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**ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

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

**Preliminary report of the Special Rapporteur, Paulo Sérgio Pinheiro, submitted  
in accordance with Sub-Commission resolution 2002/7\***

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\* This report was submitted late so as to include the most updated information possible.

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## **Introduction**

1. At its fifty-fourth session, the Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2002/7, decided to entrust Paulo Sérgio Pinheiro with the task of preparing a comprehensive study on housing and property restitution in the context of the return of refugees and internally displaced persons based on his working paper (E/CN.4/Sub.2/2002/17) as well as on the comments made and the discussions that took place at the fifty-fourth session of the Sub-Commission and the fifty-eighth session of the Commission on Human Rights. At its fifty-ninth session, in its decision 2003/109, the Commission endorsed the decision of the Sub-Commission.

2. This preliminary report is hereby submitted in accordance with Sub-Commission resolution 2002/7 and Commission decision 2003/109.

3. The Special Rapporteur would like to thank the Centre on Housing Rights and Evictions (COHRE) for its assistance with the preparation of this report.

## **I. TERMINOLOGY**

4. For the purpose of this working paper, the phrase “housing and property” refers to housing and real property, including land. This definition is used for two key reasons. First, housing and real property restitution in the context of the right to return of refugees and other displaced persons has deservedly received a great deal of attention by the international community, more so than other types of property restitution. This attention is due in large part to the unique role that housing and real property restitution play in securing the voluntary, safe and dignified return of refugees and other displaced persons to their homes and places of original residence.

5. Second, housing rights are enshrined in international human rights and humanitarian law to a far greater degree and encompass far more under international law, substantively speaking, than do property rights more generally.<sup>1</sup> The right to adequate housing is enshrined in several international human rights instruments.<sup>2</sup> Indeed, housing rights are not a new development within the human rights field, but rather have long been regarded as essential to ensure the well-being and dignity of the human person.<sup>3</sup> Accordingly, the main focus of this working paper is on issues relating to housing and real property restitution, including, in this case, the restitution of land.

6. The practice of “forced evictions”,<sup>4</sup> namely 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, is a phenomenon also reflected in this report. Forced evictions are a particular type of displacement which are most often characterized or accompanied by: (i) a relation to specific decisions, legislation or policies of States or the failure of States to intervene to halt evictions by non-State actors; (ii) an element of force or coercion; and (iii) are often planned, formulated and announced prior to being carried out. The Commission on Human Rights has affirmed “that the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing”.<sup>5</sup>

7. The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law” (E/CN.4/2000/62, annex) (hereinafter “The Basic Principles and Guidelines”) note that victims of violations of international human rights and humanitarian law, such as victims of forced eviction, have a right to a remedy. The right to a remedy includes, *inter alia*, reparation for harm suffered.

8. Restitution is a particular form of reparation. 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 (i.e. *status quo ante*). Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence; and restoration of employment and return of property (*ibid.*).

9. In this study, restitution refers specifically to the return of arbitrarily or illegally confiscated housing or property to the original owner(s) or right-holders. While there can be no dispute that housing and property restitution is a right of displaced persons and refugees under international human rights law, essential to the realization of the right to return, it must likewise be recognized as integral to the larger goals of peace-building and post-conflict resolution, essential for the creation of durable remedies to situations of displacement and conflict.

10. Compensation is a specific form of reparation. The term “compensation” refers to a legal remedy by which a person receives monetary payment for harm suffered. When appropriate, compensation may be given in lieu of restitution, for example, when it is either in fact impossible or impracticable to restore the person’s property or house. Monetary compensation should, however, be seen as a last resort, and when used as a measure of restorative justice must be adequate, fair and just.

11. While the mandate given to the Special Rapporteur refers to “refugees and internationally displaced persons”, it should be noted that the issues, norms and standards regarding housing and property restitution pertain to similarly situated persons as well. 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 law. Because such populations have the rights to housing and property restitution as do refugees and IDPs, this report utilizes the language “refugees and other displaced persons”.

## **II. PAST SITUATIONS INVOLVING HOUSING AND PROPERTY RESTITUTION**

12. Throughout the world, housing and property restitution programmes have represented a dramatic advance in the actual implementation of human rights norms. Literally hundreds of thousands of persons have been successfully returned to their original position after having been arbitrarily deprived of housing, land and other property. The development of the work of various United Nations organs in the area of housing and property restitution also represents a unique convergence between international human rights law, international humanitarian law and local-level implementation. This bridge between macrolevel standards and micro-level implementation programmes holds great promise not only for the promotion, but also the realization, of human rights.

13. This preliminary study presents an overview of selected housing and property restitution programmes which were instituted in several countries as a result of internal conflict and mass displacement. The comparative aspect of this review has three main advantages: (i) it provides a foundation on which to distil general findings and observations regarding the effectiveness of housing and property restitution programmes; (ii) it provides insights into the common problems and obstacles faced by these programmes when implemented; and (iii) it helps establish a basis for future policy-making in the area of housing and property restitution. By identifying best practices, and identifying some of the more common obstacles to restitution, this study hopes to clarify some of the more difficult practical issues surrounding housing and property restitution.

