HOUSING AND PROPERTY RESTITUTION IN SRI LANKA

Learning from other Jurisdictions

SEMINAR REPORT

COHRE

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Glossary of Abbreviations

APRC	All Party Representative Committee (Sri Lanka)
CBSM	Confidence Building and Stabilisation Measures (Sri Lanka)
CASP	Comprehensive Agricultural Support Programme (South Africa)
CCHA	Consultative Committee of Humanitarian Agencies (Sri Lanka)
CRLR	Commission on Restitution and Land Rights (South Africa)
EPAP	European Partnership Action Plan (Kosovo)
GoSL	Government of Sri Lanka
HPD	Housing and Property Directorate (Kosovo)
HPCC	Housing and Property Claims Commission (Kosovo)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDPs	Internally Displaced Persons
KPA	Kosovo Property Agency
KPCC	Kosovo Property Claims Commission
LTTE	Liberation Tigers of Tamil Eelam
MAFISA	Micro Agricultural Financial Institute of South Africa
MVOC	Monetary Value of Claim (South Africa)
PISG	Provisional Institutions of Self Government (Kosovo)
SLA	Sri Lankan Army
UDHR	Universal Declaration of Human Rights
UNMIK	UN Interim Administration Mission in Kosovo
UNOCRM	UN Office of Communities, Returns and Minorities (Kosovo)

INTRODUCTION

On 29 October 2007, the Centre on Housing Rights and Evictions (COHRE) held a seminar on Housing and Property Restitution in Sri Lanka – Learning from other Jurisdictions. COHRE has been working in Sri Lanka since 2005 with, among others, a programme on Return and Restitution. The aim of the programme is to advocate for legal and policy reforms that can lead to a comprehensive system of Housing, Land and Property Restitution (HLPR) in Sri Lanka. The programme monitors, reports and advocates on all aspects of housing, land and property restitution in the country, including restitution issues arising from displacement induced by conflict, natural disasters, development projects, and unlawful evictions.

In Sri Lanka, the displacement resulting from a civil war spanning over twenty years and the recent tsunami natural disaster has made the topic of housing, land and property restitution critical to the thousands who have lost their homes and livelihoods. The rights to return and restitution have found articulation in international law, as a remedy for arbitrary loss of housing, land, property and livelihood. Attention to standards for HLPR, property rights, claims procedures, institutional and skills development and community integration in both original locations and relocation sites are of the utmost importance for effective realisation of the right to return and the right to restitution. These considerations are often addressed in the midst of politically contentious environments and economically difficult conditions, and hence a rights based approach to resolving the housing problems of the displaced is essential. Only by providing housing, land and property restitution to IDPs returning to their homes can a process of return lead to sustainable solutions for displaced communities and individuals.

Housing and property restitution issues are most often discussed in settings of post conflict peace building. The situation in Sri Lanka may differ as the context consists of both relative peace in certain areas and frequent military confrontations in others. There are a number of IDPs who have been displaced over a long period of time who are unable to return to their original lands and properties due to on–going conflict, and others who are currently returning to their original homes or are relocating to other areas. The way forward for Sri Lanka needs to address the complexities arising from the different circumstances of displacement and the particular

legal and procedural problems of housing, land and property restitution. It is also important to consider the significance of HLPR for a future process of transitional justice and peace building, and to identify measures for both the medium and long term restitution of displaced persons and refugees.

The seminar was aimed at facilitating a high level discussion on housing, land and property restitution among international experts from other jurisdictions, and national experts from the Government of Sri Lanka, I/NGOs and UN Agencies. COHRE was fortunate to secure the participation of international experts at the forefront of HLPR in jurisdictions outside of Sri Lanka and at the international level, as well as those with expertise in the area of HLPR (and related areas) in Sri Lanka. The experts were called upon to speak from a Sri Lankan as well as international perspective and to provide an insight into jurisdictions where housing, land and property restitution programmes have been running on a large scale for some time, namely Kosovo and South Africa. It is intended that the presentations made at the seminar, and the discussions that followed help shape the debate on housing and property restitution in Sri Lanka by providing useful insights and lessons from other jurisdictions that are relevant to the Sri Lankan context.

This report is based on the presentations made and the discussions held at the seminar. It identifies the key aspects that were discussed and how they might be useful to the Sri Lankan context. It also aims to serve all those interested as background information for housing, land and property restitution in Sri Lanka.

I.

THE IMPORTANCE OF HOUSING AND PROPERTY RESTITUTION IN SRI LANKA – INTRODUCING THE PINHEIRO PRINCIPLES IN THE DISPLACEMENT CONTEXT IN SRI LANKA

In many countries, including in Sri Lanka, large numbers of people are displaced due to conflict, natural or man-made disaster or development projects. In his presentation, Kees Wouters introduced the Pinheiro Principles as the international standard on housing and property restitution and pointed out how they can be useful to resolving the complexities associated with bringing displacement to an end in Sri Lanka. This chapter is based on his presentation and the discussions held at the seminar.

In the past, people who were forcibly displaced usually lost everything and had little hope of returning to their land and regaining their property. However, a consensus has emerged at the international level that the return to ones place of origin after displacement and the restitution of lost housing, land and property is crucial not only to the individuals involved, but also to finding a peaceful solution to conflict. The right to housing and property restitution under international law guarantees that all people who have been forcibly displaced have a right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for the loss of any housing, land and/or property that is factually impossible to restore, as determined by an independent and impartial tribunal.

The Pinheiro Principles on Housing, Land and Property Restitution for Refugees and Internally Displaced Persons

The right to restitution has developed over time from a number of international human rights sources. Based on the recognition of the right to restitution and established international legal standards in relation to it, the UN Sub-Commission on the Protection and Promotion of Human Rights in 2005 adopted the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons (hereinafter referred to as the Pinheiro Principles). These Principles for the first time provide a comprehensive overview of the universal standards applicable to the legal, policy, procedural, institutional and technical implementation mechanisms for housing, land and property restitution.

In more detail, the seven sections of the Pinheiro Principles contain standards on the following:

Scope and application of the Pinheiro Principles themselves (Principle 1): The Pinheiro Principles were designed to assist all international and national actors in addressing the legal and technical issues around restitution in cases where displacement has led to the arbitrary or unlawful deprivation of homes, lands, properties or places of habitual residence. They expressly apply to all forms of displacement, i.e. to refugees, internally displaced persons and displaced persons who fled across national borders but do not enjoy refugee status. What is essential is that people have left their property involuntarily.

The meaning of the right to housing and property restitution (Principle 2): The essence of the Pinheiro Principles is the **right** to housing and property restitution for all refugees and displaced persons. This means that all people who have been arbitrarily or forcibly displaced and were as a result deprived of their housing, land and/or property to have this restored to them, **or** to be compensated in cases where restoration is factually impossible. Impossibility has to be determined by an independent and impartial tribunal. In practice, this means that people who have been forced to leave their homes have a right to use them again in a situation equal to when they were forced to leave. This also implies that they have a right to have damage done to their property repaired or have destroyed homes rebuilt. It further includes restoration of title in order to recreate the previous legal position of those displaced.

Overarching Principles (Principle 3-9): In restoring housing, land and property it is important to ensure certain essential principles under international human rights and humanitarian law. These overarching principles include the right to non-discrimination, gender equality, protection against displacement, privacy and respect for the home, peaceful enjoyment of possessions, adequate housing and freedom of movement. It is important to note here that the overarching principles prevent the restoration from returning to a situation that was unjust, unfair, or unlawful in the first place. For example, the prohibition of discrimination prevents the restoration of a situation in which women were discriminated and, for example, could not own land or have land use rights.

The right to return (Principle 10): Restitution alone, i.e. the restoration of housing, land and property, does not necessarily mean that people return. For instance, the situation at the place of origin might be such that displaced persons are unable or do not feel secure enough to actually return to their places of origin, or they might not want to return after a long period of displacement. The Pinheiro Principles therefore expressly address the issue of return separately. They state the right to return voluntarily, in safety and in dignity, and that states should allow for the return of those who wish to return. At the same time, they outlaw forced or coerced returns and give displaced persons the right to choose the durable solution that is right for them. As can be seen in the structure of the Pinheiro Principles, restitution and return are separate rights. Restitution alone does not actually solve the displacement, as finding a durable solution to displacement relies on more factors than just the restoration of housing, land and property. The right to restitution also does not end in cases where displaced persons have found a durable solution to displacement. Even when they have returned, relocated or locally integrated, the right to restitution remains until restoration has actually taken place. Though both rights clearly relate to one another, they are therefore also independent from one another.

Standards on legal, policy, procedural and institutional implementation mechanisms (Principles 11-21): This section contains standards for the design and implementation of housing, land and property restitution processes. Apart from technical guidance, it contains a further set of principles designed to ensure that the rights of all those involved in the restitution process, including not only displaced persons but also for example secondary occupants, are safeguarded in restitution programmes and policies. This section includes principles addressing accessibility, consultation and participation, rights of non-owners and non-discrimination in the procedures.

The role of the international community (Principle 22): This section calls on the international community to promote and protect the right to housing, land and property restitution and the right to return, and to avoid everything that might have a negative impact on those rights.

The clarification of the relationship between the Pinheiro Principles and other rules of international and national law (Principle 23): Finally, the Pinheiro Principles state that they should not be interpreted in a way that limits, alters or is otherwise prejudicial to the rights contained in international human rights law, refugee and humanitarian law and related standards.

The Pinheiro Principles and Displacement in Sri Lanka

The displacement context in Sri Lanka is highly complex.[1] The various forms of displacement that are currently prevalent in Sri Lanka include conflict and tsunami displacement; long term and short term displacement; internal and external displacement; old and new displacement; single and multiple displacement. At the same time, return movements are under way in some parts of the country, such as in the East. However, IDPs who return home may face problems of secondary occupation, inadequate documentation and legislation, discrimination, issues of bad governance, and other difficulties.

The tsunami displaced over 500,000 individuals and destroyed or damaged about 150,000 houses.[2] The Tsunami Housing Policy of 2005 and the Tsunami Housing (Special Provisions) Act (2005) for the first time formulated a policy and legislation which contains strong elements of restitution. However, it falls short of providing a restitution process fully compliant with international standards as the entitlements contained in the policy are not justiciable. In most cases, the housing, land and property restitution element of the policy was put into practice by providing families either with financial compensation (cash grants to be used to rebuild a house) or with a house built by a donor (compensation in kind). Restitution in its narrow sense of re-establishing completely the status quo ante was mostly factually impossible due to the destruction caused and because of the initial establishment of large coastal buffer zones. Therefore, restitution by way of compensation in kind or financial compensation for complete loss, partial damage to property or the need to relocate was the best possible option after the tsunami. The majority of persons displaced by the tsunami have found sustainable solutions to their housing problems arising from the tsunami. A number of persons however, have still not found a solution to their housing needs, and face problems in their new homes due to

1 At the time the seminar was held a formal cease fire agreement was still in place, however armed conflict was being carried out by both sides on a regular basis.

