions on how to screen such submissions for obvious errors (e.g., claims for which the body has no jurisdiction) or omissions. Claims that pass this initial screening process should be registered, ideally in a centralized system, providing the basis for easy identification of case-files and orderly processing of claims. Evidence accompanying claims should also be kept in a secure place.

The benefits of computer technology in mass-claims proceedings become particularly evident at the point of claims processing. Where technology permits, full information on claims can be entered into a database at the outset, allowing cases to be grouped according to relevant characteristics (e.g., type of property claimed or all claims for a particular location) for consistent data

¹⁰¹ Williams, *supra* note 56, at 496.

¹⁰² Pinheiro Principles., *supra* note 1, Principle 15.7.

collation and efficient processing. Given reliable scanning technology, accurate copies can be taken of all accompanying evidence, allowing claimants to retain the originals. Although the resources and capacity for such processes will be lacking in many post-displacement contexts, international actors have been able to provide assistance developing databases and training in settings such as Bosnia, where claims processing initially began on the basis of paper files and typewritten decisions.

Order of Processing of Claims

As a rule, claims should be processed in a predictable order as a means of safeguarding the transparency and efficiency of the process. Transparent processing narrows the discretion on the part of administrators to expedite or delay action on particular claims, reducing the scope for corruption and undue influence. It also allows both claimants and (in the case of restitution programs) temporary occupants to plan ahead, based on a relatively accurate sense of how soon their case is likely to be handled in the order of processing.

Chronological processing is a useful default, as the date on which claims are received is probably the most easily identifiable organizing principle for processing, particularly in situations with relatively low technology claims intake. On the other hand, chronological processing may be perceived as inequitable where some groups had better or quicker access to information about claims processes than others. In addition, where registration of claims is fully computerized and case-files can easily be grouped according to other principles than the date of filing, the adoption of alternative criteria for ordering claims processing becomes more readily feasible.

Exceptions to chronology (or other organizing principles) should be transparent and based on clear policy rationales. In Bosnia, prioritization of claims outside chronological order only produced good results when based on the status of the subsequent occupant rather than the status of the claimant (e.g., in situations where evidence existed that occupants had other housing possibilities and could be summarily evicted). However, in Kosovo, there have been calls for prioritization of claims in manners that would facilitate group

return by allowing all the claims for particular villages to be decided simultaneously.¹⁰³

Rules of Decision Balancing the Rights of Claimants with those of Secondary Occupants

The finding of a valid claim does not always mean that the claimant will be entitled to in-kind restitution. Where such restitution is impossible, the claimant may instead be entitled to financial compensation or alternative property of an equivalent nature. Where the property has been destroyed or fundamentally altered, restitution is usually deemed impossible. However, restitution may also be impossible where a subsequent user or owner has developed bona fide property interests in the claimed property. In such cases, the extent to which subsequent users had reason to know of the wrongfulness of the underlying deprivation of the claimant's right is likely to be a factor in judging good faith.

In addressing this problem, Principle 17 of the *Pinheiro Principles* proceeds from the premise that the rights of displaced persons to restitution are presumptively superior to those of secondary occupants to retain possession of claimed properties. Secondary occupants are entitled to fair procedures and to be temporarily allocated alternative housing or land if they have no means to provide for their own needs.¹⁰⁴ However, the *Pinheiro Principles* endorse the eviction of secondary occupants from claimed property where “justified and unavoidable for the purposes of ... restitution” and note that protections accorded to secondary occupants should not prejudice the right of claimants to repossess their property “in a just and timely manner.”¹⁰⁵

¹⁰³ See, e.g., Anneke Smit, *Pushing Restitution, Not Reconciliation*, BALKAN RECONSTRUCTION REP. (Dec. 2003).

¹⁰⁴ *Pinheiro Principles*, *supra* note 1, Principles 17.1, 17.3.

¹⁰⁵ *Id.* Principles 17.1, 17.2. See also Principle 17.3 (specifying that failure to provide alternative land or housing to entitled secondary occupants “should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution”).

