



Draft Model Legislation on Property Rights of Returning Persons

5-7 September 2006

Property Rights of Returning Persons Act

Chapter ... of the Laws of the Republic ...

An Act to give effect to the Protocol on the Property Rights of Returning Persons and to make provision for an administrative framework for the implementation of the said Protocol and other related matters.

BE IT ENACTED by the Parliament of the Republic as follows:-

ARRANGEMENT OF SECTIONS

Section

1. Title

Part One

2. Definitions

Part Two

3. Legal Effect

Part Three: Protection

4. Powers of the Minister
5. Local Panels
6. Functions of Local Panels
7. Commission
- 8 Functions of Commission

Part Four

9. Compensation

Part Five

- 10 Miscellaneous Provisions

Schedule 1 United Nations Principles on Housing and Property Restitution in the context of the return of refugees and in Internally Displaced Persons, E/CN.4/Sub.2/2005/17/Add.1, 11 July 2005

Title

S.1. This Act may be cited as the Property Rights of Returning Persons Act.

PART ONE

Definitions

S.2. In this Act, unless the context otherwise requires:

- (1) “**Children**” shall mean human beings below the age of eighteen years, unless under the law applicable to the children, majority is attained earlier;
- (2) “**Commission**” shall mean the Property Claims Commission for Returnees referred to in S. 7.
- (3) “**Communities**” shall mean communities, pastoralists and other groups, whose livelihood has a special dependency on and attachment to their lands;
- (4) “**Internally Displaced Persons**” shall mean persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border;
- (5) “**Internally Displaced Persons**” shall also mean persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of development induced displacement and who have not crossed an internationally recognized State border;
- (6) “**Property**” refers to autonomous possessions of economic value such as, moveable and immoveable property including land, housing, corporeal and incorporeal possessions like intellectual property or copy right, money, pecuniary gains, debts, and contractual rights;
- (7) “**Refugees**” shall apply to every person who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, as defined by the United Nations Convention relating to the Status of Refugees 1951 and as amended by the United Nations Protocol relating to the status of Refugees 1967;

- (8) “**Refugee**” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality, as defined by the African Union Convention governing the specific aspects of refugee problems in Africa 1969;
- (9) “**Returns**” shall mean internally displaced persons and refugees who return to their original places of residence in their country of origin;
- (10) “Local Panels” shall mean Local Property Recovery Panels referred to in S.5.

PART TWO

Legal Effect

S. 3 Subject to the provisions of this Act:

- (1) The Protocol shall have legal effect within, and throughout, the Republic;
- (2) The Protocol shall provide the legal basis for guaranteeing the right to ownership of property abandoned by internally displaced persons and any persons fleeing from the Republic to other States as refugees;
- (3) Property belonging to internally displaced persons and refugees shall be protected against the following acts in all possible circumstances and to the extent provided by the applicable laws of armed conflict:
 - a. Pillage;
 - b. Direct or indiscriminate attacks or other acts of violence;
 - c. Being used to shield military operations or objectives;
 - d. Being made the object of reprisal;
 - e. Being destroyed or appropriated as a form of collective punishment;
- (4) No order shall be made authorizing the acquisition or expropriation of property abandoned by internally displaced persons or refugees except in compelling and overwhelming circumstances which are justified in the general interest of the public or community, unless procedures for making such an order have been duly prescribed by a statutory instrument made under this Act;
- (5) Special provision is hereby made, in accordance with the provisions of the Protocol, for the protection of property rights for returning women, children, and communities with special attachment to land;
- (6) All women, including returning women and single women, shall have the legal capacity to own and inherit land and other property in their own right, without discrimination of any kind, as provided for in the Protocol;
- (7) Notwithstanding any other law of the Republic, children shall attain legal capacity at the age of 18 years;

- (8) Property which orphans are entitled to inherit shall be held in trust until such children attain legal capacity;
- (9) The best interest of the child shall be applied as the overriding principle in all cases involving children's rights to property, inheritance and succession;
- (10) Property belonging to returning communities, pastoralists and other groups whose mode of livelihood depends on special attachment to their lands shall be restored to them upon return, except as provided in S. 8(9);
- (11) All laws, procedures and regulations of the Republic which regulate ownership of property, inheritance and succession shall be construed in conformity with the provisions of the Protocol;
- (12) Any statute of limitation in force in the Republic shall be without prejudice to the provisions of this Act.

PART THREE

MEASURES OF PROTECTION

Powers of the Minister

S. 4 The Minister shall be responsible for the legal and administrative implementation of this Act. For this purpose, the Minister shall:

- (1) Prescribe by statutory instrument regulations for the implementation of this Act consistent with the Protocol;
- (2) Ensure that the property of internally displaced persons and refugees shall be protected, in all possible circumstances, against arbitrary and illegal appropriation, occupation or use;
- (3) Ensure the establishment of Traditional Property Recovery Panels under S.5;
- (4) Appoint Members of the Commission under S.7;
- (5) Ensure the creation of an affordable land or property registration scheme and a database for title to land held under both customary and statutory land tenure systems in order to avoid conflicting claims relating to ownership of such land or property;
- (6) Ensure that any such land or property registration scheme shall accord women the legal capacity to register title to land or property owned by them under customary or statutory land tenure systems;

- (7) Ensure that any such land or property registration scheme shall accord children, upon attaining the age of 18 years, the legal capacity to register title to land or property entitled to them under customary or statutory land tenure systems.

Local Panels

S. 5 Pursuant to S. 4(3), provision is hereby made for the establishment of local Property Recovery Panels in every district or administrative unit of the Republic.

- (1) Local Recovery Panels shall consist of:
 - (a) A local Chief who shall serve as Chairperson;
 - (b) A local Councilor who shall serve as Secretary;
 - (c) A local headman who shall serve an ordinary member;
 - (d) Four local women of which one of them shall be a returning person nominated by women residing in the locality shall serve as ordinary members.