#### A. Croatia

14. Croatia's declaration of independence in June 1991 saw the beginning of a major military offensive by rebel Serb forces. With the support of the Yugoslav People's Army (JNA), the Serb forces gained control over parts of Western Slavonia and Eastern Slavonia and eventually declared the unified territory to be a single State, the "Republika Srpska Krajina". Armed conflict in Eastern Slavonia in 1991 led to the expulsion of over 80,000 ethnic Croats from the region.

15. Once the JNA withdrew in 1992, a peace plan was agreed upon under the auspices of the United Nations, and United Nations peacekeepers deployed in the areas under Serb control (the United Nations Protection Force, or UNPROFOR) were charged both with the protection of Serb civilians and with facilitating the return of displaced Croats.<sup>6</sup>

16. In early 1995, the Government of Croatia indicated that it was unwilling to permit further extensions of the UNPROFOR mandate in Croatia.<sup>7</sup> A mission with a more limited mandate and reduced troop strength was therefore authorized in February 1995 by the Security Council, with the consent of the Government. Its deployment was effectively ended in May 1995, however, when the Croatian army launched an offensive against Serb-held territory in Western Slavonia (known as "Operation Flash"), recapturing the territory. A similar action in sectors North and South (known as "Operation Storm") in August 1995 recaptured the remaining areas outside Eastern Slavonia. According to international human rights organizations, the two operations caused the flight of more than 200,000 Serbs to Eastern Slavonia, Bosnia and elsewhere in Croatia, the single largest population displacement during the conflict in the former Yugoslavia. In the case of Operation Storm, the exodus was accompanied by the killing of Serb civilians and widespread forced eviction and the destruction of Serb housing.<sup>8</sup>

17. As a means of maintaining the displacement of persons of Serbian descent, the Government of Croatia adopted abandonment legislation favouring persons of Croat ethnic origin. Pursuant to the Law on Renting Apartments in the Liberated Areas and the Law on Temporary Taking Over and Administration of Specified Property (LTTP), Croats who fled their homes during the fighting in the early 1990s were considered to have justified reasons for doing so, while the flight of other ethnic groups, including the Serbs, was characterized as "voluntary", thus effectively denying them the remedy of restitution.<sup>9</sup> This legislation also applied to Croats, but it was in fact not applied in areas where Croats left following Serb aggression.

18. Furthermore, under the Croatian restitution programme, only owners of private property, and Croatian citizens of Croatian ethnicity, were entitled to benefit from measures of restitution.

These restrictions, particularly in a country with a history of social housing, served to restrict severely the scope of restitution, thus compromising the ability of the restitution process to contribute to post-conflict peace-building in any meaningful way. The national housing commissions which were established to deal with the complicated process of restitution, and upon which a successful return programme hinged, unfortunately failed to function properly. In fact, in many cases, these housing commissions appear to have actually prevented the return of property to members of non-Croatian groups.

19. In December 2001, the Government presented an action plan for the repossession of property affected by LTTP by the end of 2002. As of today, a substantial number of properties remain occupied because, even though legislative reforms took place, the provision of alternative accommodation for the tenants before repossession can take place has been retained, a stand that negatively affects Serb owners.

20. The slow and restricted return of displaced Serbs to their homes and habitual residences in Croatia severely compromises the restitution process. Of the estimated 300,000 Croatian Serbs displaced during the conflict, only 80,000 have returned to their pre-war places of residence.<sup>10</sup> The Croatian case reveals the importance of integrating appropriate restitution laws within the legal structure of the State in a manner which is non-discriminatory. This case also highlights the importance of having capable institutions ready to facilitate return and restitution in a prompt manner which is consistent with human rights norms and standards, including those related to non-discrimination.

## **B. Bosnia and Herzegovina**

21. Between 1992 and 1995, approximately half of Bosnia and Herzegovina's population was displaced. In total, some 2.2 million persons were forced to leave their homes. Approximately 1 million persons fled across borders, approximately half of whom fled to other republics of the former Yugoslavia, while approximately 1 million others became internally displaced. During the conflict, the different parties passed abandonment laws, a necessary response to the humanitarian crisis resulting from the conflict. The application of these laws was, however, discriminatory. In addition, the authorities used the "six-month vacancy" rule under the Law on Housing Relations to strip refugees and displaced persons of their occupancy rights.

22. Legislation adopted by the Entity authorities after the signing of the general framework agreement for peace in Bosnia and Herzegovina (Dayton Peace Accords) covered property restitution, but in very restrictive terms. The Republika Srpska 1996 Law on Use of Abandoned Property included provisions regarding return of property, but they were impossible to fulfil. In the Federation of Bosnia and Herzegovina, a law was passed requiring persons to reclaim and reoccupy their socially owned apartments by January 1996. If persons failed to do so, their apartments could be declared "permanently abandoned" and allocated to other persons on a permanent basis. These laws served to block the return of tens of thousands of refugees and displaced persons to their pre-conflict homes.