According to Pinheiro Principle 17.4, even properties that have been purchased after their abandonment may, in principle, be subject to restitution. Determinations of whether claimants or subsequent purchasers are entitled to possession of the disputed property should hinge on whether the purchase was made in good faith. In post-conflict situations, this requirement will generally be interpreted to mean that the purchaser should not have had reason to know that the property might be subject to justified restitution claims.¹⁰⁶

In the Czech Republic, claimants were presumptively entitled only to compensation where another private person had purchased the claimed property, unless that person was shown to have acquired the property illegally or participated in the persecution that led to the claimant's dispossession. In South Africa, claimants are generally given precedence over subsequent owners, but the latter are entitled to compensation for the restituted property. In Kosovo, where Albanians were deprived of rights to socially owned apartments and subsequent purchasers often privatized them under general legislation, the subsequent purchasers may be entitled to compensation in cases where apartments they purchased are to be returned to displaced claimants.

Bosnia provides an example of the most stringent approach, with secondary occupants' rights to remain in claimed property cancelled *ex lege*, and no compensation forthcoming except in the case of necessary improvements made to the properties. In Bosnia, secondary occupants entitled to alternative accommodation (see next point) could be evicted without it if all other procedural requirements had been met. By contrast, in Croatia, repossession of private properties was made contingent on the secondary occupant first receiving alternative accommodation, often in the form of a permanent home, a requirement that significantly delayed resolution of the process.

¹⁰⁶ The Principles note that “[t]he egregiousness of the underlying displacement ... 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.” *Id.* Principle 17.4.

Determination of the Rights of Secondary Occupants

Regulations on restitution should set out what rights subsequent occupants enjoy even in cases where they are not entitled to remain in claimed properties. In doing so, such regulations should take account of the following:

- Subsequent occupants must vacate claimed property according to legal deadlines, but they should not be rendered homeless as a result. The competent authorities are obliged to provide alternative accommodation to those who have no possibility of housing themselves. In Bosnia, the restitution laws set out means-testing criteria for secondary occupiers and placed the burden initially on them to demonstrate entitlement to alternative accommodation. The laws also specified that enforcement of restitution claims had to go forward even without alternative accommodation if all other legal conditions had been met.¹⁰⁷
- Subsequent occupants should not be subjected to evictions that are arbitrary under international law (see the “Legal Foundations” section above). For example, they should only be evicted according to a lawful decision and in the presence of public officials. Evictions should not be carried out in the middle of the night, in unsafe circumstances, or with any unnecessary use of force.
- Subsequent occupants should have notice of an opportunity to participate in remedial proceedings, whether hearings or presentation of submissions in *ex parte* proceedings. They should be able to present any evidence of rightful possession of claimed properties or entitlement to alternative accommodation or compensation. There should also be at least a limited opportunity to appeal decisions in favor of claimants.
- Under limited circumstances (see directly above), subsequent occupants may be entitled to compensation. This includes where they made *necessary* improvements to claimed properties, such as repairs that had to be made in order for the property to continue to be habitable or usable. In cases where coerced sales contracts are

¹⁰⁷ Williams, *supra* note 56, at 527.

annulled in the course of restitution programs, subsequent occupants who concluded such sales should, in principle, recover whatever price they paid or property they exchanged for the claimed property.

- Subsequent occupants should be allowed to harvest any crops they previously planted on agricultural properties in the course of vacating them.
- Subsequent occupants may have properties elsewhere and should be provided with updated information about how long it will take for their claims to be processed and what type of interim shelter possibilities exist in cases where it is necessary for them to vacate occupied properties before repossessing their own.
- Providing occupants with full information on restitution procedures can help to counter any sense of entitlement they may feel to remain in other people's property while simultaneously informing them of existing protections such as the right to alternative accommodation if they cannot house themselves otherwise. In some cases, such information may provide an incentive for occupants to voluntarily vacate claimed properties, avoiding the necessity of eviction proceedings.

Determination of Procedures for Appeal of Claims

In restitution settings, both claimants and other interested parties should have some means of appealing decisions on restitution to bodies with a general competence to ensure that the first instance adjudicator applied the law properly. In order to facilitate an efficient appeals process, it is important that first instance decisions be justified (e.g., that they include information on the legal rules and the facts that were relied on by the adjudicator) and that deadlines and procedures for appeal be included in the decision itself. Decisions must also be communicated to all interested parties in a manner that allows timely appeals to be made.