Functions of the Local Panels

S. 6 The functions of the Local Panels shall be to:

- (1) Provide an alternative and informal community based mechanism for recovering traditional property belonging to returning persons;
- (2) Assist returning persons to recover their property;
- (3) Settle any disputes relating to such recovery on the basis of simple requirements of proof of ownership or possession or occupation, based upon reliable and verifiable testimony, provided that a returning person who is not satisfied with a decision made by a Traditional Panel shall lodge a claim with the Commission under S.8(3);
- (4) Maintain a record of any decisions made;
- (5) Communicate such decisions in writing to a local administrative authority which shall maintain a record of all such decisions.

Establishment of Property Claims Commission for Returnees

S.7 There is hereby established a Property Claims Commission for Returnees which shall be a full-time inquisitorial and quasi-judicial body.

The Commission shall consist of five persons appointed by the Minister under S. 4(4).

The Minister shall appoint a Chairperson of the Commission from amongst its Members.

Members of the Commission shall consist of three women and two men of high integrity who shall be qualified in the fields of property law, land survey, land use and planning.

(1) Members of the Commission shall enjoy security of tenure that applies to judicial offices.

Functions of the Commission

S. 8 The functions of the Commission shall be to:

- (1) Advise the Minister to ensure that the property of internally displaced persons is legally protected against arbitrary and illegal appropriation, occupation or use in all possible circumstances;
- (2) Examine and resolve disputes arising from the recovery or loss of any property previously occupied or owned by returning persons;
- (3) Receive claims from or on behalf of returning persons or their next of kin with respect to the loss or recovery of their property and possessions which they abandoned or were dispossessed of upon being displaced;
- (4) Resolve special claims made by returning spouses, single parents, and single women, in relation to disputes on the ownership of family or other property following the death of a spouse or a relative;
- (5) Guarantee that returning spouses succeed to the property of their deceased spouses;
- (6) Ensure that children shall have rapid and unimpeded access to the enjoyment or use of the property of their deceased parents;
- (7) Guarantee the right of bereaved children to inherit family property where both of their parents were deceased during displacement or refuge, without any discrimination between girls and boys, children born out of wedlock, and adopted children;
- (8) Ensure, that returning communities, pastoralists or other groups, shall be reintegrated in areas previously occupied by them to preserve the dependency of their livelihood on their special attachment to lands which they owned or possessed prior to their flight or displacement;

(9) Where such reintegration or return is not possible, the Commission shall ensure that these communities shall be provided in all possible cases with lands at least equal in value to those previously occupied by them;

(10) Where alternative lands of equal value cannot be allocated, the Commission shall ensure that an appropriate compensation package based on S.9 shall be made available and accessible to such Communities.

Compensation

S. 9 The Commission shall determine an appropriate compensation package for the loss of the property of returnees where such property cannot be recovered or restored to them.

- (1) For this purpose, the Commission shall determine the person or organ of the Republic responsible for paying out such compensation in whole or in part.
- (2) The Commission shall determine an appropriate compensation package based on the following principles:
 - (a) Actual loss of the value of the property;
 - (b) Striking a fair balance between the right to own property and the loss or acquisition or expropriation of such property under S. 3(4);
 - (c) Denial of the enjoyment of rights, such as family life, home and adequate housing, whose fulfillment depend on such property;
 - (d) Non-discrimination against women and application of the equal protection of the law to any claim involving women;
 - (e) The best interests of the child in any claim involving a child;
 - (f) United Nations Principles on Housing and Property Restitution in the context of the return of refugees and internally displaced persons as provided for in Schedule 2 of this Act.

PART FOUR

Miscellaneous Provisions

S. 10 Nothing contained in this Act shall affect the Republic's international obligations pertaining to the right to own property with respect to any applicable treaty to which the Republic is a Party.

S. 11 Nothing contained in this Act shall affect the Republic's international obligations pertaining to refugees under the United Nations Convention Relating to the Status of Refugees 1951 and the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa 1969.

S.12 Nothing contained in this Act shall affect the Republic's international obligations pertaining to Internally Displaced Persons under the Great Lakes Protocol on The Protection and Assistance to Internally Displaced Persons.

S. 13 Nothing contained in this Act shall affect the right of returnees to take legal action aimed at recovering, or obtaining redress for the loss of, their properties before the judicial organs of the Republic or to the African Commission or African Court on Human and Peoples' Rights, or any other human rights body established by a treaty to which the Republic is a Party after they have exhausted all the local judicial remedies available.

S.14 The principles contained in this Act shall also apply to persons referred to in S.2(3) of this Act in any case where the issue of such compensation arises under S3 (5) of the model legislation on Internally displaced persons or any other national legislation

S. 14 This Act shall come into effect on such a date as the Minister may decide.

Schedule 1

United Nations Principles on Housing and Property Restitution in the context of the return of refugees and internally displaced persons, E/CN.4/Sub.2/2005/17/Add.1, 11 July 2005.

UNITED NATIONS

E

Economic and Social Council

Distr.

GENERAL

E/CN.4/Sub.2/2005/17/Add.1

11 July 2005

ENGLISH ONLY

COMMISSION ON HUMAN RIGHTS

Sub-Commission on the Promotion and

Protection of Human Rights

Fifty-seventh session

Item 4 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Housing and property restitution in the context of the return of refugees and internally displaced persons

Final report of the Special Rapporteur, Paulo Sérgio Pinheiro Addendum

Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons*

* The endnotes have not been edited.

GE.05-14873 (E) 180705

E/CN.4/Sub.2/2005/17/Add.1

Introduction

1. These Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons (hereinafter “Principles”) are meant to provide an overview of the international human rights, refugee and humanitarian law and related standards which serve to support and inform the Principles themselves. For ease of use, these Explanatory Notes are organized in parallel structure to the Principles.