2 Figures from UN Habitat Sri Lanka. Available at http://www.unhabitat.lk/theme2.htm. The figures for the number of people displaced by the tsunami vary considerably and go up to 800,000 and more.

gaps in coordination and planning of tsunami housing projects, or due to the lack of clear title to the housing they have received.[3]

Despite an ongoing problem of displacement spanning over 20 years, there is currently no comprehensive restitution policy for the whole of Sri Lanka that can address the rights of displaced persons to return home and to have their housing, land and property restored to them. The return and restitution process after the tsunami opened up a space for the topic in Sri Lanka and a basis on which the Government of Sri Lanka can formulate a comprehensive national restitution policy.

Durable solutions, restoration or compensation and the Puttalam situation

The situation in Puttalam is one of many complicated situations of displacement in Sri Lanka. It will be used here to explain the important distinction between durable solutions, restitution and compensation as contained in the Pinheiro Principles.

Over 60,000 IDPs, almost exclusively Muslims from Mannar, are registered as IDPs in Puttalam. According to a survey carried out by UNHCR in 2006, an overwhelming majority (90%+) preferred to integrate as residents in Puttalam, rather than to return to Mannar.[4] On the request of the Government of Sri Lanka, the World Bank launched a housing project in early 2007 to accommodate the local integration of IDPs in Puttalam. Land was made available and cash grants given to build houses. In the context of the Pinheiro Principles and restitution in Sri Lanka, the case of the Muslim IDPs in Puttalam is a very interesting example as it can help to clarify the difference between finding a durable solution through return, relocation or local integration on the one hand, and housing, land and property restitution on the other hand.

It was long thought that return should wherever possible be the preferred durable solution to displacement. While this will very often be the case, there are also situations where displaced persons prefer another durable solution, either local integration or relocation, over return. There can be many reasons for this. In cases of long-term displacement, the new generation might be unfamiliar or not know the places of origin of the generation of their parents or grandparents, people might have better opportunities for education and livelihood, etc. Two things matter in this regard: finding out accurately the durable solution that is preferred by IDPs on an individual basis, and to allow flexibility for displaced communities to make an informed decision. Greater clarity on the relationship between durable solutions to displacement and the right to restitution is essential, both among IDPs and those involved in housing, land and property restitution and return programmes and policy implementation.

In the case of the World Bank Housing Project in Puttalam, beneficiaries do not loose their right to return to their previous homes as their preferred durable solution and may still claim their old property back by way

3 In mid 2007, a total of 3,194 families were still living in tsunami transitional shelters, see 'TSST Round 03 – Permanent Resettlement Solution Report – August 2007', available at http://www.unops.org.lk/tsst/search2.aspx. It is unknown how many tsunami affected families outside transitional shelter sites have not yet found solutions to their housing needs or have found solutions outside the process established under the Tsunami Housing Policy.

4 Though this will not be discussed here, note that the survey has come under criticism as the question that was put to the IDPs, i.e. would you prefer to get a house in Puttalam or would you prefer to go back, was understood to mean 'do you want a house now or do you want to go back now'. As going back is not possible at the moment, people understandably said they would prefer a house in Puttalam as many of them live under inadequate housing conditions now. The results of the survey do therefore not show whether people will want to go back once they can.

of restitution. The key issue is whether the participation in the World Bank Housing Project in order to locally integrate has any effects on claims relating to the restitution of land, housing and property in Mannar.

Participation in the Project will clearly not affect the right to return to Mannar as all displaced persons have a right to return that is independent from restitution.[5] Participants will also retain their right to use the old property in Mannar. Participation in the project cannot lead to the revocation of property back in Mannar. The only possible effect the World Bank Project can have is that by accepting the project's scheme, participants may no longer be able to later claim financial compensation for repair or rebuilding works in Mannar. In other words, participation in the World Bank Project may lead to an exhaustion of the compensation claim as a part of the overall restoration claim to the property in Mannar.

However, where persons have a right to restitution, compensation as a substitute for restitution cannot be easily accepted as States are expected to demonstrably prioritise restoration over compensation. Compensation can therefore not automatically be seen as an acceptable alternative to restoration, nor can it be automatically applied because of the protracted displacement situation, insecurity in the areas of origin, or unwillingness of the State to allow restoration for political, economical or any other type of reason.

Under the standards contained in the Pinheiro Principles, participation in the World Bank Project in Puttalam can only be seen as compensation in lieu of restoration if it falls into one of the categories contained in Principle 21.1:

- The remedy of restitution is not factually possible
- The injured party knowingly and voluntarily accepts compensation in lieu of restitution
- The terms of a negotiated peace settlement provide for a combination of restitution and compensation

Factual impossibility occurs when the original house, land or property has been destroyed or no longer exists, so it refers to the actual destruction or ruin of the house, land or property. The determination of factual impossibility does not depend on political, social or economic difficulties surrounding restoration. Moreover, factual impossibility must be determined through a legal or quasi-legal process involving an independent, impartial tribunal in order to avoid potential political bias. Since such an independent determination is not made as part of the World Bank Housing Project, participation in the project cannot amount to compensation in lieu of restitution.

The second case under Principle 21.1, to knowingly and voluntarily accept compensation in lieu of restitution, only applies if the IDPs are –

- well informed about the fact that by accepting a house in Puttalam, they would give up their right to restitution, and
- are in a position to make a voluntary decision

5 People have a right to freedom of movement and a right to freely choose one's place of residence, Article 12 (1) International Covenant on Civil and Political Rights (ICCPR), .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* Mar. 23, 1976. Sri Lanka acceded to the ICCPR on 11 September 1980.

The World Bank, in close cooperation with UNHCR and various NGOs, including COHRE, have tried to provide as much relevant information as possible to enable the IDPs to make a well-informed and voluntary decision. Nevertheless, it now seems that many participating IDPs may have misunderstood the question 'would you prefer to get a house in Puttalam, or would you prefer to go back' to mean 'do you want a house now, or do you want to go back now'. Understandably, people said they would prefer a house now, as going back is currently not possible. It is therefore questionable whether the IDPs were well-informed enough. Furthermore, if the question was misunderstood, the voluntary nature of the choice would also be questionable. Many IDPs in Puttalam live in inadequate shelters and would therefore almost have to say yes if the other option was understood to mean to go back now or remain in their current situation.

The World Bank Housing Project can also be understood as a form of improving the housing situation of the IDPs during their displacement, as stipulated in Principle 8 of the Pinheiro Principles.

Finally, though clearly not applicable to the situation in Puttalam, it should be mentioned here that it is permissible to use compensation as part of a negotiated peace settlement. This possibility may for example serve the solution to problems of (widespread) secondary occupation.

Causes of the housing, land and property problems in Sri Lanka

Beyond the above example of Puttalam, there are many more relevant issues that need to be addressed in a sustainable restitution process in Sri Lanka. It is therefore important to look at the main causes of housing, land and property problems in Sri Lanka. Here are some of the issues that must be addressed.

Land alienation and land grabbing:

Nearly 80% of land in Sri Lanka is State owned. In the past, there has been much alienation in order to address landlessness and poverty. However, often the needs and ethnic diversity of the people were not taken into account in the process and the GoSL was criticised for discriminating on the basis of ethnicity. Many land alienations, such as the 'Gal-Oya project'[6] in the 1950s, thus resulted in growing tensions between individuals and communities.

Land grabbing, which as opposed to land alienation takes place in an illegal context, is also a significant problem. In Trincomalee district for example, Tamil conflict IDPs have built houses on land earmarked for the relocation of Muslim tsunami IDPs.[7]

6 Under the Gal-Oya project, land in Ampara District was alienated for paddy cultivation. Thus, new farming communities were established providing land and employment to the landless. Though this was a success for the beneficiaries and also led to economic growth in the area, the Tamil and Muslim communities felt discriminated against as the majority of the beneficiaries were Sinhalese from outside regions.

7 Amnesty International, *Sri Lanka – Waiting to go home – the plight of the internally displaced,* ASA 37/04/2006, June 2006, p. 28 (Kinniya division, Trincomalee District)

Suitable land and ethnic tensions:

The lack of suitable land, the competition for economic resources, land alienations and the traditional habitation of land are and have proven to be fuel for ethnic tensions and conflict. Consequently, the allocation of land for return, relocation or local integration as well as restoring what was damaged or lost are highly sensitive issues, especially in areas where all three major ethnic groups are present. Each community is concerned over others living in areas they have traditionally inhabited.[8]

Armed conflict:

The armed conflict itself is of course central to housing, land and property problems in Sri Lanka. The conflict has affected people from all ethnic groups and has caused further tension between the communities. It is a significant cause for much of the displacement, damage and destruction of homes, infrastructure and livelihood options and for mining of areas. It also resulted in the destruction of documentation and cadastral information. Many homes or areas have been reoccupied by another ethnic group, by the SLA or the LTTE as a result of the creation of High Security or military zones.

December 2004 tsunami:

Even more displacement and destruction of homes and documentation was caused by the tsunami. In addition, the initial response to the tsunami disaster did more harm than good. Firstly, the introduction of the buffer zone policy led to problems as alternative sites were difficult to find and often people did not want to vacate their land in the buffer zone as other locations restricted their livelihood options. Secondly, reconstruction was uncoordinated especially in the initial stages, leading to discrimination and great differences in quality of housing. Thirdly, there was no cooperation between the GoSL and the LTTE as the parties failed to set up a joint reconstruction mechanism. Fourthly, issues of gender inequality emerged as traditional ownership of women was unrecognised in favour of ownership of men.

8 Ibid, p. 27

Challenges to effectively implement the right to restitution and the Pinheiro Principles in Sri Lanka

In addition to the causes of housing, land and property problems in Sri Lanka, there are some important challenges the country needs to face:

Finding the right durable solution:

It is essential to know what the people want in terms of their place of residence. It is further essential that all those involved – displaced persons, public officials, national and international NGOs, UN agencies – know that these wishes have only a limited effect on the right to restitution. Although return is wished for and preferred as a durable solution by many, this will not the case for everyone. Therefore, comprehensive and carefully designed surveys need to be undertaken before both durable solutions and restitution are implemented.