23. In summary, many refugees and displaced persons were forced to transfer legal title of their original properties to municipal authorities or allocation right-holders, and many others lost documents during the course of their flight. As occurred very often during the conflict, those who fled their original homes but who did not flee across borders many times took up residence in another's abandoned house or flat. Such persons are known as "secondary occupiers".

24. Therefore, one of the formidable challenges of housing and property restitution in the context of the conflict in Bosnia and Herzegovina was to establish a fair and efficient property restitution framework in compliance with international and regional standards and to determine the rightful owners or right-holders of disputed properties.

25. Annex 7 to the Dayton Peace Accords, the agreement on refugees and displaced persons, established principles which are of fundamental importance to this discussion insofar as these principles delineate rights to housing and property restitution. As a notable contribution, this framework also recognized the rights of all displaced persons to housing and property restitution. Article 1 (1) of annex 7 states:

"All [r]efugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them ..."

26. International pressure, drawing on the Dayton Peace Accords and international and regional human rights treaties, eventually persuaded the Entity authorities to repeal the abandonment laws in 1998, although the legislation passed still had flaws. Consequently, the High Representative imposed amendments to the property laws in both Entities to ensure that throughout Bosnia and Herzegovina a fair and consistent legal framework existed which would allow for the full implementation of annex 7. These efforts were complemented by the Property Law Implementation Plan (PLIP). PLIP developed from collaborative relationships between the Office of the High Representative in Bosnia and Herzegovina (OHR), the Office of the United Nations High Commissioner for Refugees (UNHCR), the Organization for Security and Cooperation in Europe (OSCE), the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and the national Commission on Real Property Claims (CRPC). While property law implementation is a fundamental first step to restitution, these agencies have acknowledged that it is only one among many of the elements underpinning sustainable return.<sup>11</sup> Full implementation of annex 7 requires not only that people can return to their homes, but that they can do so safely with equal expectations of employment, education and social services.

27. CRPC, also created by the Dayton Peace Accords, was given the difficult task of processing the tens of thousands of contentious property restitution claims which eventually came forward. While CRPC worked to ensure the most orderly return process, property restitution remained fraught with difficulties at all stages.

28. One of the foremost difficulties encountered by CRPC was local resistance to implementing its decisions, especially when these decisions involved the eviction of secondary occupiers in order to facilitate minority return. Lack of adequate enforcement mechanisms compromised the effectiveness of the restitution programme and undercut the authority of



CRPC. Lengthy delays in claim-processing procedures, lack of adequate enforcement mechanisms and an excessively limited mandate all served to erode the practical effectiveness and legitimacy of CRPC.

29. While the road to housing and property restitution in Bosnia and Herzegovina has been slow and arduous, there have been notable successes. In March 2003, the PLIP agencies (OHR, UNHCR, OSCE, CRPC) announced that the property law implementation reached 78 per cent throughout Bosnia and Herzegovina, and the return process continues.<sup>12</sup> This important success underscores the importance of political will and strong organizations, at both national and international levels, which are necessary components of any effective restitution programme. Much can be learned from this experience regarding how best to implement housing and property restitution programmes in sensitive, and potentially unstable, post-conflict situations.

### C. Rwanda

30. Rwanda faced similar problems associated with the return of refugees who fled as far back as 1959, many of whom returned to Rwanda in the mid-1990s. The genocide perpetrated against members of the Tutsi minority as well as against moderate Hutus left deep scars on the country, and brought to the forefront the irrefutable responsibility of the international community in preventing such violence. A considerable proportion of returning refugees to Rwanda, however, have not been able to return to their homes of origin because their houses were either destroyed during the genocide, or because their homes were subsequently occupied by others in the intervening period due to government relocation programmes.

31. While the Arusha Agreement and the accompanying Protocol on the repatriation of refugees and the resettlement of displaced persons<sup>13</sup> have proven difficult and slow to implement, they do provide important housing and land restitution rights to Rwandan refugees, provided they had not been out of the country for longer than 10 years. Those who had lived in exile for longer were, however, authorized to receive alternative lands and other assistance allowing them to resettle within the country. Nonetheless, the 10-year rule provides yet another example of how unjust policies often serve to deny certain persons their right to restitution, in this case through the imposition of arbitrary and discriminatory time limitations.