SECTION I. SCOPE AND APPLICATION

2. International refugee law defines a refugee as anyone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a

nationality and being outside the country of his [or her] former habitual residence, is unable or, owing to such fear, is unwilling to return to it”.¹ The Guiding Principles on Internal Displacement define internally displaced persons as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”.²

3. While the mandate given to the Special Rapporteur refers to “refugees and internally displaced persons”, it should be noted that the issues, norms and standards regarding housing and property restitution pertain to similarly situated persons. Given the definitions noted above, the phrase “refugees and internally displaced persons” unfortunately overlooks those persons displaced across borders, for example due to conflict or disaster, who may not meet the legal definition of a refugee under international refugee law (that is to say, who do not flee due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion). Because such populations also have a right to housing, land and property restitution on an equal basis with refugees and internally displaced persons, the Principles incorporate the language “refugees and displaced persons”.

SECTION II. THE RIGHT TO HOUSING AND PROPERTY RESTITUTION

4. Throughout the text, the term “restitution” refers to an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position.

5. The right to a remedy for human rights violations has perhaps been best articulated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, which are based on well-established principles of international human rights and humanitarian law.³ Section II of the Basic Principles and Guidelines, on the Scope of the obligation, notes that the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law includes, inter alia, the duty to:

- (a) take appropriate legislative and administrative measures to prevent violations;
- (b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) provide those who claim to be victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
- (d) provide effective remedies to victims, including reparation.

6. The Commission on Human Rights, in its resolution 2005/35, adopted the Basic Principles and Guidelines, recommended that States take them into account and promote respect for them, and called upon the Economic and Social Council and the General Assembly to adopt them.

7. The Basic Principles and Guidelines stipulate in paragraph 15 that “Reparation should be proportional to the gravity of the violations and the harm suffered”, and in paragraph 19 that “Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights,

identity, family life and citizenship; return to one's place of residence, restoration of employment and return of property.”

SECTION III. OVERARCHING PRINCIPLES

The right to non-discrimination

8. The right to non-discrimination is protected in virtually every major international human rights instrument, including article 2 of the Universal Declaration of Human Rights,⁴ article 2 of the International Covenant on Economic, Social and Cultural Rights⁵ and article 2 of the International Covenant on Civil and Political Rights.⁶

9. Discrimination is also prohibited under the International Convention on the Elimination of All Forms of Racial Discrimination,⁷ the Convention on the Elimination of All Forms of Discrimination against Women,⁸ as well as under article 2 of the Convention on the Rights of the Child.⁹ Discrimination is similarly prohibited under article II of the American Declaration on the Rights and Duties of Man,¹⁰ article 1 of the American Convention on Human Rights,¹¹ article 2 of the African [Banjul] Charter on Human and Peoples' Rights¹² and article 14 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms.¹³

The right to equality between men and women

10. The right to equality between men and women is guaranteed in article 3 of the International Covenant on Civil and Political Rights and in article 3 of the International Covenant on Economic, Social and Cultural Rights, as well as in the Convention on the Elimination of All Forms of Discrimination against Women. The right to equality between men and women has been consistently interpreted to require the implementation of positive measures meant to remedy the effects of de facto or de jure discrimination on the basis of sex.

11. For example, in its general comment No. 28 on the equality of rights of men and women, the Human Rights Committee states that “The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women”, and goes on to note that “articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights”.¹⁴ General comment No. 28 also notes that “The right of everyone ... to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies that the capacity of women to own property”¹⁵

12. In its resolution on “Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing”, the Commission on Human Rights has also affirmed “that discrimination in law and practice against women with respect to having access to, acquiring and securing land, property and housing, as well as financing for land, property and housing, constitutes a violation of women’s human right to protection against discrimination and may affect the realization of other human rights”.¹⁶ The Commission similarly reaffirmed resolution 42/1 of the Commission on the Status of Women which, inter alia, urges States to design and revise laws to ensure that women are accorded full and equal rights to own land and other property, and the right to adequate housing, including through the right to inheritance, and to undertake administrative reforms and other necessary measures to give women the same right as men to credit, capital, appropriate technologies, access to markets and information.¹⁷

13. The Commission also encouraged all the human rights treaty bodies, in particular the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, special procedures and other human rights mechanisms of the Commission and the Sub-Commission on the Promotion and Protection of Human Rights as well as all United Nations bodies regularly and systematically to take a gender perspective into account in the implementation of their mandates and to integrate the content of the present resolution into their work, as appropriate.¹⁸ The Special Rapporteur agrees that integrating a gender perspective is critical to the work of the human rights bodies and their mechanisms, and as such has sought to integrate a gender perspective within these Principles, including provisions with respect to positive measures which should be implemented in order to ensure the equal right of men and women, and the equal right of boys and girls, to the enjoyment of housing, land and property restitution.

The right to be protected from displacement

14. The Principles articulate several rights which are relevant at all times during displacement, and in this section summarizes those rights which are of particular significance in terms of protecting people from displacement. As such, the Principles speak not only to the issue of providing a remedy (i.e. restitution) to those persons already displaced, but also to seeing that the crisis of displacement is itself averted. This is consistent with the spirit of the Guiding Principles on Internal Displacement, which note in principle 5 that “All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.”¹⁹

15. The Guiding Principles also state in principle 6 that “Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”²⁰ This language is similar to that which is reflected within principle 5.1 of the Principles.

16. Principle 5.3 makes reference to the practice of forced eviction, which deserves special consideration here, as forced evictions are often seen in situations of displacement. “Forced eviction” is 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. Forced evictions are a particular type of displacement which are most often characterized or accompanied by: (1) a relation to specific decisions, legislation or policies of States or the failure of States to intervene to halt evictions by non-State actors; (2) an element of force or coercion; and (3) are often planned, formulated and announced prior to being carried out. The right to be free from forced eviction is implicit in the right to adequate housing, as well as in the right to privacy and respect for the home.