Finding suitable land:

Essential to the fair and effective implementation of the right to restitution is the availability of usable land. In principle, restitution aims to return land to its pre-displaced rightful owners. When return is no longer possible or not the preferred durable solution, suitable land needs to be found elsewhere that cannot be claimed by others, that is safe and provides economic opportunities. In the search, it is essential to take into account the ethnic composition of the area and the needs and concerns of original inhabitants.

Finding solutions for competing claims – secondary occupation (Principle 17):

Restitution and/or return can be complicated by the presence of secondary occupants who moved into properties after the original occupiers left. Current national laws do not adequately balance the rights of the original owners' return (Principle 10) and to have their property restored to them (Principle 2) and the rights of secondary occupants to be protected against forced evictions, against being made homeless and to receive compensation for improvements made to the property. These competing rights need to be balanced in a fair and equitable way. In striking that fair balance, underlying circumstances such as good or bad faith on the side of the secondary occupant, elements of time and/or the situation of the primary owner need to be taken into account. A certain level of flexibility is called for in situations of secondary occupation.

Inequality of access to and the use and ownership of property (Principles 3, 4, 16 and 19):

It is particularly important to address the needs of all groups in society in an equal manner. The rights of tenants and other non-owners must be recognised in a similar manner to those holding formal ownership rights. Squatters too have a right to restitution. In fact, their insecure tenure status may call for a far greater human rights protection. The specific circumstances of women also need to be taken into account, especially when they hold single ownership.

Difficulties in proving ownership or obtaining new title (Principle 15):

Cadastral information has been destroyed, ownership documents lost, heirs may not be able to inherit due to the unavailability of death certificates. Adequate but flexible possibilities to obtaining new documents therefore need to be introduced, such as for example title verification through the community.

Finding a common and clear legal and institutional framework (Principles 12, 18 and 20):

Applicable legal systems and laws need to be identified and clear institutional responsibilities created. Many land laws are antiquated and not in accordance with international standards. A number of State authorities dealing with land have overlapping, competing and often unclear responsibilities. Further, the question of ownership of property in LTTE controlled areas and the extent of their acceptance by the GoSL needs to be addressed.

Safety and demilitarisation (Principle 10):

Both the right to return and restitution entail the responsibility to demilitarise civilian areas as soon as possible. This includes the dismantling of High Security Zones and LTTE occupied military zones, the demarcation and dismantling of mine fields, collecting weaponry, etc. Safety is a crucial element in the implementation of both return and restitution. Neither should be carried out in haste, for political or military reasons.

Following the presentation, the panellist identified different challenges for return and restitution in Sri Lanka from their perspectives.

Menique Amarasinghe, Assistant Protection Officer with UNHCR Sri Lanka, spoke of protection concerns relevant to restitution that UNHCR has identified during the course of its activities in the North and East of Sri Lanka. Chief among these is the fact that for many IDPs the bar to achieving a durable solution is often related to land and their inability to access it. High Security Zones (the Muttur East/Sampoor High Security Zone was used to illustrate the lack of procedure and transparency in establishing High Security Zones and the lack of information provided to those affected), secondary occupation (both by private citizens and by the military) and the lack of a uniform and universally accepted claims procedure were highlighted as causes of great concern for the realisation of the property rights of IDPs and returnees and for the sustainability of the return movement and the achievement of durable solutions for IDPs.

Cynthia Caron, Project Manager with UNOPS and Programme Manager for Reconstruction, Resettlement and Rehabilitation with the ASB in Mannar, highlighted two particular issues that demonstrate the need for a comprehensive process of return and restitution in Sri Lanka. Firstly, she observed that in the restitution process after the tsunami, many donors imposed conditions on new owners to not sell their houses for a certain period of time. She questioned whether this kind of conditionality was in line with a rights based approach to restitution. Secondly, she drew attention to the issue of second generation displaced persons and mentioned that in cases of long term displacement, it was necessary to carefully consider in the planning process who to ask about the wish to return, as answers from the first and the second generation of IDPs can vary even within the same family. In that context, it also needed to be considered how restitution should deal

with larger families that have grown in displacement and for whom purely getting the old house back might not be enough to build up a sustainable livelihood again.

On the issue of conditions being imposed on returnees, Kees Wouters stated that this was not permissible under international standards for restitution, as restitution was about restoring the previous position 'with no strings attached'. He clarified that by imposing conditions, returnees were in fact not put back into the previous position and thus full restitution had not taken place in those cases. Rhodri Williams noted that some conditionality might be permissible in the case of donor reconstruction of destroyed houses but that legal questions remained and that such measures had proven nearly impossible to enforce in post-war Bosnia.

II.

POST-CONFLICT AND TRANSITIONAL RESTITUTION IN LAW AND PRACTICE

As mentioned above, the express right of refugees and displaced persons to return to their place of origin and to have their housing, land and property restored to them is relatively new. Until recently, this right was not clearly recognised in international law. However, the emerging consensus that such a right does exist is based on longstanding human rights standards. At the seminar, these were set out by Rhodri C. Williams in his presentation on Post-Conflict and Transitional Restitution in Law and Practice. This chapter is based on the presentation made and the discussions held at the seminar.

Housing, land and property restitution is important in post-conflict and transitional settings in many ways. Often, disputes over land and property are one of the root causes of conflict, and are therefore key to resolving the conflict. It is essential to take steps to avoid and/or to pre-empt violations of property rights during conflict, as well as to include these land and property issues in the transitional and post-conflict process of peace building and reconciliation. In post-conflict situations, these land and property disputes can then be addressed properly within the local context, which can in turn help achieve a lasting peace.

Furthermore, housing, land and property restitution is a means to remedy human rights violations that occurred during conflict. Ending displacement is about finding durable solutions for those displaced. It is about restoring people to their homes, assets and independent livelihoods. Conflict induced displacement typically constitutes violations of human rights, including the rights to housing, property and freedom of movement. Under international human rights law, human rights violations give the individual the right to a remedy, i.e. the right to a legal means by which the violation is stopped and the individual is restored to the position s/he was in before the violation occurred. Uniquely, in the case of violations of housing, land and property rights, these violations can be undone through a process of restitution that gives people back what they had before the violation occurred, or offers them an alternative. This process is not only important for those individuals concerned, but also serves the very important form of reconciliation after conflict as the harms done to those displaced are officially acknowledged.

The basis for the right to return and restitution in international human rights law

It is important to clearly state that housing, land and property restitution is a right of those displaced by conflict, natural or man-made disaster or development projects. Those affected by displacement are entitled to return and to restitution and do not receive assistance on the basis of charitable considerations. Even though the recognition of this right is relatively new, it is based on well established rules in international human rights and humanitarian law, as well as on general legal principles.

Under international human rights law, the right of individuals to own or possess property has been established for a long time.[9] International human rights law also protects other forms of tenure such as rent or traditional rights of occupation, and can even protect squatters against unlawful interference with their right to housing.[10] Furthermore, international humanitarian law not only protects the civilian population against arbitrary displacement, but also protects the property of the civilian population against pillage and direct or indiscriminate attacks, against being made the object of reprisals and against destruction or appropriation as collective punishment.[11]

Common to all human rights law is that it puts states under an obligation to refrain from actions that violate human rights, known as the duty to respect. Furthermore, states have a duty to protect human rights by preventing violations of human rights by private actors. In order to give effect to international human rights law, human rights violations trigger a right to a remedy, i.e. a legal means to overcome any harm suffered as the result of the violation, on the part of the individual whose human rights were violated.[12] This right to a domestic remedy is set out in most treaties and principles that are important for housing, land and property restitution of IDPs.[13] Both international law and national law generally reflect the principle that wherever possible, this remedy should primarily consist of restitution of the status quo ante (i.e. of putting the individual who suffered harm back into the position that s/he was in before the harm was done). In cases where this is not possible, compensation must be provided so that the injured person can, as far as possible, regain the position s/he was in before the harm was done. In fact, the UN Basic Principles on the Right to a Remedy and Reparation in Principles 19 and 20 specifically mention that restitution by way of return to one's place of origin and return of property should be ensured wherever possible and that compensation should be provided for economically assessable damage, including material damage.

The Guiding Principles on Internal Displacement, presented to the UN Human Rights Commission in 1998, restate international law protections relevant to IDPs and therefore present an important normative framework for protecting IDPs both during and after conflict. In terms of housing, land and property protection, the Guiding Principles state that when displacement occurs, the property and possessions of IDPs shall be protected against pillage, direct or indiscriminate attacks or other acts of violence, and use to shield military operations or objectives; that IDPs have a right to return voluntarily, in safety and dignity; and that they have a right to restitution. Regarding returns, competent authorities have the duty to actively establish conditions that allow for the voluntary return or resettlement[14] of IDPs. These obligations

9 The right of property goes back as far as the Declaration of the Righs of Man of 1789 (Art. 17). Under current international human rights law, the right of property is guaranteed in Article 17 of the Universal Declaration of Human Rights (1948) (UDHR).

10 Rights to adequate housing and respect for the home are set out in Article 17 ICCPR and Article 11 ICESCR. Protections for indigenous and tribal peoples' land rights is set out in the ILO Convention 169 on Indigenous and Tribal Peoples (1989) and referred to in Principle 9 of the Guiding Principles on Internal Displacement. See also General Comment No. 7 on the Right to Adequate Housing (Art. 11.1): Forced Evictions, available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument , last accessed January 2008.

11 Article 4.2 and 14 Protocol II to the Geneva Conventions, relating to the Protection of Victims in Non-International Armed Conflicts and common Article 3 of the Geneva Conventions.

12 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (2006), UN doc. A/RES/60/147.

13 Article 2.3 ICCPR, Principle 7.3 Guiding Principles on Internal Displacement, Article 8 UDHR

14 Return means the return of IDPs to their places of origin, while resettlement means that IDPs resettle in other parts of the country. In the Sri Lankan discourse, the term resettlement is often used to describe the return of IDPs to their places of origin.

expressly apply to "the competent authorities" and thus not only refer to the state, but also other parties such as non-state actors who may exercise effective control over a given territory.[15]

The most specific international guidelines on housing, land and property restitution for IDPs are the Principles on Housing and Property Restitution for Refugees and IDPs ('Pinheiro Principles'), which were endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005. As described in the previous section, the Pinheiro Principles provide a set of standards on which states should base restitution programmes for refugees and IDPs.