32. Like many countries struggling to implement restitution processes, the issue of secondary occupation has proven to be a volatile issue in Rwanda. National authorities attempted to ameliorate the conflicts surrounding secondary occupations by entrusting "abandoned land" to the municipalities, who were in turn empowered to administer and manage these lands. While secondary occupants were allowed to occupy temporarily abandoned lands, so long as they made a written request to do so, the original inhabitants maintained the right to immediate restitution should they return home. If an original inhabitant returned to find her or his home occupied by a secondary occupant, the secondary occupant was then given two months to vacate the premises voluntarily. If the secondary occupant was unable to find alternative accommodation within that time period, the Government was entrusted with finding her/him another home or providing building materials.

33. The Government of Rwanda established a ministerial committee to deal with property and land issues, designed to restrict the illegal occupation of homes, lands and properties. Yet, in practice, these restitution measures proved difficult to enforce and implement. Intimidation of

lawful owners by some secondary occupants and the deliberate arrest of some returning refugees served to complicate matters further. On a positive note, however, restrictive Rwandan laws and traditions regarding inheritance by women created particular problems for returnee women who were seeking to regain access to their homes and land and whose husbands had died, disappeared, or remained behind in exile. This obstacle was removed through the 1999 Law on Matrimonial Regimes and Succession which now allows women to inherit the property of their husbands, while previously property had traditionally passed to the husband's heirs.

#### **D. Georgia**

34. Georgia has also dealt with extremely complex housing and property disputes related to the 1990-1992 conflict in South Ossetia. As a result of the conflict, housing and property disputes obstructed the safe and lasting return of over 53,000 refugees and IDPs.

35. Much of the housing originally registered to Georgian refugees and IDPs, particularly within urban areas, continued to be occupied by secondary occupants who were unwilling to vacate these premises voluntarily. Secondary occupation was often judicially sanctioned through biased application of a "six-month vacancy" rule under the 1983 Housing Code. This rule stipulated that a tenant could lose his or her right to reside in a given flat if they were absent for longer than six months without a "valid reason". On applying this rule, the courts often found that fleeing to escape the conflict was not a valid reason to vacate one's home.

36. UNHCR, however, took the view that any application of this rule based upon any form of racial, ethnic or national origin or other forms of discrimination would be classified as both unreasonable and disproportionate, and thus a violation of international law.

37. In order to resolve these problems and promote voluntary repatriation, UNHCR supported a multifaceted strategy, emphasizing that both the rights of refugees and IDPs and the rights of secondary occupants must be ensured throughout all phases of the restitution process. The Government of Georgia was also instrumental to this process, and was urged by UNHCR to provide the legal framework required for large-scale return and to build a solid basis for national reconciliation.

#### **E. Guatemala**

38. In 1994, after a decades-long civil war which devastated Guatemala, the Government of Guatemala and the forces of the Unidad Revolucionaria Nacional Guatemalteca agreed through the Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, signed in Oslo on 17 June 1994, to undertake measures to facilitate the return of persons who had fled the war-torn country. The Agreement was guided by the following principles:

"1. Uprooted population groups have the right to reside and live freely in Guatemalan territory. Accordingly, the Government of the Republic undertakes to ensure that conditions exist which permit and guarantee the voluntary return of uprooted persons to their places of origin or to the place of their choice, in conditions of dignity and security.

"2. Full respect for the human rights of the uprooted population shall be an essential condition for the resettlement of this population.

“3. Uprooted population groups deserve special attention, in view of the consequences they have suffered from being uprooted, through the implementation of a comprehensive, exceptional strategy which ensures, in the shortest possible time, their relocation in conditions of security and dignity and their free and full integration into the social, economic and political life of the country.

“4. Uprooted population groups shall participate in decision-making concerning the design, implementation and supervision of the comprehensive resettlement strategy and its specific projects. This participatory principle shall extend to population groups residing in resettlement areas in all aspects concerning them.

“5. A comprehensive strategy will be possible only within the perspective of a sustained, sustainable and equitable development of the resettlement areas for the benefit of all the population groups and individuals residing in them in the framework of a national development plan.

“6. The implementation of the strategy shall not be discriminatory and shall promote the reconciliation of the interests of the resettled population groups and the population groups already living in the resettlement areas.”

39. In October 1992, the Guatemalan Government and the representatives of the Guatemalan refugees in Mexico had signed an agreement, witnessed by UNHCR, reiterating constitutional and other basic rights and creating a mechanism for landless refugees to acquire land, thus setting the stage for the organized collective returns. Further, the case of Guatemala highlights the importance of having both a strong normative framework in which to pursue restitution programmes, as well as the positive role that international institutions and refugees can play in legitimizing and/or facilitating this process.

40. UNHCR was also involved in programmes involving documentation enabling returning refugees to purchase, transfer or obtain title to land. Of the 20,000 returnees who repatriated collectively, approximately half recovered their original land or received alternative land in direct compensation for lost original land, while the other half bought new land under a land-buying programme. Another major achievement was the recognition of the individual title of returnee women to land held under cooperative agreements.