17. In its general comment No. 7, the Committee on Economic, Social and Cultural Rights stated that “forced evictions are prima facie incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law”.²¹ The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction

- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) all persons carrying out the eviction to be properly identified;
- (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (g) provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.²²

18. Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states in the relevant part that “Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²³

19. In applying article 16, the Committee against Torture has interpreted the Convention against Torture to protect persons from the destruction of their homes. In *Hijrizi v. Yugoslavia*,²⁴ for example, the Committee against Torture held that the burning and destruction of houses constituted, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment, even though the destruction was not perpetrated by public officials. The case involved the destruction of the Bozova Glavica settlement in the city of Danilovgrad by private residents lived nearby. Furthermore, in its 2001 concluding observations on Israel, the Committee held that Israel’s policies of housing demolition may amount to cruel, inhuman or degrading treatment or punishment in violations of article 16 of the Convention.²⁵

20. The United Nations Commission on Human Rights has reaffirmed “that the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing”.²⁶ General comment No. 7 states that States shall ensure that, in cases where lawful evictions are deemed justifiable and unavoidable, evictions are carried out in a manner which is compatible with international human rights standards, including principles of non-discrimination, reasonableness and proportionality. States shall also ensure that persons subjected to eviction do not become homeless as a result of the eviction, that all the legal recourses and remedies are made available to them, and that they are given an opportunity for genuine consultation throughout evictions processes.

21. The Commission on Human Rights, in its resolution 2004/28, also recommended that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups and consistent with their wishes, rights and needs, and recognizing the obligation to ensure such provision in the event of any forced eviction.²⁷

22. The Sub-Commission has similarly reaffirmed that “every woman, man and child has the right to a secure place to live in peace and dignity, which includes the right not to be evicted arbitrarily or on a discriminatory basis from one’s home, land or community”.²⁸ The Sub-Commission has also reaffirmed that “the practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of

movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment”.²⁹

23. Principle 5.3 also makes reference to other well-established prohibitions under international law. For example, the Geneva Convention relative to the Protection of Civilian Persons in Time of War states in its article 33 that “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited” and that “Reprisals against protected persons and their property are prohibited.”³⁰ Article 53 stipulates that “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”³¹ Article 14 of Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts states that “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”³²

The right to privacy and respect for the home

24. Article 12 of the Universal Declaration of Human Rights states that “No one shall be subjected to arbitrary interference with his [or her] privacy, family, home or correspondence, nor to attacks upon his [or her] honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³³

25. Article 17 of the International Covenant on Civil and Political Rights states that “No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attacks on his [or her] honour and reputation”, and that “Everyone has the right to the protection of the law against such interference or attacks.”³⁴ Similarly, article 16 (1) of the Convention on the Rights of the Child states that “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”³⁵

26. The Human Rights Committee, in its general comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, states that “... [the right of every person to be protected against arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence as well as against unlawful attacks on his [or her] honour and reputation] is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right”.³⁶

27. There is also a connection to be made here with the practice of forced eviction, discussed above. For example, the Human Rights Committee recently stated, in its concluding observations on Kenya, that the “Committee remains concerned about reports of the forcible eviction of thousands of inhabitants from so-called informal settlements, both in Nairobi and other parts of the country, without prior consultation with the populations concerned and/or without adequate prior notification. This

practice arbitrarily interferes with the Covenant rights of the victims of such evictions, *especially their rights under article 17 of the Covenant*” (emphasis added).³⁷

28. Article IX of the American Declaration on the Rights and Duties of Man also states that “Every person has the right to the inviolability of his [or her] home.”³⁸ This right is also codified in the American Convention on Human Rights, which states in its article 12 that “No one may be the object of arbitrary or abusive interference with his [or her] private life, his [or her] family, his [or her] home, or his [or her] correspondence, or of unlawful attacks on his [or her] honour or reputation”,³⁹ and in article 8 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, which states “Everyone has the right to respect for his [or her] private and family life, his [or her] home and his [or her] correspondence.”⁴⁰

The right to peaceful enjoyment of possessions

29. Principle 7.1 incorporates similar language to that which is used in Protocol No. 1 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, which stipulates in its article 1 on “Protection of property” that “Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”⁴¹

30. “Property” within the context of the Principles refers primarily to real and/or immovable property, most notably, but not exclusively, housing and land. Article 17 of the Universal Declaration of Human Rights stipulates that “Everyone has the right to own property alone as well as in association with others” and that “No one shall be arbitrarily deprived of his [or her] property.”⁴²

31. Article XXIII of the American Declaration on the Rights and Duties of Man states that “Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”⁴³ Article 21 of the American Convention on Human Rights states that “Everyone has the right to the use and enjoyment of his [or her] property. The law may subordinate such use and enjoyment to the interest of society” and provides that “No one shall be deprived of his [or her] property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”⁴⁴

32. Similarly, article 14 of the African [Banjul] Charter on Human and Peoples’ Rights states that “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”⁴⁵

33. It also deserves mention that International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provides that “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized.”⁴⁶ Article 16 (3) of ILO Convention No. 169 also stipulates that “Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.”⁴⁷

The right to adequate housing

34. The right to adequate housing is enshrined in several international human rights instruments. The Universal Declaration of Human Rights stipulates in its article 25 that “Everyone has the right to a standard of living adequate for the health and well-being of himself [herself] and of his [her] family, including food, clothing, housing and medical care and necessary

social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his [her] control.”⁴⁸

35. The leading statement of international law relating to housing rights can be found in the International Covenant on Economic, Social and Cultural Rights, which states in its article 11 (1), “The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself [herself] and for his [her] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁴⁹ Housing rights are also enshrined and protected within other international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁰ the Convention on the Elimination of All Forms of Discrimination against Women,⁵¹ the Convention on the Rights of the Child,⁵² the Convention Relating to the Status of Refugees,⁵³ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁵⁴

36. Certain aspects of the right to adequate housing must be taken into account when determining the meaning and scope of adequacy. The right to adequate housing has been defined by the Committee on Economic, Social and Cultural Rights in its general comment No. 4 on the right to adequate housing.⁵⁵ The Committee notes that the right to adequate housing should be seen holistically, encompassing the right to live somewhere in security, peace and dignity. In this regard, the Committee identified seven key criteria which comprise the right to adequate housing, namely, legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.

