

# The right of IDPs to return home and property restitution

## Legal background<sup>1</sup>

International law not only specifies the forced and arbitrary transfer of populations as a crime against humanity, but also provides for a remedy for the persons victimised by these forced transfers. Persons forcibly transferred from their homes in violation of international standards are entitled to return to their home areas and property, a right known as the “right to return.”

Most international human rights instruments recognise the right to return to one’s country (for instance Article 13 of the Universal Declaration of Human Rights). Although there is no specific provision in international covenants affirming the right of internally displaced persons to return to their places of origin, this right, or at least the obligation of states not to impede the return of people to their places of origin, is implied. For example, article 12 of the ICCPR recognises the right to enter one’s own country, as well as the right to choose freely one’s own place of residence, which incorporates the right to return to one’s home area. In some cases, the right to return to one’s former place of residence is also supported by the right to family reunification and to protection for the family. Moreover, as noted by the United Nations High Commissioner for Refugees, “the right to return to one’s own country is increasingly seen as linked with the right to adequate housing.” (Global Consultation on International Protection, “Voluntary Repatriation”, EC/GC/02/5, 25 April 2002)

Recognising these various rights, the Sub-Commission on the Promotion and Protection of Human Rights has 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” (Resolution 1998/26).

The U.N. Security Council and other U.N. bodies have also repeatedly asserted the right of internally displaced persons to return to their former homes. The Security Council, in its resolution 820 (1993) dealing with Bosnia and Herzegovina, stated 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 affirming this right to return can be found in resolutions addressing the conflicts in Abkhazia and Georgia, Azerbaijan, Bosnia and Herzegovina, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan. The UN Committee on the Elimination of Racial Discrimination (CERD), in its General Recommendation XXII on Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, has stated:

*All ... refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.*

The Commission on Human Rights has often recognised the need for property restitution as an effective remedy for victims of forced displacement (resolution 2005/35). The Inter-American Court of Human Rights recommended payment of fair compensation to returning IDPs, for the

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<sup>1</sup> Adapted from: Claims in Conflict: Reversing Ethnic Conflict in Northern Iraq, Human Rights Watch, August 2003

loss of their property and possessions (Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, 29 November 1983). Finally the Statute of the International Criminal Court authorises restitution as a remedy, stating that “[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” (Rome Statute, art. 75).

## The Guiding Principles on Internal Displacement

Internally displaced people often leave their homes at short notice and without being able to secure their property. In flight and in camps, their few remaining physical possessions may be vulnerable to theft, destruction, or arbitrary seizure by authorities. Guiding Principle 21 provides that internally displaced people should not be arbitrarily deprived of property or possessions through pillage, direct or indiscriminate attacks or other acts of violence, being used to shield military operations or objectives, or being made the object of reprisals. Nor may their property be destroyed or appropriated as a form of collective punishment. The responsible authorities must take steps to protect the property of internally displaced people from such acts, as well as from arbitrary and illegal appropriation, occupation or use.

Guiding Principle 29 states that the competent authorities have the duty and responsibility to assist IDPs with recovery, to the extent possible of their lost properties and possessions. When recovery (or restitution) is not possible, appropriate compensation or other forms of fair reparation should be envisaged.

### **The Principles on Housing and Property Restitution for Refugees and Displaced Persons**

More guidance on the issue of property restitution and compensation can be found in the Principles on Housing and Property Restitution for Refugees and Displaced Persons endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in August 2005. The Principles on Housing and Property Restitution are the result of a four-year study by the Sub-Commission, led by the Special Rapporteur on housing and property restitution in the context of the return of refugees and internally displaced persons, Paulo Sérgio Pinheiro.

The Principles on Housing and Property Restitution for Refugees and Other Displaced Persons articulate standards regarding protection from displacement and strengthening restitution procedures, institutions, mechanisms and legislation from a human rights standpoint. The main aim of the Principles is to develop a set of international standards, which provide a universal approach to housing and property restitution policy at both the national and international level, by drawing upon existing international human rights and humanitarian law.

See:

The Principles on Housing and Property Restitution for Refugee and Displaced Persons:  
<http://daccessdds.un.org/doc/UNDOC/GEN/G05/146/95/PDF/G0514695.pdf?OpenElement>

Explanatory notes of the Principles:

<http://daccessdds.un.org/doc/UNDOC/GEN/G05/148/73/PDF/G0514873.pdf?OpenElement>

Resolution of the Sub-Commission on the Promotion and Protection of Human Rights

<http://daccessdds.un.org/doc/UNDOC/LTD/G05/151/32/PDF/G0515132.pdf?OpenElement>

## Good practices<sup>2</sup>

*Include housing and property restitution issues in refugee and IDP registration procedures*

→ Systems should be developed by those involved with refugee registration procedures to obtain as much detailed information as possible regarding the housing and property situation of IDPs at the time they fled their homes. Relevant information includes the address, type of tenure status, ownership records and other personal housing information from the beginning to provide a reasonably objective source of information for use in eventual repatriation and restitution efforts.