However, in cases where the circumstances of displacement justify strong presumptions in favor of claimants, secondary occupants should not be encouraged to engage in frivolous appeals simply to slow the process down. In some cases, it may be possible to either limit the grounds for appeal of

positive decisions in order to exclude arguments that have no chance of success (such as reliance on earlier decisions on temporary allocation that have later been cancelled *ex lege*). Under such circumstances, it may also be justified to provide that appeals against positive decisions should not delay the enforcement of decisions unless suspension is specifically ordered by an appeals body in accordance with law.

Determination of Rules for Enforcement of Decisions on Claims

Regulations on restitution may set out special provisions on enforcement of decisions in favor of claimants. However, to the extent possible, these decisions should be compatible with, and integrated into, existing domestic procedures for enforcement of administrative decisions.¹⁰⁸ Law enforcement officials should have the same obligations to assist and protect officials carrying out their restitution duties and to prevent and prosecute the obstruction of legal enforcement proceedings as they would in any other comparable situation.

Threats or attacks on the personnel involved in claims adjudication and enforcement or the parties to claims should be investigated and prosecuted. “Looting” of possessions and fixtures by vacating subsequent users or others should also be subject to prosecution. Unless inventories have been taken, however, evidentiary problems will be hard to overcome in pursuing prosecutions for looting. In Bosnia, official documents related to restitution cases such as decisions routinely included notice of the criminal penalties for looting, threatening public officials in the course of their duties, etc. in order to discourage such acts.

Vetting of the Residential Situations of Persons in Positions of Public Responsibility

Persons in positions of public responsibility, and especially those with a direct role in restitution processes, should not occupy property that may be subject to claims. In Bosnia, vetting processes were directed at police officers, judges

¹⁰⁸ See Pinheiro Principles, *supra* note 1, §20.

and prosecutors, elected officials, and (national and international) employees of some international agencies, removing potential vested interests of such officials in obstructing the broader restitution process.¹⁰⁹

Establishment of Further Conditions Allowing Exercise of Pre-Displacement Rights

Restitution beneficiaries should be reinstated in all their prior rights to the property as well as any subsequent legal rights adhering to such properties. For instance, in Bosnia, those who repossessed socially owned apartments were entitled to purchase them as part of a general privatization scheme that non-displaced apartment residents had already benefited from.¹¹⁰

The case of customary and informal rights represents a particular challenge, as even the retrospective restoration of such rights implies a minimum degree of prospective recognition. The *Pinheiro Principles* call upon states to accompany restitution of customarily held land with titling or other measures to provide prospective tenure security.

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.¹¹¹

¹⁰⁹ Philpott, *supra* note 76, at 59-61.

¹¹⁰ Williams, *supra* note 56, at 518.

¹¹¹ Pinheiro Principles, *supra* note 1, Principle 15.2.

However, a good deal of caution and sensitivity to local context is important in implementing this recommendation. Although systematic titling of land held in informal tenure was often recommended by development experts in earlier decades, such programs proved unmanageably complicated and expensive in many cases. At the same time, the sudden introduction of statutory private property rights concepts into traditional communities that had previously held their land in collective tenure often led to opportunism, conflict, and further marginalization of vulnerable groups such as female-headed households.

In this context, the World Bank has shifted its policy on land titling to recognize the importance of recognizing and supporting customary tenure regimes under appropriate circumstances.¹¹² Other observers have noted the need for limiting state interventions in support of customary tenure regimes to those that are demonstrably necessary to protect indigenous groups from specific development threats.¹¹³ Thus, although it is clear that customary tenure forms should be accorded retrospective recognition, the level and nature of accompanying prospective legal protection that should be accorded to such systems should be decided on a case-by-case basis.

INSTITUTIONAL ELEMENTS OF STATE REGULATION

In the Context of Durable Solutions

Adjudication Bodies

In practice, provisional remedial mechanisms for addressing mass-claims typically take the form of an independent commission, with an adjudication panel supported by a secretariat that takes and processes claims and drafts decisions for discussion and approval. Such commissions are typically mandated under peace agreements or domestic legislation to remove the caseload of property claims relating to specific past displacement events from

¹¹² See Deininger, *supra* note 41.

¹¹³ See Daniel Fitzpatrick, *Best Practice Options for the Legal Recognition of Customary Tenure*, 36(3) DEV. & CHANGE (2005).

the jurisdiction of ordinary adjudicatory bodies and decide them on the basis of facilitated administrative procedures.