37. While the right to adequate housing is a human right which applies to all persons, specific statements have been made at the international level with respect to refugees and internally displaced persons and their access to adequate housing which deserve mention here. For example, with respect to refugees, the Executive Committee of the Office of the United Nations High Commissioner for Refugees has, through its Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, encouraged countries of origin to provide homeless returning refugees, as appropriate, with access to land and/or adequate housing, comparable to local standards.⁵⁶ Principle 18 of the Guiding Principles on Internal Displacement provides that “All internally displaced persons have the right to an adequate standard of living” and that “At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: ... basic shelter and housing.”⁵⁷

The right to freedom of movement

38. The right to freedom of movement and residence is recognized in article 13 (1) of the Universal Declaration of Human Rights, which states that “Everyone has the right to freedom of movement and residence within the borders of each State.”⁵⁸ This right is also protected under article 12 (1) of the International Covenant on Civil and Political Rights,⁵⁹ as well as article VIII of the American Declaration of the Rights and Duties of Man,⁶⁰ article 22 (1) of the American Convention on Human Rights,⁶¹ and article 12 (1) of the African [Banjul] Charter on Human and Peoples’ Rights.⁶²

39. General comment No. 27 of the Human Rights Committee on freedom of movement notes that “the right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. ... Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one’s

choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory”.⁶³

SECTION IV. THE RIGHT TO VOLUNTARY RETURN IN SAFETY AND DIGNITY

40. The right to return to one’s own country is guaranteed in article 13 (2) of the Universal Declaration of Human Rights;⁶⁴ article 12 (4) of the International Covenant on Civil and Political Rights;⁶⁵ articles 45, 127, 132, 134 and 135 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War;⁶⁶ and article 12 (2) of the African [Banjul] Charter on Human and Peoples’ Rights.⁶⁷

41. General comment No. 27 of the Human Rights Committee on freedom of movement also notes that “The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.”⁶⁸

42. The right to return is increasingly seen as encompassing not merely returning to one’s country, but to one’s home as well. Indeed, the right of refugees and displaced persons to return to their homes is recognized by the international community as a free-standing, autonomous right in and of itself. In 1980, the General Assembly, in its resolution 35/124 on international intervention to avert new flows of refugees, reaffirmed “the right of refugees to return to their homes in their homelands”. Many later resolutions of a number of bodies, including the Security Council, have reaffirmed that principle.

43. There are also examples referring to specific cases of displacement. For example, the Security Council, in its resolution 820 (1993) concerning Bosnia and Herzegovina, adopted on 17 April 1993, reaffirmed that “all displaced persons have the right to return in peace to their former homes and should be assisted to do so”. Similar language by the Security Council reaffirming the right to return to one’s home can be found in resolutions addressing displacement in numerous countries and regions, including Abkhazia and the Republic of Georgia,⁶⁹ Azerbaijan,⁷⁰ Bosnia and Herzegovina,⁷¹ Cambodia,⁷² Croatia,⁷³ Cyprus,⁷⁴ Kosovo,⁷⁵ Kuwait,⁷⁶ Namibia⁷⁷ and Tajikistan.⁷⁸

44. Other United Nations bodies have also reaffirmed the right to return to one’s home. For instance, in addition to resolution 35/124 mentioned above, the General Assembly has reaffirmed or recognized the right to return to one’s home in resolutions concerning Algeria,⁷⁹ Cyprus,⁸⁰ Palestine/Israel⁸¹ and Rwanda.⁸²

45. Likewise, the Sub-Commission reaffirmed “the right of all refugees ... and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish” with the adoption, without a vote, of resolution 1998/26, entitled “Housing and property restitution in the context of the return of refugees and internally displaced persons”.

46. The Committee on the Elimination of Racial Discrimination also reaffirmed this principle in its general recommendation XXII on article 5 and refugees and displaced persons, in which it states: “all ... refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety”.⁸³ Similarly, the international community, meeting in Durban, South Africa in August and September 2001 for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, unequivocally declared its universal recognition of “the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge[d] all States to facilitate such return”.⁸⁴

47. The UNHCR *Handbook on Voluntary Repatriation* provides additional guidance on these issues. The *Handbook* stresses, for instance, that the mandate of UNHCR includes promoting “the creation of conditions that are conducive to voluntary return in safety and with dignity” and promoting “the voluntary repatriation of refugees once conditions are conducive to return”.⁸⁵ In addition, it states that the recovery and restitution to returnees of their land or other immovable and movable property which they may have lost or left behind are to be included in any tripartite agreement or any declaration of amnesties and guarantees.⁸⁶

48. The Executive Committee of UNHCR, in its Conclusion No. 18 (XXXI) of 1980, “called upon governments of countries of origin to provide formal guarantees for the safety of returning refugees and stressed the importance of such guarantees being fully respected and of returning refugees not being penalized for having left their country of origin for reasons giving rise to refugee situations”.⁸⁷ Similarly, in its Conclusion No. 40 (XXXVI) of 1985, the Executive Committee reaffirmed “the basic rights of persons to return voluntarily to the country of origin” and affirmed “the need for [repatriation] to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his [or her] country of origin”.⁸⁸

49. UNHCR also recently stated that experience has shown that voluntary repatriation operations are likely to be less successful if housing and property issues are left too long unattended, particularly if refugees are not able to recover their houses and property in the country of origin.⁸⁹

50. The forced return of refugees and other displaced persons is, *prima facie*, incompatible with international human rights standards, as forced repatriation violates the principle of non-refoulement. Article 33 (1) of the Convention relating to the Status of Refugees provides that “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”⁹⁰ Similarly, principle 15 of the Guiding Principles on Internal Displacement provides that “Internally displaced persons have ... [t]he right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.”⁹¹

SECTION V. LEGAL, POLICY, PROCEDURAL AND INSTITUTIONAL IMPLEMENTATION MECHANISMS

51. Section V of the Principles provide specific guidance regarding how best to ensure the right to housing, land and property restitution in practice. The principles articulated in this section are based, in part, on the findings of the preliminary report (E/CN.4/Sub.2/2003/11), which analysed some of the common obstacles to restitution programmes, including secondary occupation, property destruction, loss or destruction of property, ineffectual institutions and discriminatory restitution programmes. In this section, the Principles also express a good governance approach and as such reflect some of the “best practices” which have been devised at the level of policy to address these common obstacles.