41. Despite these notable successes, however, the restitution process in Guatemala was hampered by a lack of legal titles to homes and property, the loss of documents during the conflict, destruction of property records, and the policy on the part of the Government to redistribute land and issue new deeds, leading to a complex layer of competing claims. All of these factors contributed to the difficulties of return experienced in Guatemala.

## **F. Additional cases**

42. The United Nations, addressing the crisis in Kosovo, again recognized the remedy of housing restitution as essential to implementing the right to return to one's home. In 1999, the United Nations Mission in Kosovo (UNMIK) set up a Housing and Property Directorate and a Housing and Property Commission mandated to deal with the issue of housing restitution for returning refugees and other displaced persons.<sup>14</sup>

43. Similar mechanisms are now being considered by the United Nations for situations of displacement in East Timor, Georgia and Albania.

44. These and other case studies demonstrate that policy approaches to housing restitution premised on the human right to adequate housing may hold the greatest promise for ensuring that the process of voluntary repatriation protects human rights, strengthens the rule of law and provides the basis for economic and social stability. These are essential elements for any successful programme of reconstruction and reconciliation.

### **III. COMMON OBSTACLES TO HOUSING AND PROPERTY RESTITUTION**

#### **A. Secondary occupation**

45. As the above examples indicate, secondary occupation is a common phenomenon in situations of displacement. It is also a reality which often complicates the process of return for refugees and other displaced persons. 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, more often, secondary occupiers are themselves displaced persons. They themselves may have fled conflict, leaving behind their own homes and communities. In many cases, secondary occupation is enforced, encouraged, and/or facilitated by the forces that caused the initial displacement, and the secondary occupiers themselves may have had little or no choice in relocating to the housing in question.

46. Secondary occupation is an obstacle to return, and consequently to housing and property restitution, because it results in several practical difficulties. First, secondary occupation raises complex questions with regard to legal ownership and often necessitates judicial consideration in order to establish legal property rights and original residency. This problem may be further exacerbated by the loss of legal documents during flight, or by the destruction of legal documents which establish property ownership, discussed below. From a purely logistical perspective, documenting and verifying property ownership in these cases may be tedious, ineffective and slow. This is especially the case where domestic institutions do not have the capacity and resources to deal with the heavy caseloads resulting from widespread secondary occupation.

47. Furthermore, even in cases where property ownership can be established, the removal of secondary occupiers raises several difficulties. First, the legal eviction of secondary occupiers in order to facilitate return may unfortunately have the result of inciting local resistance to these evictions and may further deepen ethnic or other social divisions, as was the case in Bosnia and Herzegovina.

48. Adequately addressing the phenomenon of secondary occupation has proven extremely delicate. Such a common obstacle to return necessitates the formulation of a universally acceptable policy response based upon human rights principles in order to minimize social unrest and maximize effectiveness. For example, in all cases, adequate measures must be taken to ensure that secondary occupiers are protected against homelessness, unreasonable relocation and other violations of their human rights, including the right to adequate housing. Furthermore, due process guarantees, and access to fair and impartial legal institutions, must be assured for all parties. Institutional strength and political will are inevitably crucial factors, and restitution

programmes may succeed or fail solely on the strength and capacity of existing institutions. Commissions, courts and other legal mechanisms which may be entrusted with considering and ruling upon these complex restitution issues must have the enforcement authority necessary to put their decisions into practice.

### **B. Property destruction**

49. Because the destruction of property effectively precludes the possibility of restitution, the only adequate alternative is compensation, be it financial or in lieu. Compensation must be granted with the same intention as restitution, however, so that victims are returned as far as possible to their original pre-loss or pre-injury position (i.e. status quo ante).

50. Even in situations where compensation is the only possible remedy, due process guarantees, and access to fair and impartial legal institutions, must be assured for all parties. The need to verify property ownership and economic value again highlights the importance of having functioning and effective institutions ready to oversee and administer complex return programmes.

### **C. Loss or destruction of housing and property records**

51. As many of the above cases illustrate, the loss and destruction of housing and property records and documentation is a problem which significantly complicates the restitution process. The difficulties incurred by the loss of personal documents, however, may be partially offset if official government housing and property cadastres are kept intact. If no official documentation is available, the ability to implement restitution programmes effectively is substantially hindered, necessitating a formal investigation and verification procedures.

52. In cases where the documentation of property ownership is a formidable obstacle to return, formal investigations and property ownership verification procedures require that the overseeing institutions have the resources (including professional training, personnel and finances) needed in order to carry out their work effectively in a timely and efficient manner. Without the political will to meet these basic organizational needs, the restitution process is virtually doomed to failure from the outset.

### **D. Ineffectual institutions**

53. Effective and competent institutions are the cornerstone of successful restitution programmes. Judicial mechanisms are especially important here and the absence of effective and accessible judicial remedies severely limits the utility of pursuing legally based solutions as a means of protecting rights to housing and property and thereby facilitating their restoration. 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.