*Equitable, transparent and non-discriminatory institutions, procedures and mechanisms to assess housing and property claims should be established directly within peace settlements and voluntary repatriation agreements*

→ As peace settlements and voluntary repatriation agreements are almost invariably concluded prior to organised return, housing and property issues should be considered during the negotiations of these instruments to ensure that these issues are clearly addressed. Specific mention of the legal, judicial, policy and other mechanisms required to protect these rights should, to the maximum possible extent, be explicitly enshrined within such texts.

*A human-rights based approach to return and the recovery of refugee and IDP housing and property will yield the best, fairest and most suitable results*

→ International best practice has very clearly shown that any attempt to deal adequately with housing and property issues must be entrenched within a legal framework, based firmly on the internationally recognised rights of the displaced and which is fully consistent with the status of relevant international human rights standards.

*Fully recognise and protect women's rights*

→ Restitution programmes should always explicitly protect the housing and property rights of women, and ensure that discrimination against women is prevented in all areas, in particular in the areas of housing and property. Women's rights to inherit property, rights to participate in the restitution process and equal rights to ownership, use and control of housing, property and land must be guaranteed and securely recognised.

*A consistent legislative and administrative framework is indispensable for resolving housing and property issues*

→ All countries that have undertaken to confer repossession rights on refugees and IDPs have had to adopt new law governing the process, or have had to repeal or amend earlier laws that have subsequently been seen to be incompatible with more current efforts. Practice has clearly shown that a consistent legal framework should ideally be in place prior to instigating the claims process. A clear and consistent legal framework is vital for restitution programmes to succeed.

*Consistency between domestic law and relevant international standards should be ensured*

→ To ensure this compatibility, domestic legal analysis, repeal and reform should form a cornerstone of programmes designed to ensure the right to housing and property restitution.

*Flexible and effective remedies based on IDP and refugee choice should be established*

<sup>2</sup> Adapted from: Conclusions – Best practices to guide future housing and property restitution efforts, by Scott Leckie, in: *Returning Home, Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie, Transnational Publishers 2003, Chapter 14.

→ When more flexible, largely administrative, procedures have been established, more claims can be considered and cases closed at a much more rapid rate. Courts still have final oversight under these procedures, but are only used when claimants feel they have not received fair and equitable redress.

*Restitution claims processes should be free, simple and equitable*

→ While claimants may reasonably be expected to pay a nominal fee to register any titles or other declarations awarded in their favour, the process of claiming itself must be free of charge to all. The claims process must be easy to understand and with as little legal language as possible. Claims forms must be available in languages understood by those likely to submit claims. Claims processing centres and offices should be established throughout the areas where claimants currently reside. Mechanisms to assist potential claimants through legal counsel or direct representation to claimants requiring this assistance, should be available.

*A commitment to strenuously enforce decisions on housing and property rights by the parties will be vital to its success*

→ Local and national governments must recognise decisions by restitution bodies, and vigorously enforce these if necessary.

*Reversing the application of unjust or arbitrary applications of law relating to refugee or IDP housing or property will ensure that the rights of returnees are fully respected*

→ Unless the application of discriminatory, biased and unfair laws impinging upon the housing and property rights of members of certain groups is reversed and temporarily lost rights restored, the repatriation process will be severely hampered.

*Housing and property issues can only be adequately redressed if the rights of secondary occupants are fully respected*

→ To the maximum extent possible, relocation of secondary occupants should take place on a voluntary basis, with enforceable legal guarantees in place stipulating that under no circumstances will any secondary occupant become homeless or be forced to reside in intolerable living conditions.

*The repair and reconstruction of damaged housing should be seen as an indispensable element of any return and restitution claims process*

→ The reconstruction and rehabilitation process should not be initiated before there is clarity with respect to ownership and tenants rights.

*Housing and property registration systems are central components in the redress of housing and property claims*

→ Claims mechanisms must have free, unhindered and cost-free access to all existing housing, property and land records relating to land, housing and property claims, and must have clear procedures for determining the validity and relative evidentiary status of such records. Existing records, even if incomplete, must be accessible to any claimant seeking re-possession. All possible claimants must be allowed to submit whatever records or other evidence they have in their possession as evidence in support of their restitution claims. At the same time, while records are crucial for determining claims, no IDP or refugee can be penalised or treated differently from others, simply on the ground that they no longer possess records or evidence of their own.

*Ensure that appropriate compensation systems are in place*

→ An injured party should receive compensation to remedy the wrongful dispossession of housing only if that particular housing no longer exists, or the injured party knowingly and voluntarily accepts compensation in lieu of restitution. In some situations, a

negotiated peace settlement combining compensation and restitution may be the most appropriate remedy and form of restorative justice.