Compatibility with international human rights and humanitarian law and related Standards

52. The provision that all restitution procedures, institutions, mechanisms and legal frameworks related to the right to restitution are fully compatible with international human rights, refugee and humanitarian law and related standards is important to ensure that these standards are adequately reflected at the level of national policy-making vis-à-vis restitution. Doing so will

ultimately serve to protect all persons from future violations of human rights and ensure the effective implementation of the Principles.

National procedures, institutions and mechanisms

53. In situations where restitution has been tried in situations of post-conflict, effective and competent national institutions have been the cornerstone of successful restitution programmes. The provisions contained in section V on restitution procedures, institutions, and mechanisms are meant to provide practical guidelines for the establishment and support of national-level institutions, and other institutions, charged with implementing restitution policies.

54. It deserves mention within the Explanatory Notes that the absence of effective, impartial and accessible judicial remedies severely compromises the restitution process. This is particularly the case in post-conflict situations where internal political divisions render domestic institutions incapable of effectively administering restitution programmes, either due to institutional bias, or due to a lack of capacity and resources. Certainly, while ensuring the integrity of the restitution process as a whole is a task of all relevant procedures, institutions and mechanisms, effective judicial mechanisms play a special role in upholding the credibility, justness and fairness and of the entire restitution process.

55. Because restitution procedures often need to be implemented in the midst of delicate or charged political situations, the Principles recognize that States should, where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the restitution process in a just and timely manner, request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes responsible for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

Accessibility of restitution claims procedures

56. The Principles provide for the accessibility of restitution claims procedures, with the understanding that not only must institutions be effective in their work to implement restitution policies, they must also be accessible to those constituencies which they are meant to benefit. As such, claims procedures must be physically, linguistically and economically accessible, and special measures should be taken to ensure that marginalized groups and vulnerable persons are able to benefit from such institutions in an equitable and just manner. The provision of legal aid also increases the accessibility of restitution claims procedures, and ensures that persons are not deterred from benefiting from such procedures due to barriers associated with navigating complex or intimidating legal systems. Emphasis on access to justice is clear in section VIII of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Adequate consultation and participation in decision-making

57. In addition to the general right to take part in the conduct of public affairs (Universal Declaration of Human Rights, art. 21 (1); International Covenant on Civil and Political Rights, art. 25 (a)), the right to adequate consultation and representation in decision-making has been articulated, for example, by the Committee on Economic, Social and Cultural Rights within the context of forced evictions. In its

general comment No. 7, the Committee observed that affected communities should have a right to “an opportunity for genuine consultation”.⁹²

58. Similarly, principle 28 (2) of the Guiding Principles on Internal Displacement states that “Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”⁹³

Housing, land and property records and documentation

59. The provisions made within the Principles regarding housing and property records and documentation are meant in part to facilitate, from a logistical point of view, restitution processes through the establishment or preservation of property registration systems.

60. In emergency situations, alternative mechanisms may need to be established in order to create or recreate a system for the registration of property. One effective way to do this, perhaps, would be to integrate housing and property restitution protections in registration procedures for refugees and displaced persons. Many States have registration systems in place for the provision of humanitarian aid to the displaced, and many States include within their registration processes a mechanism for the collection of demographic data on the displaced population. It would seem quite feasible to amplify the data-collection component of these registration processes, to record information regarding the housing and property situation of refugees and displaced persons at the time they fled their homes, including, inter alia, address, length of residency, estimated value, tenure status, ownership records and any other relevant personal information related to residency, ownership, possession or use and loss of property rights.

61. Because displacement often occurs in situations of conflict, including ethnic cleansing, principle 15.8 stipulates 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. ...” Similar language was used in Security Council resolution 820 (1993) on the situation in Bosnia and Herzegovina.⁹⁴ This provision is consistent with basic tenants of contract law which stipulate that contracts entered into under duress by physical compulsion are void. Similarly, if a party’s assent to a contract is induced by a threat from another party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

The rights of tenants and other non-owners

62. Ensuring the rights of tenants and other non-owners is very important in situations of repatriation, resettlement and restitution, as in many cases only the minority of the affected displaced population will have actually owned their housing. Tenants and other non-owners do have rights of possession, including security of tenure, which protect them from forced eviction and displacement.

Secondary occupants

63. Ensuring the rights of secondary occupants is a critical concern because secondary occupation is a common phenomenon in situations of displacement and may present itself as an obstacle to restitution, as was recognized in the preliminary report (E/CN.4/Sub.2/2003/11). Secondary occupants are persons who take up residence in a home after the home’s rightful occupants have fled due to, inter alia, forced displacement, forced eviction, violence or threat of violence, or natural or human-made disasters. Secondary occupation may at times occur when the perpetrators of human rights abuses forcibly evict

residents and subsequently loot property and move into the abandoned homes themselves. Yet, often, secondary occupiers are themselves displaced persons.

64. Adequately addressing the phenomenon of secondary occupation has proven extremely difficult and delicate in practice. In all cases, however, secondary occupants must be protected against forced evictions and must benefit from the procedural protections outlined in general comment No. 7 of the Committee on Economic, Social and Cultural Rights.⁹⁵ Similarly, secondary occupants have a right to adequate housing under international human rights laws and standards, and States should adopt adequate measures to protect secondary occupiers against homelessness, unreasonable relocation and other violations of their human rights. Due process guarantees, and access to fair and impartial legal institutions, must be assured for all parties.