54. One interim solution to this impediment is the establishment of ad hoc independent housing and property commissions designed to promote and protect the right to housing and property restitution. Yet, these institutions must also have external support in order to meet their heavy caseloads and to overcome the many formidable challenges encountered during the restitution process.

### **E. Discriminatory restitution programmes**

55. As with the application of discriminatory abandonment laws, Governments may design and implement restitution programmes which favour certain groups, all the while barring others from returning to their own homes. 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 legal obligations.

56. Discriminatory restitution programmes may also manifest themselves in unanticipated ways, especially in situations where the status quo ante itself discriminated against particular groups. In such cases, it may not be sufficient to simply restore the pre-displacement housing situation, and additional measures may be needed to ensure that housing rights are realized by all sectors of the population without discrimination.

## **IV. THE ROLE OF THE INTERNATIONAL COMMUNITY IN FACILITATING RETURN**

### **A. Peace-building, peacekeeping and conflict resolution**

57. While housing and property restitution is necessary to post-conflict resolution and peace-building, restitution programmes cannot be properly implemented under conditions which are overly volatile and unstable. In all cases of housing and property restitution, the safe and dignified return of affected persons must be the foremost consideration.

58. The international community, as represented by the United Nations, has an important role to play in ensuring the success of housing and property restitution programmes simply by adequately fulfilling its peace-keeping role. Peacekeeping allows for the stabilization of conflict situations, paving the way for housing and property restitution programmes to be implemented and, perhaps even more importantly, enforced.

59. It is also important to mention that while housing and property restitution is best seen as a remedy, or as a particular kind of reparation, for past human rights abuses, there is much to be said for the prevention of these violations. Indeed, housing and property restitution programmes are often developed in the wake of widespread forced evictions and other violations of human rights, during which masses of people are forced to leave behind their homes and communities. The international community's peace-keeping role is also critical in the effort to stop these violations by preventing the spread of conflict and abuse and by holding Governments accountable for their actions.

### **B. Development of restitution programmes**

60. The United Nations has a leading role to play in the development of housing and property restitution policies and programmes. While these programmes would no doubt be implemented

in different countries and would address varying situations, it is important to develop a universal standard approach to the restitution issue so as to (i) anticipate and overcome common obstacles to return; (ii) establish an acceptable standard response consistent with international human rights laws and standards; and (iii) build the capacity of international organizations in responding to conflict situations.

61. In addition, the United Nations is perhaps best situated to address both the theoretical and practical concerns relating to housing and property restitution within the context of return. First, the human rights bodies of the United Nations, including expert bodies such as the Sub-Commission, could provide much needed insight into the human rights implications of various approaches to restitution, leading to the crafting of restitution policies consistent with human rights laws and standards. Second, institutions such as UNHCR have practical experience in restitution which would be an invaluable contribution to the design of a universal approach to housing and property restitution which would successfully address some of the major problems and obstacles encountered during the process.

### **C. Oversight of restitution programmes**

62. The international community, and the United Nations in particular, has an important role to play in overseeing the successful implementation of restitution programmes. This question should be seen as part of human rights monitoring more generally, an essential function of multiple United Nations bodies.

63. The international community also has a responsibility to act in ways which protect and promote the right to housing and property restitution as well as the right to return. Normative development and the strengthening of international standards in this regard could significantly improve the living situation of countless refugees and other displaced and vulnerable persons throughout the world.

64. Similarly, the careful monitoring of conflict situations and the adequate and prompt response to mass displacements and refugee flows would do much to facilitate any restitution process implemented later on, simply by narrowing and minimizing the scope of the human tragedy at the onset.

### **D. Implementation of restitution programmes**

65. While the United Nations and other international agencies may be called upon to assist or to implement restitution programmes under specific circumstances, it is by no means a requirement in all post-conflict situations. Rather, domestic institutions and mechanisms may be designed and put in place to address and administer restitution processes. Such institutions should, however, have the support and guidance of the international community, and the international community should carefully monitor the progress of such programmes especially with regard to the common obstacles to return as identified above.

## **V. CONCLUSIONS**

**66.** As this study illustrates, housing and property restitution for refugees and other displaced persons has been a remedy used in many post-conflict situations. While success with respect to the implementation of this remedy has been varied, much of this variation results from the failure to have a comprehensive approach, governed by international human rights law, to address such situations. When properly implemented, housing and property restitution programmes are indispensable to post-conflict resolution and to creating a durable peace, as they are essential components of the right to reparations for past human rights violations as well as the right to return.

**67.** Not all situations requiring housing and property restitution as a remedy arise out of conflict situations. For instance, ethnic cleansing may involve one-sided violence against certain ethnic groups without the existence of an ongoing violent conflict. Nonetheless, in these cases, housing and property restitution remains a just and essential strategy to remedy the harms suffered by victims.

**68.** While each specific situation of displacement is unique, commonalities can be identified regarding obstacles to the effective implementation of housing and property restitution mechanisms. Such commonalities include the loss or destruction of housing and property records and documentation, secondary occupation, property destruction, the existence of ineffectual institutions, and the adoption of discriminatory restitution programmes and policies.