**The limits of cash compensation:**

"While cash compensation is often viewed as a simple means of settling housing and property restitution claims, cash compensation should be reserved only for any economically assessable damage resulting from violations of international human rights and humanitarian law (...). Practice has repeatedly shown – particularly in the context of development-based displacement involving the loss of housing – that cash compensation is rarely used to secure an adequate home, and can, in fact, be a reason for a person becoming homeless. The World Bank warns against this form of compensation: "cash compensation alone should generally be avoided, except in well justified instances, as it typically leads to the impoverishment". There are many alternative means, other than monetary alone, that can satisfy the obligations associated with the provision of compensation. The obvious first alternative to cash compensation would be the construction – by the State or subsidised by the State – of adequate, affordable and accessible housing which could be made available to returnees or displaced secondary occupants. Other housing-based or fair alternative solutions might be made accessible through a range of creative measures, including: the establishment of a public voucher system or individual subsidies which can only be redeemed in relation to the construction of residences; government assistance for returnees in finding an empty flat or in accessing new housing; tax reductions could be given to returnees for a fixed period; returnees could be placed at the head of the official housing waiting list; State land plots could be allocated to the returnees; government bonds in a substantial sum could be provided to returnees; or, returnees could be given favourable housing credits for building materials should they choose to build new housing themselves."

Conclusions – Best practices to guide future housing and property restitution efforts", by Scott Leckie, in: *Returning Home, Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie, Transnational Publishers 2003, Chapter 14

*Privatisation can seriously complicate restitution efforts*

→ This shift in ownership rights from the State to other private individuals (such as secondary occupants) effectively results in the confiscation of a refugee or IDPs home or land during their absence and must be seen as an act incompatible with housing and property restitution rights. States should refrain from shifting social and other housing resources into the private sphere when such homes or properties were legally occupied by refugees and IDPs at the time of flight.

*Restitution claims are not rendered void due to the passage of time*

→ States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin.

*Restitution rights must extend to heirs of property*

→ In principle, all living IDPs and refugees and the heirs of those who have died since their flight from their original homes and lands must have a right to submit restitution claims on the housing or property which would have been restored to the original owner or occupant had they survived.

*Housing and property issues are best addressed with effective institutional coordination*

→ Post-conflict programmes to restore refugee and IDP housing and property rights tend to involve the efforts of numerous institutions. To ensure the successful return of original homes and lands to returnees, therefore, institutional efforts should be well coordinated through the conclusion of agreements or memorandums of understanding, aimed at promoting cooperative actions prior, during and subsequent to the work of restitution institutions. The appointment of one agency to oversee the coordination of restitution may facilitate restitution.

*Claims processes can be used to provide permanent land, housing or property solutions for all returnees – owners, tenants and the landless*

→ Return programmes have sometimes focused only on the restoration of ownership rights, in effect excluding former tenants or holders of occupancy or other rights from returning to their original homes. For re-possession programmes to be fair and equitable, however, legitimate non-owners, who were forced to flee their original homes due to the same reasons that owners in the same area fled, should be entitled to the same rights as former owners.

*Financial support for restitution mechanisms need to be secure and sustained*

→ Restitution mechanisms and institutions need to be assured of their own existence for restitution procedures to succeed. Preferably, a State or coalition of States, should be identified as soon as possible to act as the key supporter of a restitution mechanism for IDPs and refugees.

*Citizenship, nationality and residency should not preclude restitution*

→ Restitution rights should not be subject to a person's citizenship, nationality or place of residence. Claims should be allowed by any person with a legitimate claim, notwithstanding any other criteria.

## Resources

Centre on Housing Rights and Evictions (COHRE): <http://www.cohre.org>  
COHRE is the lead NGO with regard to issues of property restitution, housing rights, protection from eviction. It publishes comprehensive surveys on the international legal framework related to these issues, as well as national practices and policies.

Scott Leckie (ed.), **Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons**, Transnational Publishers (Ardsley, US), 2003

*Examples of country studies:*

Norwegian Refugee Council, **A Guide to Property Law in Afghanistan**, March 2005  
[http://www.db.idpproject.org/Sites/idpSurvey.nsf/6D9A00D5A27A27ACC125705A00283DBA/\\$file/Property+Law+Manual+FINAL.pdf](http://www.db.idpproject.org/Sites/idpSurvey.nsf/6D9A00D5A27A27ACC125705A00283DBA/$file/Property+Law+Manual+FINAL.pdf)

Civil Society Organisations for Peace in Northern Uganda (CSOPNU), **Land Matters in Displacement, The Importance of Land Rights in Acholiland and What Threatens Them**, December 2004  
[http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/EC258E63C957773CC1256FAB002D3D3E/\\$file/Land+matters+in+displacement+final.pdf](http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/EC258E63C957773CC1256FAB002D3D3E/$file/Land+matters+in+displacement+final.pdf)