A key question in the development of such commissions is whether they should operate primarily at the central or local level. In Bosnia, decentralized first instance processing allowed benefits from local knowledge and access to local information (records, witnesses, field investigations) and dispersed a very large caseload (over 200,000 claims) broadly, speeding the overall process.¹¹⁴ However, heavy international monitoring was crucial to keep the process on track. By contrast, in Guatemala, *de facto* and *de jure* responsibility for property remedies was often delegated to local authorities with most to lose from the implementation of such remedies. In the absence of either dedicated international monitoring of this process or systematic government oversight, local authorities often worked openly against the provision of remedies to displaced persons.¹¹⁵

In cases where there is no capacity or resources for setting up an adjudicatory body in the wake of armed conflict and displacement, the competent authorities should recognize both the utility and the limitations of initial reliance on existing local dispute resolution processes in seeking to ensure some type of a remedy for claimants.¹¹⁶ Such bodies are often informal and more likely to apply customary rules than statutory ones. In some cases, these rules may lead to discriminatory or arbitrary outcomes and such bodies often rely on a negotiated approach to property claims, in which occupiers of abandoned property are allowed to retain possession of some land in exchange for ceding the rest back to displaced owners or lawful users. While such outcomes do not necessarily constitute legal remedies, they may provide the only feasible basis for durable, locally accepted solutions in situations where the state itself temporarily lacks the capacity to provide better terms to IDPs.

¹¹⁴ Philpott, *supra* note 76, at 42.

¹¹⁵ See Painter, *supra* note 54.

¹¹⁶ See Aursnes & Foley, *supra* note 62, at 10-14 (discussing legal aid to property claimants in Afghanistan).

Enforcement Bodies

Existing enforcement bodies with experience and established legal capacity to provide administrative enforcement are typically more reliable than *ad hoc* enforcement bodies. However, the responsibility of existing institutions to enforce the orders of provisional remedial adjudication mechanisms should be clearly and explicitly set out in law.

INTERNATIONAL ROLE

The role of the international community—UN agencies, development actors, regional organizations, bilateral donors, and NGOs—is likely to be crucial in many settings involving remedies for property violations. Remedies for property violations are necessary but expensive in terms of both political capital and state finances. As a result, barring international support, there may often be inadequate domestic political support and capacity to implement restitution and inadequate domestic funding to implement compensation, leaving IDPs and other dispossessed groups at risk of being denied a remedy. With the exception of the post-1989 “re-privatizations” in Eastern Europe and post-Apartheid restitution in South Africa—both of which took place in the context of peaceful political transitions from authoritarianism to democracy—there are few examples of countries that have provided adequate remedies for property violations without international support.

Unfortunately, the international community’s performance in identifying property violations and supporting efforts to address them is mixed. For instance, while the UN Mission in Kosovo (UNMiK) assumed exclusive jurisdiction over the restitution of local housing, the contemporaneous UN Transitional Administration in East Timor (UNTAET) was unable to promote an active approach to property issues despite destabilizing post-conflict land disputes in the context of mass repatriation.¹¹⁷ In response to calls for a more systematic approach, UNHCR and UN Habitat have sponsored recent efforts

¹¹⁷ Daniel Fitzpatrick, *Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor* (UNHCR Evaluation and Policy Analysis Unit, Working Paper No. 58, 2002).

to ensure that attention to property issues is programmatically included from the planning of UN peace missions through their implementation.¹¹⁸ Such proposals have ensured the inclusion of “housing, land and property issues” as a focal point issue for the Protection Cluster Working Group (PCWG) in the context of the current UN Humanitarian Reform process.¹¹⁹

Nevertheless, attempts to connect property issues more systematically with the UN’s broader rule of law agenda in post-conflict settings could go a long way to countering concerns that the priority accorded to remedial programs in any given setting may be set according to inconsistent and essentially arbitrary factors such as the repatriation policies of refugee-receiving donor countries. For example, although Bosnia and Croatia both began as Yugoslav Republics and both became mired in conflict and ethnic cleansing after declaring independence in the early 1990s, the international community’s approach to return issues in the two countries has been notably inconsistent. While international monitors intervened forcefully to ensure the restoration of 100,000 abandoned socially owned apartments in Bosnia to their pre-war residents, their counterparts in Croatia have effectively condoned the permanent confiscation of up to 30,000 such apartments, leaving as many minority Serb families without any prospect of a genuine legal remedy for the loss of their homes.¹²⁰ Although many factors may explain this disparate approach, it is telling that over 600,000 Bosnian refugees found shelter in Western European countries which frequently supported restitution as a means of facilitating their repatriation, while the bulk of Croatian Serb refugees were

¹¹⁸ Scott Leckie, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a new UN Institutional and Policy Framework*, UNHCR Department of International Protection, Legal and Protection Policy Series, PPLA/20005/1 (Mar. 2005); *See also*, Agnès Hurwitz, Kaysie Studdard & Rhodri C. Williams, *Housing, Property and Conflict Management: Identifying Policy Options for Rule of Law Programming*, *International Peace Academy Policy Report 4* (2005).