**69.** The international community, as manifest in the organs and agencies of the United Nations, has an important role to play in facilitating housing and property restitution for refugees and other displaced persons by contributing to the development of universally acceptable standards, based on human rights principles, which can be applied to different situations.

**70.** The success and effectiveness of housing and property restitution programmes also demands that the international community fulfil its peace-keeping obligations, so as to maintain stable domestic situations wherein appropriate restitution programmes may be successfully implemented and enforced. The international community should carefully monitor the progress of such programmes, especially with regard to the common obstacles to return identified above.

## **VI. RECOMMENDATIONS**

### **A. Development of a model restitution policy**

**71.** That restitution programmes have been implemented in varying situations with varying results is at least partly attributable to the lack of a comprehensive and universal approach to restitution policy, informed by international human rights law. Many of these disparate approaches to housing and property restitution have been marred by conceptually flawed strategies, biased policies and ineffectual institutions which have not had the internal and external supports necessary to complete their mandates.



72. Therefore, it would be desirable to draft a model policy on housing and property restitution, specifically within the context of the right to return for refugees and other displaced persons, which would help address and alleviate these problems. This model policy could serve as the foundation for implementing housing and property restitution programmes in different situations, addressing many of the common obstacles to return in a manner consistent with international human rights and humanitarian law.

73. The intended audience of such a model policy should be the institutions and commissions established at the national level to implement housing and property restitution programmes. The model policy should provide such entities with much-needed guidance regarding how best to design a policy which best fits their particular needs by providing them with a statement of universal principles on which they can build.

74. While the responsibility for the implementation of such a model policy would fall on the shoulders of institutions, the benefit would extend primarily to those persons who have been victims of human rights violations, as they would ultimately be the targets of housing and property restitution programmes.

75. While the model policy should be drafted with a view to the practical implementation of restitution programmes, it is not in itself meant to provide the technical basis on which to design and support such initiatives. Rather, the model policy shall be framed primarily as a statement of fundamental rights and shall address specifically, *inter alia*, the following themes:

(a) The underlying principles on which all housing and property restitution programmes must be based, *inter alia*, the principles of non-discrimination and equality of all parties and the principle of safe and dignified return;

(b) The right of displaced people to participate in decision-making concerning the design, implementation and supervision of restitution programmes;

(c) The rights of secondary occupiers to adequate housing and to reasonable relocation;

(d) The rights of all parties to petition and access independent and unbiased tribunals for the consideration of their case, including the right to an adequate appeals procedure;

(e) The right to adequate compensation in cases where housing and property restitution is not possible due to the destruction of housing; and

(f) The right to housing and property restitution as a key component of post-conflict resolution and peace-building.

#### **B. Development of international guidelines on housing and property restitution**

76. Because the model policy outlined above would not provide the technical basis on which to design and implement housing and property restitution programmes, it would

also be of tremendous importance to develop a supplemental document which would provide specific guidelines for the practical implementation of such programmes.

77. As we have seen, the restitution of housing and property to those displaced can only take place if political will is present and results in the development and implementation of relevant institutions, laws and other protections. As such, the development of concrete international guidelines on housing and property restitution, based on international human rights laws and standards, would be a crucial step towards the development of a universal approach to the problem. Such a contribution would lend itself to the practical implementation of housing and property restitution programmes by offering specific policy recommendations and protocols for how best to overcome common obstacles.

78. While such guidelines would inevitably complement and even overlap with the model policy, the guidelines would go into considerably more detail with regard to all aspects of the restitution question. As such, the guidelines would make a very valuable contribution to this field by explicitly addressing what would in effect be the synthesis of the legal, theoretical and institutional frameworks necessary to ensure the success of housing and property restitution programmes.

79. It is therefore suggested that, as a parallel measure to the model policy, specific guidelines on the question of housing and property restitution should be developed. It is suggested that such a document be organized so as to address the following:

(a) Principles: specific international human rights norms and standards underlying the right to housing and property restitution for refugees and other displaced persons, including:

- (i) The right to return;
- (ii) The right not to be forcibly evicted;
- (iii) The right to adequate housing;
- (iv) The right to non-discrimination;
- (v) The right to equality; and
- (vi) The right to a remedy for human rights violations;

(b) Guidelines: specific approaches to the design, implementation and enforcement of housing and property restitution programmes, including:

- (i) Acceptable and effective responses to many of the common obstacles to housing and property restitution programmes, including secondary occupation, loss or destruction of property records and the destruction of property;

- (ii) **Specific criteria to assess the circumstances under which compensation may be granted in lieu of restitution, as well as criteria addressing what constitutes just and fair compensation; and**
- (iii) **Institutional guidelines regarding institutional organization, staff training and caseloads, investigation and complaints procedures, verification of property ownership, and decision-making, enforcement and appeals mechanisms.**