All these sources taken together are meant to prevent property violations in conflict and to mitigate the consequences if they do take place. Examples of such violations (see next section) include arbitrary expropriation and commandeering of property, abuse of prescription and abandonment laws, transfer of property through private contracts under duress, and official reallocation of abandoned property without a mechanism for its return.

Protective steps during conflict

It is important to ensure that statements are made by the competent authorities during the conflict upholding the property rights of the displaced as well as the right to voluntary return. Necessary steps should also be taken to document property rights and clarify that property rights will not be lost because of displacement. IDPs and all relevant authorities and organisations should be aware of the relevant rules of international humanitarian law that apply during armed conflict and which protect the property of IDPs against acts of pillage or use as military installations. Where military necessity demands the commandeering of land and property, rights holders should be compensated and their status with regard to their property clarified.

Another issue that needs to be addressed in situations of displacement are the prescription periods of abandonment laws. In many countries, including in Sri Lanka, a person loses the right to a property if it is abandoned for a lengthy period of time.[16] Rights over the property can then be legally transferred to another person, who can in some cases gain ownership over the property. In cases of conflict, such prescription periods should be suspended as one cannot speak of abandonment when people were forced to flee their homes and have been unable to return due to on-going conflict.

Private transactions of property in the context of conflict or ethnic cleansing may be presumed to be invalid in some cases in light of the implicit duress faced by those displaced. Cases of squatting should be addressed in a manner that takes into account any humanitarian need for housing on the part of squatters without unnecessarily delaying the right to restitution on the part of claimants.

Last but not least, humanitarian allocation of abandoned property needs to be looked at carefully. In many conflict situations where large numbers of people are uprooted, the property of those who fled is allocated to others who are in urgent need of shelter. While this practice is often demanded by the circumstances and not per se problematic in terms of property rights of the original owners and possessors, the authorities need

15 Principle 2(1), Guiding Principles on Internal Displacement

16 In Sri Lanka, the prescription period in general is 10 years, after which the property rights of the original owner can be claimed by the possessor of the property concerned, see Section 3 Prescription Ordinance (1981)

to be clear on the criteria for allocating property and that these allocations should not subsequently create problems for returnees who have the right to repossess their properties. Return procedures that are clear to all those involved therefore need to be established. Inventories of the condition and contents of each such allocated property should be made and kept so that disputes regarding the property in question can be prevented.

Post-conflict issues

Once the situation is at the post-conflict stage, restitution and return need to be addressed in practice. The transition from the conflict to post-conflict stage is often not clear. However, in the case of Sri Lanka and for the purpose of talking about housing, land and property restitution, where return is taking place in at least some parts of the country, restitution issues need to be considered.

This is the stage where durable solutions for displacement need to be found. Return to one's place of origin is often seen as the most durable solution to displacement and many IDPs continue to want to return to their place of origin even after a long period of displacement. However, all durable solutions (return, local integration and resettlement in another location) have to be voluntary. Hence it must be ensured that IDPs are not forced to return to their place of origin and are given the necessary information about options available to them to make an informed choice.

Unlike compensation-based remedies, which tend to preclude return, restitution can be important for all durable solutions – whether IDPs choose to return, or to sell, rent or exchange restituted properties to finance local integration or settlement elsewhere in the country.

Another issue is the relationship between restitution and compensation: Where restitution in the sense of enabling displaced persons to repossess their property (e.g. through the eviction of current occupants) is not possible, compensation should be used to remedy the violation. In the context of housing, land and property restitution, there are at least four different situations where restitution is arguably impossible.

a) **Impossibility due to physical destruction** – Where property has been destroyed or damaged beyond repair, restitution in the sense of giving returnees the legal means to repossess their property (e.g. by evicting secondary occupants) does not remedy their situation.

b) **Legal impossibility** - In cases of protracted displacement, subsequent users may gain bona fide rights in abandoned property, for instance where they purchase it without having any reason to know of the circumstances under which it was taken from earlier occupants. In many legal systems, such purchasers are entitled to remain in the properties in question, for which the displaced former owners would retain a right to compensation.

c) **"Regulatory" impossibility** – In some cases, there may be a strong societal interest against allowing return, for instance where there is a likelihood of severe natural disasters that would threaten the lives of the returnees. However, any prohibitions on return and restitution for such reasons should be applied restrictively.

d) **Political impossibility** – A question that has arisen in cases of protracted displacement is whether the right to return can be collectively bargained away in the process of arriving at a peace settlement.

Furthermore, there are issues of practicality (political cost of restitution, cost of compensation and whether it should be in cash or in kind) and regarding complementary remedies, such as compensation for deprivation of access and loss of value, and the question of reconstruction assistance in support of return.

Remedying property violations:

In terms of actually making housing, land and property restitution happen in practice, it is perhaps easiest to think about the implementation in the categories of how, when, where, what and who. In addition, the question of how to implement the remedies awarded to displaced persons needs to be addressed.

As to the question of **how** to put restitution into practice, it must be borne in mind that when displacement occurs, and especially in cases of conflict displacement, it almost inevitably affects a large number of people. Consequently, a large number of restitution claims need to be addressed in the aftermath of displacement, leading to the question of how the large number of claims can be dealt with appropriately and as quickly as possible. The ordinary judicial and administrative system of any country will usually be overwhelmed by the sheer number of the claims and usually lacks the structures necessary to remedy large numbers of human rights violations. A provisional mass-claims procedure that takes into account the particular context of the respective country should therefore be considered in order to remedy past property rights violations where these occurred on a large scale during conflict.

The principal reason for this, apart from the problem of numbers, is that the ordinary legal system is based on the assumption that illegal acts are exceptional. Therefore, those claiming to be victims of illegal acts have to present evidence and prove their case. To the contrary, in conflict settings, illegal acts such as arbitrary displacement often temporarily constitute the rule rather than the exception. Moreover, such illegal acts are often particularly hard to prove due to problems such as the destruction or loss of records. Addressing all those cases under the ordinary legal system will lead to intolerable delays in the process and/or compromise the possibility of victims to successfully seek a remedy at all. Introducing special procedures allows the authorities to recognise this state of affairs in those procedures and use relaxed rules for the burden of proof and for standards of evidence (e.g. under special procedures, the assumption can be that a claimants' rights were violated based on the fact that s/he fled from a particular area at a particular time). Under such procedures, claims can be accepted and processed unless it is proven that they are not valid, rather than the other way around.

The importance of special procedures does not only lie in the pragmatic argument of creating structures that can deal with a large number of claims, but also in the fact that these procedures will spare the victims cost, delay, uncertainty and the psychological pressure of having to prove that a violation has taken place. Special procedures further leave the ordinary judicial and administrative system free to continue and/or resume their normal activities as the situation progresses towards normality.

The question of **when** needs to be taken into account within the procedural framework for the resolution of restitution claims after displacement. Furthermore, the time period for which claims can be brought needs to be defined as this is crucial for determining who can claim under the special procedure. The cut off date for claims both at the beginning of conflict and displacement as well as at the end needs to be

chosen very carefully. Often, it is especially difficult to address the question of how far back claims should reach. The choice is between three possibilities:

- Firstly, transitional justice which seeks to address injustices in the immediate wake of conflict or widespread/systematic rights violations;
- Secondly, inter-generational justice systems address redress for violations that occurred within living memory;
- Thirdly, historical justice seeks to address violations going back beyond living memory.

The most appropriate approach for the situation at hand depends on many factors, but most importantly needs to be decided based on when violations occurred. It is crucial to not 'cut victims out' of the process by choosing inappropriate cut off dates.

With regard to **where**, just like the temporal scope, the geographical scope needs to be determined as well. That is, the area to which provisional procedures of the restitution process apply needs to be defined. Again, this should enable all victims of large scale violations to put in a claim for a remedy, so it should be based on the full geographical area that was affected rather than on administrative boundaries or zones of declared emergency.

The question of **what** applies in identifying which categories of housing and property rights require remedies under a special restitution programme. While formal ownership rights should always be included, sub-proprietary rights, i.e. those rights that fall short of ownership rights and only give a right of possession, should also be taken into account. This category includes formal and informal use rights, access rights and rights under customary and collective systems. Furthermore, the remedy awarded by the restitution programme should restore such rights as they existed prior to displacement, allowing those reinstated in their properties the ability to dispose over them in accordance with law.

The definition of **who** is eligible to claim abandoned properties in the context of a provisional mass claims procedure for restitution is another issue where care needs to be taken to not deny victims of housing and property rights violations access to justice. Most claims will be brought by the titular rights holder, i.e. the primary claimant. However, there may be exceptions to this that need to be taken into account. For example, spouses and household members or heirs in inter-generational remedies should in principle be entitled to participate as subsidiary claimants. Group claims should be possible where groups of claimants can be defined. In some cases, restitution programs may need to go beyond the status quo prior to displacement if doing so would perpetuate discriminatory rules denying property rights to vulnerable groups such as women or ethnic minorities.

Implementation of the legal remedies:

Last but not least, a well thought out process for the implementation of remedies awarded should take into account the specific context. It is important that the public is consulted and informed about the design of the implementation mechanism in order to ensure that all parties to the process have informed and realistic expectations of how it will affect them.

In many cases, evictions will nevertheless need to be carried out in order to restore properties to claimants. It must be ensured that the secondary displacement resulting from those evictions does not result in renewed violations of housing and property rights.

In the discussion following the presentation, the panellists related the issues raised in the presentation to Sri Lanka on the basis of their perspectives.

Mario Gomez, Human Rights Lawyer, made four points that he considered particularly relevant to contemplate in the Sri Lankan context where land is a key issue both as a source and a driver of the conflict:

Firstly, he pointed out that in the event of a peace agreement, a number of specific issues may arise in relation to the right of IDPs to recover their housing, land and property. These include, but are not limited to, multiple claims to the same piece of land, destroyed or ambiguous boundary lines, prescription rights over abandoned land, absence of potential claimants, rights of secondary occupants as well as issues of gender and land. Reference was made to Rhodri's view that in a context of post-conflict resolution of land disputes, it would be necessary to look into an ad hoc legal process outside the legal system as there would be legitimate concerns over the adequacy of the normal legal channels to address restitution in a post conflict setting.

Secondly, he addressed the importance of land to a constitutional settlement of the conflict. Such a settlement would need to consider whether land should be a devolved subject that is governed by the regions (Provinces), or whether it should be controlled by the centre. Experience so far with merging and subsequently de-merging the Provincial Councils of the Northern and Eastern Province should be taken in addressing this question.