¹¹⁹ *See* Protection Cluster Working Group Home Page, <http://www.humanitarianreform.org/humanitarianreform/Default.aspx?tabid=79>.

¹²⁰ Human Rights Watch, *A Decade of Disappointment: Continuing Obstacles to the Reintegration of Serb Returnees* (Sept. 2006).

displaced to relatively un-influential countries in the region.¹²¹ The extent to which the concerns of third countries hosting large refugee populations can shape restitution and return policies has been seen in many other scenarios, such as Guatemala and Afghanistan.¹²²

Despite the international community's lack of a coherent general approach to property issues in displacement settings, many specific international efforts to support domestic remedies have been highly successful. These have ranged from internationally run restitution programs (as in Kosovo), to monitoring, capacity-building, funding reconstruction and resettlement programs, advocacy, reporting, and standard setting, most notably in the form of the *Pinheiro Principles*. In addition to funding and technical knowledge, international actors can often provide a degree of impartiality that can be of great utility in shifting the focus from politicized debates over responsibility for displacement to the technical discussions on addressing its consequences.

In the course of its protection work, the Office of the United Nations High Commissioner for Refugees (UNHCR) has become involved in the practicalities of implementing property restitution programs on behalf of displaced persons in numerous settings from Tajikistan and Bosnia in the early 1990s to contemporary Iraq. In 2001, UNHCR developed standardized guidelines to its field presence on identifying and addressing property issues.¹²³

¹²¹ Joanna Harvey, *Return Dynamics in Bosnia and Croatia: A Comparative Analysis*, 44(3) INT'L MIGRATION 103 (2006).

¹²² The role of Mexico in facilitating durable solutions for Guatemalan refugees is explored in Christine Cheng and Johannes Chudoba, *Moving Beyond Long-term Refugee Situations: the Case of Guatemala* (UNHCR New Issues in Refugee Research, Working Paper No. 86, 2003). For a discussion of repatriation to Afghanistan from camps in Pakistan, see David Turton & Peter Marsden, *Taking Refugees for a Ride? The Politics of Refugee Return to Afghanistan* (Afghanistan Research and Evaluation Unit, 2002).

¹²³ Office of the United Nations High Commissioner for Refugees, *Checklist on the Restitution of Housing and Property* (Nov. 2001).

The United Nations Human Settlements Program (UN-Habitat) played an early role in the development of the HPD/HPCC in Kosovo and its Disaster, Post-Conflict and Safety Branch continues to advocate a more systematic approach to remedies for violations of housing rights within the UN system. UN-Habitat is the focal point agency for “housing, land and property issues” in the Protection Cluster Working Group (PCWG).¹²⁴

The International Organization for Migration (IOM) has developed significant expertise in mass-claims reparations procedures in the last decade although it traditionally has focused on the repatriation of refugees. IOM’s experience with mass-claims reparations began with work on Nazi forced labor and Swiss bank compensation programs dating from the World War II era but has more recently expanded to include technical advice to the bodies competent for restitution in Iraq and Colombia.¹²⁵

The Centre on Housing Rights and Evictions (COHRE), an international NGO, has expanded from its initial focus on housing rights to become a leading advocate of post-displacement restitution of housing, land, and property.¹²⁶ COHRE has published numerous studies and legal resource guides on the right to restitution and supported the mandate of Sergio Paulo Pinheiro, the Special Rapporteur on Housing and Property Restitution, whose *Pinheiro Principles* on this topic were adopted by the UN Sub-Commission on Human Rights in June 2005.

Displacement Solutions, a relatively new international NGO, undertakes research on issues related to durable solutions to displacement and property restitution. It maintains a roster of experts who can be called in to provide technical assistance in specific local settings.¹²⁷

¹²⁴ See Protection Cluster Working Group, *Land, Housing and Property Issues*, available at <http://www.humanitarianreform.org/Default.aspx?tabid=434>.