Legislative measures

65. The legal recognition of the right to housing, land and property restitution for refugees and other displaced persons is indispensable to the adequate implementation of restitution programmes and policies and to their adequate enforcement. Legal protections should be clearly articulated in an internally consistent manner, and legal protections should be consistent with international human rights, refugee and humanitarian law and related standards. In order to establish an adequate legal regime for the protection of the rights articulated in these Principles, States will need to pursue a range of legislative measures, including the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices. Paragraphs 2 and 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law reaffirm the obligation to provide such an appropriate legal regime.

Prohibition of arbitrary and discriminatory laws

66. The prohibition of arbitrary and discriminatory laws builds upon the right to non-discrimination recognized in section III of the Principles. As the preliminary report (E/CN.4/Sub.2/2003/11) points out, one of the common obstacles to the successful implementation of restitution programmes has been the establishment of policies which favour certain groups, all the while barring others from returning to their own homes, as with the application of discriminatory abandonment laws.

67. Discriminatory restitution programmes further entrench social divisions and animosities, and are counter to post-conflict resolution, peace-building, as well as to fundamental human rights principles and international human rights legal obligations. As such, it is essential for States to bring their national legislation into compliance with non-discrimination standards, as emphasized in paragraph 25 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Enforcement of restitution decisions and judgements

68. The adequate enforcement of judgments related to restitution is essential to the effective implementation of restitution policies and programmes (e.g. see paragraph 17 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law), and

are especially important in situations where persons have been displaced due to violence and/or conflict.

Compensation

69. The term “compensation” refers to a legal remedy by which a person receives monetary or in-kind payment for harm suffered. Compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation. For example, an injured party may receive compensation to remedy the wrongful dispossession of housing only if that particular housing no longer exists, as determined by an independent, impartial tribunal, or if the injured party knowingly and voluntarily decides it is in his or her interest not to return to his or her home.

70. The Principles do acknowledge that in some cases, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice. However, the standard still applies that compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible. In all cases it is the injured party who should be able to knowingly and voluntarily decide whether to accept restitution, compensation, or some combination therein.

71. In its general recommendation XXIII on indigenous peoples, the Committee on the Elimination of Racial Discrimination affirmed such a formulation in the context of indigenous land and resources, calling upon States parties “to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the rights to just, fair and prompt compensation”.⁹⁶

72. Similarly, principle 29 (2) of the Guiding Principles on Internal Displacement provide that “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*” (emphasis added).⁹⁷

SECTION VI. THE ROLE OF THE INTERNATIONAL COMMUNITY, INCLUDING INTERNATIONAL ORGANIZATIONS

Responsibility of the international community

73. Section VI of the Principles outlines the role of the international community and of international organizations in facilitating restitution processes. In this regard, principle 22.1 notes that the international community should promote and protect the right to housing, land and property restitution, as well as the right to voluntary return in safety and dignity.

74. The agencies and organs of the United Nations, in particular, have important roles to play in overseeing the successful implementation of restitution programmes. At times, these roles can appropriately be seen as part of the United Nations human rights monitoring activities. Most notably, the human rights treaty-monitoring bodies and the Charter-based human rights bodies including the

Commission on Human Rights and the Sub-Commission for the Promotion and Protection of Human Rights should monitor the implementation of restitution programmes within States in order to ensure that they comply with international standards. At other times, however, it will be important for international organizations such as the United Nations to play a more central role in the implementation of restitution programmes.

75. The provisions articulated within section VI on the role of international organizations in peace operations recognize that while housing and property restitution is necessary to post-conflict resolution and peace-building, restitution programmes cannot be properly implemented under conditions that are overly volatile and unstable. As such, peace operations allow for the stabilization of conflict situations, paving the way for housing and property restitution programmes to be effectively institutionalized and, perhaps even more importantly, effectively enforced. The United Nations, as well also other international and regional organizations, also play a unique role in this regard.

76. In many cases, international actors are called upon to negotiate and broker peace agreements between warring factions. As such, the Principles stipulate that the international organizations, including the United Nations, should strive to ensure that peace agreements and voluntary repatriation agreements contain provisions related to the establishment of national procedures, institutions, mechanisms and legal frameworks for facilitating the restitution process.

SECTION VII. INTERPRETATION

Interpretation

77. The final provision on the interpretation of the Principles incorporates a savings clause which prohibits any interpretation that limit, alters or otherwise prejudices the rights recognized under international human rights, refugee and humanitarian law and related standards, or rights consistent with these laws and standards as recognized under national law.

Notes

¹ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* 22 April 1954. See also Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967.

² Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).

³ Commission on Human Rights Resolution 2005/35, Annex.

⁴ The Universal Declaration of Human Rights, UN Doc. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁵ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976.

⁶ *Ibid.*

⁷ International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* 4 January 1969.

⁸ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 September 1981.

⁹ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990.

- 10 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
- 11 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
- 12 African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.
- 13 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
- 14 Human Rights Committee, General Recommendation No. 28 on equality of rights between men and women, CCPR/C/21/Rev.1/Add.10 (29 March 2000).
- 15 *Ibid.*
- 16 Commission on Human Rights (15 April 2005), "Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing," Commission on Human Rights resolution 2005/25, UN Doc. E/CN.4/RES/2005/25.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).
- 20 *Ibid.*
- 21 For more information, please see the UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing (1997): forced eviction, and UN Fact Sheet No. 25: Forced Evictions and Human Rights.
- 22 *Ibid.*
- 23 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* 26 June 1987.
- 24 Communication No. 161/2000: Yugoslavia, UN Doc. CAT/C/29/D/161/2000 (2 December 2002).
- 25 United Nations Committee Against Torture (2001), Conclusions and Recommendations of the Committee against Torture: Israel, UN Doc. CAT/C/XXVII/Concl.5.
- 26 Commission on Human Rights (10 March 1993), "Forced evictions," Commission on Human Rights resolution 1993/77, UN Doc. E/CN.4/RES/1993/77.
- 27 Commission on Human Rights (16 April 2004), "Prohibition of Forced Eviction," Commission on Human Rights resolution 2004/28, UN Doc. E/CN.4/RES/2004/28.
- 28 Sub-Commission for the Promotion and Protection of Human Rights (formerly the Sub-Commission on the Prevention of Discrimination and Protection of Minorities) (20 August 1998), "Forced evictions," Sub-Commission for the Promotion and Protection of Human Rights resolution 1998/9, UN Doc. E/CN.4/Sub.2/RES/1998/9.
- 29 *Ibid.*
- 30 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* 21 October 1950.
- 31 *Ibid.*
- 32 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* 7 December 1978.