Thirdly, implications for restitution where land is the source of inter-ethnic tension need to be addressed, namely the tensions between the Muslim communities in the North and East and the LTTE. The forced eviction of Muslims from the North in 1990 and during the peace process by the LTTE has led to significant deterioration of relations between Tamil and Muslim persons. This in turn has led to demands by Muslim communities for Muslim nationality, Muslim self determination and an autonomous Muslim region.

Fourthly, High Security Zones (HSZ) have a far reaching impact on the rights to return and restitution of IDPs. Many of the HSZ have grown as the LTTE's long range military capacity has increased. HSZ have been a stumbling block in negotiations between the LTTE and the Government. The LTTE has taken the stand that dismantling the HSZ and responding to the humanitarian crisis in the North and East is a prerequisite to addressing core political issues of the conflict. The Government in turn is not willing to reduce HSZ demarcations before the LTTE decommissions some of its long range weapons, but has in fact expanded areas that are now either de iure or de facto HSZ. A compromise needs to be reached, where the interest of the State in national security is at odds with the rights of individual owners of land in HSZ. At a minimum, the State should urgently provide some form of compensation to those affected by the expropriation of land, and give clarity on who is responsible for compensating owners, when and how much compensation is to be paid.

Fara Haniffa, Senior Lecturer in the Sociology Department at the University of Colombo mentioned the importance of including the concerns of the Muslim minority in any restitution process. The grievances of the Muslims from the North and East, many of whom have been displaced for decades, are partly based on the difficulty Muslims face in Sri Lanka in having their group rights recognised. The drafting of any return and

restitution process therefore needs to ensure that the concerns of Muslims are safeguarded. She also called attention to the specificity of the Northern Muslim experience, where the LTTE expelled the entire Muslim population of the North. The Eastern Muslims, also facing severe hardships from the war have a different history. The different experiences of the Northern and Eastern Muslims and the fact that what they want from a future settlement may not be the same things are not often recognised in discussions about Muslims and the conflict. Muslim political representatives' are mostly from the East and have their largest support base there, so are not eager to undermine eastern aspirations in favour of Northern Muslims. She also called attention to the World Bank Housing project in Puttalam. The fact that provision of immediate housing needs to Northern Muslim communities may be seen as restitution is a problem. She stated that it was important that such provision should be made without prejudice to restitution in the future. She also mentioned that the UNHCR survey which claims to represent the numbers that wish to return was seriously questioned by the local communities and that it pays little attention to the politics of the displacement or to the current marginal status of that community.

Shirani Goonatilleke, Legal Director with the Secretariat for the Coordination of the Peace Process (SCOPP), mentioned that the most important point when talking about return and restitution is to bring back normalcy instead of just providing pure legal remedies. She noted that the peace process was a complex and dynamic process that needed creative solutions, and drew attention to the Confidence Building and Stabilisation Measures (CBSM), the Consultative Committee on Humanitarian Assistance (CCHA) and the All Party Representative Committee (APRC) as positive initiatives to bring back normalcy to Sri Lanka.

III.

EXAMPLES OF HOUSING AND PROPERTY RESTITUTION FROM OTHER JURISDICTIONS

a) Kosovo: Strategies to operationalise housing, land and property rights of the displaced

Kosovo provides an example where a very comprehensive system was put in place that contributed, together with experiences in other countries, to the development of return and restitution law and policy at the international level. The following gives an overview of the presentation by José Arraiza on the experiences from Kosovo regarding strategies to operationalise housing, land and property restitution of the displaced. These strategies were implemented through the establishment of a mass-claims mechanism (the Housing and Property Directorate, now Kosovo Property Agency) which addresses conflict related property claims and the establishment of institutional structures which channelled housing and reconstruction assistance in the returns process.

After the large scale displacement among residents of Kosovo caused by both the Milošević regime between 1989 and 1999 and the Kosovo conflict (February 1998 to June 1999), the United Nations Security Council established the United Nations Interim Administration Mission in Kosovo (UNMMIK).[17] Through that same Resolution, the Security Council affirmed the right of all refugees and displaced persons to return home without impediments.[18]

Subsequently, UNMIK had to address the restoration of property rights affected by both discriminatory legislation and conflict related displacement and subsequent occupation. The discriminatory laws and policies that were enacted and implemented by the Milošević regime between 1989 and 1999 effectively dispossessed hundreds of individuals of their residences. Moreover, a number of persons were unable to lawfully register transfers of immovable property due to this legislation.[19] Most importantly, large waves of displacement took place before and after the 1999 conflict. The 1999 conflict alone displaced 800,000 persons and destroyed 80,000 houses. Upon return of the majority Kosovo Albanian population to Kosovo after the

17 UN Security Council Resolution 1244 (1999)

18 UN Security Council Resolution 1244 (1999) para. ???

19 See Law on Changes and Supplements on the Limitation of Real Estate Transactions (Official Gazette of the Republic of Serbia, 22/91 of 18 April 1991) and the Law on Conditions, Ways and Procedures of Granting Farming Land to Citizens who wish to work and live in the Territory of the Autonomous Provicen of Kosovo and Metohija (Official Gazette of the Republic of Serbia, 43/91 of 20 July 1991). These laws were repealed by UNMIK through UNMIK Regulation 1999/10.

conflict, large parts of the minority (Kosovo Serbs, Roma, Ashkali and Egyptian) population fled (between 100,000 and 200,000). Further riots in 2004 displaced another group of 1,200 persons.

Institutional and legal framework: The property claims mechanism

The law applicable in Kosovo[20] is defined through the regulations and subsidiary instruments promulgated by the Special Representative of the Secretary General, i.e. the head of UNMIK, and the law in force in Kosovo on 22 March 1989. In cases of conflict between the two sources of law, UNMIK regulations and subsidiary instruments take precedence.

While private property rights have been recognised in Kosovo before and after the establishment of UNMIK, the Kosovo property rights system inherited the Yugoslav feature of 'socially owned property'. The concept of socially owned property implies that the society is the ultimate owner of means of production. Socially owned property is a category on its own, a 'left over' from the Yugoslav socialist system, which aimed to establish a society where all individuals could use means of production for both personal and common interests: a 'society ruled by the workers' leading to the disappearance of the state.

Bodies such as the municipalities can administer under certain conditions the use of socially owned property (for example, land registered under a municipal body). Most relevantly, Socially Owned Enterprises had the power to allocate residential occupancy rights to its workers. Occupancy rights do not amount to full ownership, and the rights of disposal over the apartments concerned are restricted. Allocation rights of Socially Owned Enterprises are currently suspended by UNMIK.[21]

Due to the unclear status of Kosovo after the conflict and a resulting lack of a clear mandate for government, the UN Security Council, under Resolution 1244, gives an extensive mandate to UNMIK which includes the task to assure the return of all refugees and displaced persons to their homes. The following institutions are instrumental for the process of return and restitution in Kosovo.

The Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC). These were established in 1999 to deal with the large amount of residential property claims resulting from displacement.[22] HPD/HPCC addressed close to 30,000 conflict related residential property claims between 1999 and 2007.

In 2006, the HPD was transformed into the **Kosovo Property Agency (KPA). Moreover, a new quasi-judicial body -the Kosovo Property Claims Commission (KPCC)-** was created. KPA and KPCC were given the mandate to resolve conflict related claims over private immovable property (including agricultural and commercial property. Therefore, the mandate was expanded to cover also non-residential property -which was not within the mandate of the HPD and the HPCC. The KPA/KPCC has to date taken close more than 33,000 claims.

With regards to structures for the provision of housing reconstruction assistance to minority communities, the **UN Office of Returns and Communities (now UN Office of Communities, Returns and Minorities** (UN

20 UNMIK Regulation 1999/24 On the Law Applicable in Kosovo, as amended.

21 Section 6, UNMIK Regulation 2000/60.

22 UNMIK Regulation 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission

OCRM) was formed in 2002 in response to the slow pace of returns of the displaced minority population.[23] UN OCRM has the mandate to oversee both the development and the implementation of return and reintegration projects. Two years later, in 2004, a domestic **Ministry of Communities and Returns** was set up with the aim to take over responsibility from UN OCRM. However, the process was not too successful due to an initial period dominated by mismanagement and corruption. Despite the creation of these institutions, only about 17,000 persons from minority groups, representing less than a quarter of the displaced minority population, returned between 1999 and 2006.

The Housing and Property Claims Commission, as a quasi-judicial body, had exclusive jurisdiction over three types of claims:[24]

- Claims by individuals who lost ownership, possession or occupancy rights to residential real property after 23 March 1989 on the basis of legislation which was discriminatory in its application or intent (Category A claims);
- Claims by individuals who entered into informal transactions of residential property which could not be registered due to discriminatory laws after 23 March 1989 (Category B claims);
- Claims by individuals who were the owners, possessors or occupancy rights holders of residential real property and who involuntarily lost possession of the property after 24 March 1999 (Category C claims – these constitute 90+% of the total caseload of the HPD).

These categories of claims did not cover non-residential property. This gap was only addressed in 2006, when the KPA/KPCC was established[25] with the additional mandate to decide on conflict claims over private agricultural and commercial property. The KPA/KPCC has exclusive jurisdiction over ownership claims and over property use rights claims regarding private immovable property, including agricultural and commercial property, where the claimant is not able to exercise those property rights as a result of the conflict.[26] In addition, the KPA/KPCC is responsible to take over the responsibilities of the HPD/HPCC to enforce outstanding HPCC decisions and administer abandoned property. Currently, the Kosovo Property Agency administers more than 5,000 residential units through its administration mandate. These residences are administered either *ex officio* through an inventory process or at the request of a successful claimant. These properties have been subject to a rental scheme since 2006.

Claims procedure of the KPA/KPCC

The KPA Executive Secretariat is responsible for receiving claims and for notifying the parties to the claim. It then deals with the preparation of the claims and replies to those claims that it refers to the KPCC for consideration. In cases of claims that are manifestly not receivable and/or clearly not within the judicial scope of the KPA/KPCC, the Executive Secretariat has authority to dismiss those claims. The work of the KPA Executive Secretariat is guided by a Supervisory Board which provides oversight, direction and policy guidance. The Supervisory Board cannot interfere with the KPCC, which acts as an independent body.

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23 In 2002, about ??? % of the displaced population had returned to their places of origin.