¹²⁵ See International Organisation for Migration, *Reparation Programmes*, available at <http://www.iom.int/jahia/page74.html>.

¹²⁶ See Centre on Housing Rights and Evictions Home Page, <http://cohre.org>.

¹²⁷ See Displacement Solutions Home Page, <http://www.displacementsolutions.org>.

The Norwegian Refugee Council (NRC) is a humanitarian NGO that began providing legal advice and representation to beneficiaries in the context of its work supporting repatriation and return in the Balkans during the mid-1990s. NRC's legal counseling programs have expanded considerably with programs set up to assist displaced persons in locations ranging from Afghanistan and Uganda to Georgia and Colombia. Infringements of housing, land, and property rights have been one of the most frequent complaints encountered by virtually every one of these programs, giving the NRC considerable insights into how to seek domestic remedies for such violations.

The Internal Displacement Monitoring Center (IDMC) is an international body originally set up by the NRC in 1998 that monitors conflict-induced internal displacement in about fifty countries worldwide. In its regular updates on internal displacement in these countries, the IDMC focuses on land, housing, and property issues as one of its main thematic issues.¹²⁸

SUMMARY OF RECOMMENDATIONS

1. In cases where conflict-induced displacement is imminent and local populations are likely to be coerced into giving up rights to their homes and lands, states should consider passing legislation allowing the temporary suspension of legal property transactions in such areas.
2. During displacement situations, states should prevent the destruction of property abandoned by displaced owners, rights-holders, users, or residents in accordance with international humanitarian law and ensure that it is not destroyed, appropriated, or altered by other persons.
3. Humanitarian allocation of abandoned property to temporarily house other displaced populations should be based on written regulations setting out specific provisions for the reinstatement of the pre-displacement occupants as soon as circumstances allow and sanctioning the damaging or alteration of temporarily allocated properties.

¹²⁸ See International Displacement Monitoring Centre Home Page, <http://www.internal-displacement.org>.

4. During displacement situations, records establishing legal rights in property should be safeguarded in order to allow accurate reconstruction of the situation prior to displacement.

5. In the wake of displacement, all competent authorities should commit themselves to providing remedies for violations of housing, land, and property rights and to upholding all such rights recognized not only under domestic law, but also in accordance with international human rights law, without adverse distinction.

6. In the wake of conflicts, discriminatory or arbitrary reallocations of displaced persons' property should be revoked, along with coerced private sales or exchanges. In addition, temporary humanitarian allocations of abandoned housing should be phased out and the pre-conflict owners, residents, and users allowed to resume the exercise of their rights.

7. Where displacement and dispossession have taken place on an (at least locally) large scale and under similar or uniform circumstances, provisional remedial programs should be set up as a temporary measure to ensure rapid processing of claims in a manner that complements the ordinary domestic judicial and/or legal framework.

8. Provisional remedial programs for property violations should be limited to violations alleged to have occurred within set geographic and temporal parameters; however, these parameters should be based strictly on when and where systematic displacement is known to have occurred, regardless of formal criteria such as the date states of emergency or war were declared, in order to avoid arbitrary exclusion of displaced individuals.

9. In their substantive scope, remedial programs for property violations should aim to restore rights to homes and lands that IDPs depended on for their shelter or livelihoods even in cases where they did not formally own them.

10. In choosing remedies for property violations, states should provide full restitution except under limited circumstances where financial or in-kind compensation may be more appropriate. In cases where property was destroyed or its pre-displacement owners or users were denied access to it for

an unjustifiable time period, both restitution and compensation should be provided.

11. Eligibility to claim for remedies should not be limited to the nominal pre-displacement rights holders of properties but also to subsidiary claimants such as their spouses or heirs; where groups that held property in common allege violations of their rights, collective claims should, in principle, be admissible.

12. Claimants should be exempted from administrative fees and onerous bureaucratic requirements. While claims deadlines may be imposed, they should be accompanied by outreach and information campaigns designed to reach all potential claimants and accessible procedures for laying claims.

13. States should provide clear public information and outreach on property remedies to all affected parties, and should, in principle, support the provision of legal aid to claimants. Additional measures should be considered, as necessary, to ensure participation on an equal basis by disadvantaged individuals or groups.