### **C. Final recommendations**

**80. For all of the reasons outlined in this preliminary study, it is suggested that the Sub-Commission, based on the work of the Special Rapporteur, develop “Universal Principles and Guidelines for Housing and Property Restitution for Refugees and Other Displaced Persons” as well as a “Model Policy on Housing and Property Restitution for Refugees and Other Displaced Persons”, in consultation with all relevant agencies and organs of the United Nations, Governments and NGOs.<sup>15</sup>**

**81. The Sub-Commission should also reiterate its condemnation of the practice of forced evictions, and recommend to the Commission on Human Rights that it adopt a resolution on forced evictions during its sixtieth session in 2004 with a particular emphasis on issues such as government obligations and the discriminatory effect of forced evictions.**

### **Notes**

<sup>1</sup> Housing rights are enshrined in numerous instruments. For instance, the Universal Declaration of Human Rights (art. 25) and the International Covenant on Economic, Social and Cultural Rights (art. 11 (1)) both guarantee the right to adequate housing. Additionally, the International Covenant on Civil and Political Rights (art. 17 (1)) protects persons from arbitrary or unlawful interference with their home; the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e) (iii)) prohibits discrimination on account of race, colour, or national or ethnic origin with respect to the right to housing; the Convention on the Elimination of All Forms of Discrimination against Women (arts. 2 and 14 (2) (h)) obliges States parties to “condemn discrimination against women in all its forms” and, specifically, to eliminate discrimination against women in rural areas in order to ensure that such women enjoy adequate living conditions, particularly in relation to housing; the Convention on the Rights of the Child (art. 27 (3)) obliges States parties to provide, in cases of need, material assistance and support programmes to families and children, particularly with regard to housing; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43 (1) (d)) provides that “[m]igrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... (d) [a]ccess to housing, including social housing schemes, and protection against exploitation in respect of rents”. Other international instruments guaranteeing housing rights include various International Labour Organization conventions and humanitarian law instruments, as well as the Convention relating to the Status of Refugees.

<sup>2</sup> For example, the right to adequate housing is recognized and implicit in the following international human rights instruments: article 25 of the Universal Declaration of Human Rights; article 11 (1) of the International Covenant on Economic, Social and Cultural Rights; article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 14 (2) (h) of the Convention on the Elimination of All Forms of Discrimination against Women; article 27 (3) of the Convention on the Rights of the Child; and article 21 of the Convention relating to the Status of Refugees.

<sup>3</sup> See, for example, the work of the Special Rapporteur on adequate housing, Mr. Miloon Kothari, at [www.unhchr.ch/housing/](http://www.unhchr.ch/housing/).

<sup>4</sup> See General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights on Forced Eviction (E/C.12/1997/4).

<sup>5</sup> Commission on Human Rights resolution 1993/77 of 10 March 1993.

<sup>6</sup> Human Rights Watch, *Croatia, Second Class Citizens: The Serbs of Croatia*, New York City: HRW, March 1999.

<sup>7</sup> Readers may also be interested in the activities of the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) in the process of housing and property restitution. Please see for more details: [http://www.un.org/Depts/dpko/dpko/co\\_mission/untaes.htm](http://www.un.org/Depts/dpko/dpko/co_mission/untaes.htm).

<sup>8</sup> Ibid.

<sup>9</sup> Under the 1995 Law on Temporary Taking Over and Administration of Specified Property, more than 18,500 private residential properties belonging almost exclusively to Croatian Serbs were taken over by the Government and assigned to Bosnian and domestic Croats, including internally displaced persons and Bosnian refugees of Croatian ethnicity (settlers).

<sup>10</sup> Organization for Security and Cooperation in Europe (OSCE), OSCE Mission to Croatia, "Return and Integration: Displaced Populations", 2003.

<sup>11</sup> The Office of the High Representative in Bosnia and Herzegovina (OHR), "Property Law Implementation is Just One Element of Annex VII", press release, 27 February 2003.

<sup>12</sup> UNHCR, OHR, OSCE and CRPC, "Statistics - Implementation of the Property Laws in Bosnia and Herzegovina", 31 March 2003.

<sup>13</sup> The Arusha Peace Agreement was signed on 4 August 1993. For a detailed explanation of the efforts the United Nations to implement the Agreement, see the second progress report of the Secretary-General on the United Nations Assistance Mission for Rwanda (S/1994/360); see also General Assembly resolution 49/23 (1994) which recognized that the Arusha Peace Agreement provided an appropriate framework for national reconciliation in Rwanda.

<sup>14</sup> See UNMIK Regulation No. 1999/23 (1999).

<sup>15</sup> The Sub-Commission may, for example, take into account the recommendations to Governments on discrimination and housing proposed by the Special Rapporteur on adequate housing in his report to the fifty-eighth session of the Commission on Human Rights (E/CN.4/2002/59, para.46).

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