24 See UNMIK Regulation 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission. See also UNMIK Regulation 2000/60 On Residential Property Claims and the Rules of Procedure of the Housing and Property Directorate and the Housing and Property Claims Commission.

25 UNMIK Regulation 2006/10 On the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property, superseded by UNMIK Regulation 2006/50.

26 Ibid, section 2

Once the KPA has prepared the claim, it refers the claim to the KPCC to reach a decision. The KPCC has the competence to reach a decision on claimed property in relation to ownership rights and rights of use. Its decisions are subject to appeal within 30 days to the Supreme Court of Kosovo. Once final and enforceable, KPCC decisions constitute title determinations which can be registered in the Kosovo Immovable Property Rights Register. The possibilities for executing them include, but are not limited to: eviction, placing property under administration, lease agreements, seizure of unlawful structures and auction.

Destroyed or damaged property

It should be noted that neither the HPD/HPCC, nor the KPA/KPCC, have the mandate to award compensation for destroyed or damaged property. They are purely concerned with the legal process of enabling displaced persons to repossess the property they lost and have their title confirmed (in the case of KPCC), providing compensation only in limited cases (i.e., in the HPCC concerning A and C claims involving the same residence).

In cases where housing claimed through the HPD/HPCC is found to be destroyed, successful claimants are therefore issued with a declaratory order which recognises their lawful possession.[27] Claims for compensation have to be brought before the Kosovo courts. Currently there are close to 20,000 compensation claims pending resolution by the Kosovo courts. These claims were stayed at the request of the UNMIK Department of Justice in August 2004 due to the fact that they had been lodged by displaced Kosovo Serbs. They are therefore related to the conflict and need a special solution to ensure their fair resolution in accordance with international standards. However, no solution has been provided as of yet.

Kosovo Standards Implementation Plan:

In order to support the claims mechanism, the international and local institutions operating under and in cooperation with UNMIK devised policies to coordinate the process of implementation of the claims mechanism and to ensure that it adhered to certain standards, within the overall context of the 'Standards for Kosovo'.

In 2004, partly as a response to riots in March that year, UNMIK develops a set of political standards to evaluate the progress in institution building in Kosovo before the UN Security Council. These standards are set out in the Standards for Kosovo document[28], which contains benchmarks by which the progress of Kosovo towards full compliance with UN Security Council Resolution 1244 can be monitored[29]. The Standards for Kosovo are accompanied by the Kosovo Standards Implementation Plan[30], an action plan detailing institutional responsibilities and timelines to work towards the full implementation of UN Security Council Resolution 1244 (1999). The overall aim of the evaluation through the Standards for Kosovo process is to start a process to define the international status of Kosovo.

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27 See website of the Housing and Property Directorate and the Housing and Property Claims Commission at http://www.hpdkosovo.org/faqdestroyed.htm

28 http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf

29 These standards are: I. Functioning Democratic Institutions, II. Rule of Law, III. Freedom of Movement, IV. Sustainable Returns and the Rights of Communities and their Members, V. Economy, VI. Property Rights, VII. Dialogue (between Pristina and Belgrade), VIII. Kosovo Protection Corps.

30 http://operationkosovo.kentlaw.edu/symposium/resources/KSIP%20final%20draft%2031%20March%202004b.htm

In terms of housing and property restitution, Standard IV on Sustainable Returns and the Right of Communities and their Members and especially Standard VI on Property Rights are decisive. 31 Standard IV states the importance of a creating an environment conducive to return in order to enable minorities to return in safety and dignity, and introduces measures to bring about change. Standard VI does the same for property rights and calls for their effective protection in a coordinated manner, the creation of legal certainty and the re-establishment of the immovable property rights register. It states the fundamental importance of property rights in general and for the return of minorities in particular.

In order to implement the actions contained in Standard VI, a Property Standard Implementation Group with the participation of relevant institutions meets regularly to evaluate progress in the implementation of the Property Rights Standards and to recommend further steps to be taken.

European Partnership Action Plan (EPAP): The EPAP was adopted by the government of Kosovo in August 2006 as a component of Kosovo's European integration process.32 This plan inherited the goals of the Standard VI (Property Rights): strengthen municipal courts and police action to prevent, sanction and address illegal occupation, use and construction of property;

- evict illegal occupants from properties and return those property to the rightful owners;
- develop and implement a strategy including sustainable successor arrangements to the Housing and Property Directorate in order to implement all outstanding residential property claims;
- complete legislation and actions to safeguard property rights notably on ownership possession; occupancy rights to residential and non-residential property incl. the legislative framework to regulate construction.
- Harmonise municipal regulations and establish a mechanism for the effective resolution of commercial and agricultural property disputes.
- Increase public awareness on consequences of illegal construction

Public awareness campaigns: In 2005, the campaign 'Illegal occupation is not a solution' was implemented jointly by the OSCE Mission in Kosovo and the Ministry of Environment and Spatial Planning to help change social perceptions and attitudes towards the property law implementation process and contribute to strengthen the legitimacy of the laws by supporting the notion that illegal occupation is not acceptable AND to discourage potential future illegal occupation. Additional campaigns were organised by the OSCE Mission in Kosovo in 2006 and 2007 ('You are displaced, your rights are not' and 'Legal remedies campaign').

Overall evaluation of the effectiveness of the HPD (now KPA):

The process of post conflict property restitution in Kosovo continues to pose diverse challenges. The following paragraphs describe a number of the problems identified and approaches taken.

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31 Standard VI – Property Rights reads: "The fair enforcement of property rights is essential to encourage returns and the equal treatment of all ethnic communities. This requires that there is effective legislation in place, that there are **effective property dispute resolution mechanisms;** that rightful owners of residential, commercial and agricultural lands are able to take effective possession of their property and that there is an accurate system for transfer, encumbrance and registration of property as well as the prevention of coerced property sales."

32 http://www.unmikonline.org/eu/epap.html

Providing an effective remedy:

The goal of housing and property restitution is to provide victims of property rights violations with a remedy that is accessible, independent, fair and effective.

While accessibility was ensured through mobile teams and external offices across Kosovo and in Serbia, it was challenging to make the process accessible to minority groups whose members often lack documents. This was addressed by involving other agencies to support the HPD/HPCC and later the KPA/KPCC in ensuring access to information and records.

In terms of independence of the restitution claims mechanism, the HPD/HPCC, an internationally established and supervised body, earned a reputation of impartiality. This was achieved by the governing regulations of the two institutions which contained a number of institutional and procedural safeguards against the concentration of decision making power.

Effectiveness, i.e. adequacy of the remedies provided by the HPD/HPCC perhaps posed the biggest challenge due to lack of resources, the complexity of the property rights issues that needed to be addressed and the socio-political situation. Repossession and/or temporary administration following an HPCC decision (which did not constitute a determination of title, but of lawful possession) proved to be a less effective remedy due to the fact that displaced persons did not feel safe enough to physically return to their residences. Moreover, limited resources available and the sheer mass of claims that had to be resolved compounded the situation.

While the situation was challenging enough in itself, instances of obstruction by local officials led to a temporary suspension of the enforcement of HPCC decisions in August 2007, later revoked.

Today, the effective enforcement of KPCC decisions is the largest remaining challenge for the process of property restitution in Kosovo. Lack of funding and the ongoing transition process may obstacle the process.

Providing an adequate solution for the return and reconstruction process:

Even with a functioning, well planned and implemented housing and property restitution mechanism in place, the return and restitution process can only be entirely successful when the environment is conducive to return. In Kosovo, structures to support the return of minority communities to their places of origin and to provide for the reconstruction of their housing were only established in 2002. Moreover, the mass claim mechanism for residential property claims (HPD/HPCC) did not become fully efficient until 2003 due to funding and other constraints.

The returns and reconstruction structures were not linked to the restitution process. A 2006 Protocol on Voluntary and Sustainable Return signed by UNMIK, the Government of Kosovo and the Republic of Serbia sought to establish an administrative process for enabling reconstruction assistance upon request by the displaced. However, this was not implemented. Due to these insufficiencies and the general environment, displaced persons from minority communities often do not feel secure enough or with sufficient living opportunities (employment, public services) in Kosovo to return home. The riots in March 2004 displaced 4,000 persons and reinforced the sense of insecurity of minority communities in Kosovo. Last but not least, displaced persons are often not given adequate housing and/or land and continue to live in inadequate housing conditions, and there is still not clear programme in place to address this problem. Overall, the environment in Kosovo is therefore still not conducive to the return of minority communities.

Concluding questions and possible lessons identified

The on-going process of return and housing and property restitution in Kosovo clearly demonstrates which elements are indispensable for a successful programme of return and restitution.

From the outset, it is crucial that restitution programmes are planned in a comprehensive and coherent manner and that restitution in the pure legal sense is accompanied by adequate and efficient return and reconstruction structures. In Kosovo, the situation and consequently the restitution programme changed significantly from design to implementation as shortcomings of the initial assessment were understood. Ideally, this problem should have been avoided by a more accurate needs assessment at the beginning of the process, which would have allowed for better planning and resource allocation from the beginning. Furthermore, the importance of transparency and information to the public on the restitution programme can not be stressed enough.

One of the major shortcomings of the restitution programme in Kosovo is that it was and still is not linked adequately to structures for return, resettlement and reconstruction. The experiences of Kosovo show that providing claimants with the legal remedy of repossession is not adequate and effective when the conditions are not conducive to return.

After going through the restitution claims mechanism, many claimants remain with the theoretical ability to return to their property, but do not in fact repossess their property as they are unwilling or unable to return due to the general situation in Kosovo and continued discrimination against minority communities. This opens the question whether the remedy they were given – either repossession or temporary administration– is effective for them, and what remedy they could have been provided with as an alternative. Furthermore, the restitution process did not address the problem of destroyed properties, meaning that those affected have to seek redress from aid agencies and outside the legal process. This missing link between providing an environment conducive to return on the one hand, and purely legal restitution on the other is particularly problematic as it can evidently deny those displaced the ability to exercise their right to return and to again exercise their property rights.

In addition, adequate housing solutions need to be found for persons in displacement who do not wish to return home. Resettlement and/or local integration programmes have not been sufficiently developed in this regard.