- 33 The Universal Declaration of Human Rights, UN Doc. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
- 34 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.
- 35 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990.
- 36 Human Rights Committee, General Comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 8 April 1988.
- 37 Human Rights Committee, Concluding observations of the Human Rights Committee: KENYA, UN Doc. CCPR/CO/KEN (29 April 2005).
- 38 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic documents Pertaining to Human Rights in the Inter-American System, EA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
- 39 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
- 40 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
- 41 [European] Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, Protocol I on enforcement of certain rights and freedoms not included in Section I. of the Convention, 20 March 1952.
- 42 The Universal Declaration of Human Rights, UN Doc. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
- 43 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, EA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
- 44 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).
- 45 African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986.
- 46 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, *entry into force* 5 September 1991.
- 47 Ibid.
- 48 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
- 49 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976.
- 50 International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* 4 January 1969, Article 5(e)(iii).
- 51 Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* 3 September 1981, Article 14(2)(h).
- 52 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* 2 September 1990, Article 27(3).

⁵³ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, Article 21.

⁵⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003.

⁵⁵ United Nations Committee on Economic, Social and Cultural Rights, 13 December 1991, “General Comment 4: The Right to Adequate Housing (Art. 11 (1)).”

⁵⁶ UNHCR Executive Committee (8 October 2004), Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, Document symbol: No. 101 (LV) - 2004.

⁵⁷ Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).

⁵⁸ Universal Declaration of Human Rights, G.A. res. 217A (III), UN Doc A/810 at 71 (1948).

⁵⁹ Article 12 (1) states that “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

⁶⁰ Article VIII states that “Every person has the right to fix his [or her] residence within the territory of the state of which he [or she] is a national, to move about freely within such territory, and not to leave it except by his [or her] own will.” American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev. 1 at 17 (1992).

⁶¹ Article 22 (1) states that “Every person lawfully in the territory of a State party has the right to move about in it, and to reside in it subject to the provisions of the law.” American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

⁶² Article 12 (1) states that “Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.”

African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁶³ *Ibid.*

⁶⁴ Article 13 (2) states that “Everyone has the right to leave any country, including his own, and to return to his country.” Universal Declaration of Human Rights, G.A. res. 217A (III), UN Doc A/810 at 71 (1948).

⁶⁵ Article 12 (4) states that “No one shall be arbitrarily deprived of the right to enter his own country.” International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976.

⁶⁶ Articles 45 states, *inter alia* “Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.” Article 127 states, *inter alia* “When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.” Article 132 states, *inter alia* “The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.” Article 134 states “The

High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.” Article 135 states, *inter alia* “The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.” Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* 21 October 1950.

⁶⁷ Article 12 (2) provides that “Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

⁶⁸ The Committee goes on to observe that “In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.” United Nations Human Rights Committee, 2 November 1999, “General Comment 27: Freedom of Movement (Art. 12).”

⁶⁹ See Security Council resolutions 1287 (2000), 1036 (1996), 971 (1995) and 876 (1993).

⁷⁰ See Security Council resolution 853 (1993).

⁷¹ See Security Council resolution 752 (1992).

⁷² See Security Council resolution 745 (1992).

⁷³ See Security Council resolution 1009 (1995).

⁷⁴ See Security Council resolution 361 (1974).

⁷⁵ See Security Council resolutions 1244 (1999) and 1199 (1998).

⁷⁶ See Security Council resolution 687 (1991).

⁷⁷ See Security Council resolution 385 (1976).

⁷⁸ See Security Council resolution 999 (1995).

⁷⁹ General Assembly resolution 1672 (XVI).

⁸⁰ General Assembly resolution 3212 (XXIX).

⁸¹ General Assembly resolutions 51/126 and 194 (III).

⁸² General Assembly resolution 51/114.

⁸³ Committee on the Elimination of Racial Discrimination, General Recommendation XXII on Article 5 and refugees and displaced persons (forty-ninth session), A/51/18 (1996).

⁸⁴ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, para. 65.

⁸⁵ UNHCR, *Handbook on Voluntary Repatriation*, Geneva, UNHCR (1996).

⁸⁶ *Ibid.*, annexes 5 and 6.

⁸⁷ UNHCR EXCOM Conclusion No. 18 (XXXI)-1980, “Voluntary repatriation,” para. 48 (3) (f), United Nations document A/AC.96/588 (16 October 1980).

⁸⁸ UNHCR EXCOM Conclusion No. 40 (XXXVI)-1985, “Voluntary repatriation,” paras. (a) and (b) (18 October 1985).

⁸⁹ See UNHCR Global Consultations on International Protection, “Voluntary repatriation,” nEC/GC/02/5 (25 April 2002), para. 23.

⁹⁰ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954.

91 Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).

92 UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing: forced eviction (1997).

93 Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).

E/CN.4/Sub.2/2005/17/Add.1

page 24

94 Security Council Resolution 820 (1993) reaffirms “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.” Security Council Resolution 820 (1993), UN Doc. S/RES/820 (1993), *adopted* 17 April 1993.

95 Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing: forced eviction (1997).

96 Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on the rights of indigenous peoples (fifty-first session), A/52/18, annex V, para. 5 (1997).

97 Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2).