Lastly, a number of displaced persons, particularly Kosovo Roma, Ashkaeli and Egyptians, did not have registered property title at the time of their displacement, as they lived in conditions of informal property tenure (unregistered transfers, occupation of socially owned land, etc). Positive measures are needed to ensure the return of these persons. In the case of the Roma Mahala of Mitrovica, the municipality and UNMIK agreed to allocate 3.5 hectares of agricultural land for residential use by the returnees. However, responses to displaced persons from informal settlements lacked a consistent approach. As a norm, Kosovo Roma, Ashkali and Egyptian displaced persons did not see a remedy to their situation. Although the government has taken certain steps in line with the European Partnership Action Plan requirements for the regularisation of informal settlements, a consistent policy for the government to address the situation of persons living in and/or displaced from informal settlements (i.e., by allocating rights of use over land or providing alternative housing) has not yet been developed or implemented.

b. South Africa: Restitution Claims Procedures and Integrated Development Planning

South Africa has a past of a severely discriminatory apartheid regime through which millions of people were forcibly evicted from their homes and to a large extent settled in townships and Bantustans[33], resulting in the loss of their property rights. South Africa started a process of land restitution in order to remedy the property rights violations and to reconcile society by admitting the severe human rights violations. The following is a summary of the presentation by Dr. Monty Roodt about restitution claims procedures and integrated development planning in South Africa.

The restitution process in South Africa is based on the recognition that forced removals were a key injustice suffered by black people under colonial rule and during the apartheid regime. Between 1960 and 1983 alone, 3.5 million people were forcibly removed from their homes through so called black spot clearances, homeland consolidation and the Group Area Act, which were specifically designed to physically separate the living spaces of the African and Coloured population from that of the White population. The figure of 3.5 million is illustrative of the massive number of people who, over the course of colonial rule and the apartheid regime, lost their homes and lands and were forced to move to townships with little recourse to justice.

The land reform programme introduced after the end of apartheid has three legs: restitution, redistribution and tenure upgrade. Restitution is a rights-based programme that is situated within the programme for land reform. The redistribution part of the land reform programme in turn is discretionary. The objective of land reform in South Africa is to redress historical injustices with the aim of promoting equitable land ownership, secure tenure rights and economic growth.

In the process of transition from apartheid to democracy, South Africa first enacted an interim constitution in 1993[34], under which transitional institutions were created. These were given the constitutional mandate to draft a final constitution for South Africa, which was passed in 1996 and took effect from February 1997. The 1993 interim constitution already contained a part on Restitution of Land Rights to start the important process of housing, land and property restitution in South Africa.[35] The 1996 Constitution of the Republic of South Africa addresses the land reform process in Section 25 and clearly identifies redistribution of land, tenure reform and restitution as entitlements within the bill of rights. With regard to restitution, Section 25.7 of the Constitution states that 'a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'. By placing the process of land reform, including restitution, into the Bill of Rights, restitution is made a justiciable right according to Section 38 of the Constitution. South Africans who suffered dispossession due to discriminatory laws or practices hence have a restitution claim against the State as the actor primarily responsible for the violation of their rights.

33 Bantustans, also known as reserves or homelands, were created to separate the black majority population from the white population. The Bantustans were declared separate territories, one for each of the major indigenous ethnic groups. Many black South Africans were forcibly relocated to these territories and stripped of their South African citizenship when these entities were forced to take pseudo independence.

34 Constitution of the Republic of South Africa Act 200 of 1993, available at http://www.info.gov.za/documents/constitution/93cons.htm

35 Ibid, Section 121 to 123.

The more detailed legal and institutional framework for restitution in South Africa is contained in the Restitution and Land Rights Act 22 of 1994, which was later amended to reflect the 1996 Constitution. The Restitution and Land Rights Act was passed to give effect to the right to restitution contained in the interim constitution and to create the means by which people could realise this right. The Act established a Commission on the Restitution of Land Rights (CRLR) to assist people to make claims, to investigate their validity, to prioritise them and prepare them for settlement or adjudication. Further, a special Land Claims Court was formed with the remit to approve claims, grant restitution orders and adjudicate disputes, i.e. to provide people with a legal remedy for the loss of their rights in land since 1913.

However, of the 63,455 claims eventually received by the CRLR by December 1998, the Commission, in early 1998, had only resolved 18 cases, rejected 172 and referred a further 20 to the Land Claims Court. The 18 resolved cases enabled about 27,000 people to recover approximately 150,000 hectares of land. Due to the slow pace resolution of claims, the restitution process was changed after a Ministerial Review in 1998, by which a faster administrative route of settling claims by negotiation with claimants was introduced.

The claims mechanism established by the Land Rights Act and implemented by the CRLR and the Land Claims Court was organised in distinct phases and included methods to prioritise the large number of claims received. At the beginning of the process lies the lodgement of claims by individuals or groups who feel they are entitled to restitution under the Constitution and the Land Rights Act. Claims were lodged only slowly at the beginning of the process, but numbers increased significantly when the Department of Land Affairs, the CRLR and the National Land Committee launched a campaign titled 'Stake your claim'.

Claims received by the CRLR are then validated. In this phase, prima facie evidence of claims is determined, records are located, boundaries of land clarified and, in the case of group claims, the composition of the claimant group established. The validation of claims often proved difficult, especially in rural areas, as it involved determining claims over injustices committed as far back as 1913. A validation campaign which took place in 2001-2002 somewhat improved the situation, but problems still remain. The validation process in general split urban claims down to the household level, while rural claims, including those brought by individuals, were amalgamated into community claims.

At the time of the cut off date for the lodgement of claims on December 31, 1998, the CRLR had received 79,696 claims that had to be dealt with. These claims did not only include claims from individuals, but also community claims which sometimes affected more than 500 people per community. In order to deal with the case load, claims were prioritised according to the following categories: Elderly, those who – officially – suffered substantially, those in nodal areas and, until recently, urban claims. Recently, the CRLR started to prioritise rural over urban claims.

After the lodgement, validation and prioritisation of the claims, each claim was validated once more, this time financially, to establish the Monetary Value of Claim (MVOC). This element of the restitution process is necessary as claims where restitution in kind is impossible need to be settled by awarding adequate compensation to the claimant. However, South Africa faced the perhaps particular problem that, due to the age of some claims, the two methods used to establish the MVOC lead to two different results: The MVOC could either be arrived at by calculating the current value of the claim, or by calculating the historical value of the claim and then inflating it to the current Rand value. The decision about which method should be used was left to the discretion of the CRLR. The first method was usually used where little or no improvements had been made to the land and little or no compensation paid to the claimant at the time of dispossession. The second valuation method was in turn mainly used where improvements

to the land had been made and/or where compensation had been paid to the claimant. Furthermore, the Regional Land Claims Commissions responsible for determining the MVOC sometimes faced difficulty in finding enough competent valuers to carry out the valuation, as valuers were sometimes reluctant to work on restitution cases or charged very high fees.[36]

At the settlement stage of the restitution process, the options available under the South African restitution model are land restoration, the provision of alternative land, financial compensation, development compensation or a combination of these.

In South Africa, as in international law and in most domestic jurisdictions, restoration in kind, i.e. land restoration, is the preferred option, if viable, for remedying the loss of or harm to personal rights such as rights in land. South Africa adopted the approach that land restoration could only take place if there was a willing buyer and a willing seller of the land, meaning that only when the current occupants of the land are willing to sell the land at prices offered by the CRLR, full land restoration of the claimant can take place. The implementation of land restoration as the preferred option is proving difficult, as current owners are frequently unwilling to sell, either because they do not want to sell at the price offered by the CRLR, or because they are hostile towards the restitution programme in general or question the particular claim. This situation is the result of the fact that in South Africa, restitution claims are not against the current landowner, but against the State. Expropriation of the current landowner can therefore only take place if, as defined in Section 25 (2) and (4) of the Constitution, there is a 'public purpose' or it is 'in the public interest', which includes the commitment to land reform. However, expropriations for the purpose of restitution and overall land reform are rare.[37] Failing the option of land restoration, the option of awarding claimants alternative land is the alternative closest to restoration of land rights over the former land. However, this type of settlement has not been used in many cases. Where it was used, alternative land was usually given because of value added to the original land, due to public interest considerations, because of the unwillingness of the current owner to sell to the CRLR, or because the new occupiers had themselves legitimate rights to the land.

The option of financial compensation is especially used in claims that involve urban land or property rights. In those cases, standard settlement agreements are used instead of the MVOC, thus making the validation process of the claim unnecessary and allowing for a faster settlement of claims. Where claimants are not satisfied with the standard settlement offered by the CRLR, they have the possibility of approaching the Land Claims Court for a ruling. Though the avenue of financial compensation and the introduction of standard settlement agreements greatly increased the number of claims settled, especially in urban areas, there is disagreement as to whether this form of restitution complies with the aim of land reform stated in the Constitution and whether it provides an equitable remedy to claimants.[38]

Last but not least, South Africa included the option of awarding development compensation to claimants after a Ministerial Review in 1998 found that restitution was failing because there was no link between restitution and opportunities for development. Under this approach, claimants not only get access to land, but the development needs of the particular community are taken into account. This can mean that priority access to housing projects is given, or communities are rebuilt, infrastructure projects implemented, etc.

36 MVOC from Ruth Hall, Rural Restitution, p. 5

37 Ruth Hall, Rural Restitution, p. 7-9.

38 Ruth Hall, Rural Restitution, p. 11.

Once the end of the process is reached and a settlement agreed to in accordance with one of the options described above, the settlement is then usually implemented. However, there are two other methods in use by the CRLR, namely cases that are only partially settled, and others where a 'payout approach' is taken. Partial settlement occurs primarily in rural areas with a group of claimants where settlement can only be reached for parts of the land claimed, but not the rest – either because the current owner is unwilling to sell, or because there are overlapping claims by different claimants. While this leads to satisfaction for at least some of the claimants, there are complaints that the unsettled part of the claim is then not prioritised. Under the payout approach, a settlement agreement to award alternative land is in principle reached with the claimant(s). However, instead of providing that land and thus implement the claims settlement, money equivalent to the MVOC is paid into a trust account by the CRLR until suitable alternative land is found. This approach could be described as a mix between compensation in kind and financial compensation. Both partial settlements and the payout approach can lead to problems, as the cases are then counted as settled, while the claimants are still awaiting the full implementation of the remedy awarded to them. Social complexities such as overlapping claims to land, of owners and tenants or of claimants and farm dwellers are left unaddressed by both these settlement methods.

The results delivered under the South African restitution model, despite its problems, are impressive and have improved markedly from 1999 with the introduction of the administrative settlement mechanism. Of the 79,696 claims lodged, only 41 had been settled by March 1999. In October 2006, this figure had risen to +-73,200. By July 2006, the programme had delivered a total of 1,067,152 hectares of land and spending increased to R2,247 billion (approx. $330 billion) for the financial year 2006/7.

However, the majority of the claims settled were in urban areas and settlement was through financial compensation. Of the 36,488 claims settled by March 2003, only 185 were rural claims settled with land and the bulk of rural claims (approx. 11,500) were still outstanding. Yet rural claims have more potential than urban claims to transform landholding redress past injustices and address development needs of the poor.

The current concern is that political pressure has been applied to settle all claims by 2008. There is no indication that this is possible, given the number of large rural claims that were still outstanding at the beginning of 2007 despite the acceleration in their settlement since March 2003. The political pressure largely stems from the high cost of the restitution programme. On average, the cost of land for settled rural claims was R1.7 million (approx. $250,000) per settlement so far, even though one in six of these were settled with state land and thus involved no capital cost for land. At the moment, it is unclear what the settlement of the remaining rural claims might cost. A very conservative estimate is that the completion of the restitution process will cost approximately R10 billion (approx. $1.5 billion) for the settlement of rural claims, and R1 billion (approx. $150 million) for the settlement of urban claims. These figures represent only the cost for land or financial compensation, but not the related costs for development projects related to restitution, or the operating cost of the restitution programme which amounts to approximately 25% of the total cost. While recent and projected increased spending on restitution is welcome, it is unlikely to address the scale of restitution and related development needs South Africa still faces. Over time, the limited budget for restitution will therefore have to be seriously rethought.

Another issue related to restitution that South Africa has started to address, but where it still faces difficulties, is the link between restitution as a legal remedy to violations of rights in land on the one hand and addressing more overarching development needs in order to make the restoration of land sustainable on the other hand. The implementation of restitution as a purely rights based process can be anti-developmental as the needs of the people who regain land are left out in a legalistic process. In the beginning of the restitution process

in South Africa, the emphasis was to establish "a right in land". The provision of services and the need for development were seen as separate issues to be dealt with by other government departments. Especially in rural areas, this led to problems as some of the communities did not have the means and/or the skills to establish a sustainable livelihood on the land they regained as a result of restitution.

In order to address the problem of a lack of support to claimants after the settlement of their claim, a group within the CRLR fought for a more integrated developmental approach to restitution on the part of the CRLR. The idea was to involve claimants, civil society and governmental departments at the national, provincial and local level in planning the process of both restitution and development for areas concerned. After initial opposition to the idea within the CRLR, the need for support for claimants beyond the mere settlement has been accepted. As a result, steering committees for each group or community claim with the involvement of relevant stakeholders are now set up early in the settlement process so that development needs can be identified and addressed. However, many beneficiaries still complain of little or no post-settlement support from relevant government institutions at all levels of government and from the private sector.

In general, the process of restitution in South Africa still remains market based as it relies on the 'willing seller-willing buyer' approach to acquire the claimed land and free it for restoration of the original owner. This market based approach precludes a systematic and planned approach to meeting the land needs in specific areas of the country. Land acquisition under the system remains piecemeal as it is reliant on individual pieces of land coming up for sale.

A positive development with regard to the improvement of post-settlement support has been the introduction of the Comprehensive Agricultural Support Programme (CASP) and the re-introduction of the Agricultural Credit Scheme from the Micro Agricultural Financial Institute of South Africa (MAFISA). The specific aim of the CASP programme is to provide post-settlement technical and financial support to the poor rural population.

In order to meet the needs of economic development of the mass of poor rural people and to secure their land rights, significant increase is now required in the scale of delivery of such programmes. Therefore, steps need to be taken to substantially increase resources for land reform, to increase capacity within implementing agencies and to devise policy reforms capable of delivering land and the necessary support at a significantly increased scale. In South Africa and in any other country, a truly effective programme for land restitution always requires strong political commitment to provide resources, capacity building within institutions, mechanisms to ensure government agencies collaborate effectively and a will to confront vested interests of those who will loose something upon implementation of restitution.

The case study from South Africa shows how a country facing the problem of remedying long term displacement induced by discriminatory legislation and practice over a long period has dealt and is dealing with restitution. The example of South Africa can therefore be used to find elements that can be adapted for a restitution process in Sri Lanka. Not only South Africa, but also Kosovo, show how international legal standards and practices on return and restitution are developing and how they can be used in a local context. Each of the case studies presented and the overall international system have been successful in some aspects in addressing restitution, but have also suffered set backs. Both the successes and the problems should be taken into account in planning for housing, land and property restitution in Sri Lanka.

THE WAY FORWARD FOR SRI LANKA

Lessons identified

- Housing, land and property restitution is central to the resolution of conflict, as land and property rights are often key contentions around which conflicts arise. The human rights violation of arbitrary displacement and loss of property can be undone by giving displaced persons back their rights over lost property or by adequately compensating them for their losses. While many human rights violations that usually occur during conflict are difficult to remedy, this is possible in the case of violations of housing, land and property rights. The restitution of those rights is further conducive to the fulfilment of other rights, such as for example the right to an adequate standard of living. This gives restitution a central place in post conflict processes.

- Restitution is important for victims on an individual level. Ideally, displaced persons can return home, move back into their old property and regain their livelihood. This can contribute to overall reconciliation after conflict as the process of restitution contributes to acknowledging the detrimental effects of conflict on the enjoyment of human rights.

  In South Africa, land reform and restitution play a central role in the process of addressing and undoing the injustices of apartheid, during which the black majority housing, land and property rights on a massive scale. Giving people back their lands was identified as one of the most important aspects to address past discrimination and to work towards equality. Despite the difficulties South Africa faced and still faces in this process, the central role restitution plays in South Africa after apartheid shows its importance in the overall reform process. Likewise, restitution is seen as key in the post-conflict process in Kosovo. Past discrimination and loss of property during the war are addressed with the aim of a transformation to a society where all peoples of Kosovo can live together peacefully.

- The case of Kosovo shows that return and restitution should be planned together and that compensation for damage and destruction needs to be an integral part of the restitution claims mechanism in post-conflict settings. Restitution implemented as a purely legal remedy that legally enables displaced persons to repossess their property is futile in cases where property has been destroyed or damaged due to the conflict. A process of restitution must also take into account equitable remedies in addition to legal remedies. Further, the return and the restitution processes need to be linked. The stated aim of restitution is to enable people to return to their places of origin. Where return is not linked to this process, there is a real danger that the environment is not conducive to return and that displaced

persons therefore are unable to return to their places of origin, even if a legal remedy is awarded to them.

- The South African case study highlighted the importance of integrating development planning in a wider sense to the restitution process. The Sri Lankan and South African context are very different due to the manner in which property rights violations occurred and the length of time during which they took place. In South Africa, land reform is seen as one of the aims of the restitution programme. However, repossession of land by the black majority has been low as the supporting framework for return is often too weak to enable people to actually move back to their old homes and lands, or to alternative pieces of land.

- All presentations highlighted the need for a special judicial or quasi-judicial restitution process. Kees Wouters pointed out that currently, there is no process for restitution and that victims of housing, land and property rights violations therefore have no forum to turn to. Rhodri Williams set out the rationale for a special restitution procedure: Firstly, the normal judicial and administrative institutions will in virtually all cases be overwhelmed by the caseload. Secondly, human rights violations on big scale call for different rules of process especially regarding the evidence that needs to be presented for a successful claim. In conflict situations, victims can often not proof the violation conclusively under normal procedural rules. Therefore, the knowledge that violations occurred during a certain time in a certain area should allow for a reversal of the burden of prove under special procedures. Moreover, this is psychologically important for victims as they do not have to fear that their allegations are overly questioned. Both in South Africa and in Kosovo, special institutions and procedures were created to address the large number of restitution claims.

- The proper dissemination of accurate and updated information is absolutely crucial. Both South Africa and Kosovo experienced an initial period in which claims were made only very slowly. In both countries, the number of claims increased significantly after information campaigns. Restitution processes can only be successful if the population at large knows about and understands the procedure.

- Sri Lanka is currently still in conflict. The implementation of a comprehensive restitution process can only be carried out after the civil war is over and could be part of a peace settlement. However, the right to restitution needs to be recognised now for those who are returning during the conflict. The return process currently in operation in the East should ideally be a durable solution for the displacement of the returnees. However, without a well defined return and restitution policy and process, there is a danger that property rights of returnees are not restored or only restored in a manner which makes the sustainability of the return process questionable.

- Planning for a future process of restitution in a setting of post conflict peace building is of paramount importance. While it may not be possible to fully implement a programme of restitution in the current context of conflict, it is important to identify issues and obstacles that may impede the implementation of a restitution programme, and formulate adequate policy and procedural responses to overcoming them. As is seen in the cases of Kosovo and South Africa, housing and property restitution requires adequate laws, institutions, and

procedural mechanisms that can effectively deal with property claims and provide remedies for violations of housing, land and property rights.

- A discussion about what elements a restitution process in Sri Lanka will need should start now. This can help prevent further violations of property rights during conflict, and will help at the post-conflict stage. It is crucial that there are measures in place at the present time which can safeguard and uphold the housing, land and property rights of those currently in displacement, and who hope to return and be restored to their lands and properties in the future.

Appendix I

TOPICS, SPEAKERS AND PANELISTS

Panel 1: Housing and Property Restitution Standards

Speaker: Kees Wouters is an International Law Consultant with the COHRE Sri Lanka office. In 2005, he was instrumental in setting up the COHRE office in Sri Lanka and has worked extensively on the topic of housing, land and property rights in Sri Lanka and internationally. Kees presented an introduction to housing, land and property restitution and the Pinheiro Principles as the international standard setting instrument on restitution matters.

Panelists: Menique Amarasinghe, UNHCR and Cynthia M. Caron, UNOPS and ASB, joined the Panel for a discussion on the issues presented.

Panel 2: The Role of Restitution in Post-Conflict and Transitional Settings: Developments in International Law and Practice

Speaker: Rhodri C. Williams is currently involved in drafting a manual on the domestic implementation of the UN Guiding Principles on Internal Displacement at the Brookings Institution – Bern University Project on Internal Displacement. He has worked extensively on housing and property restitution in post-conflict settings in different countries. Rhodri gave an overview of developments in international law and practice regarding the role of restitution in post-conflict and transitional settings.

Panelists: Shirani Goonatilleke, SCOPP, Fara Haniffa, Unversity of Colombo, and Mario Gomez, Human Rights Lawyer, joined the Panel for a discussion on the issues presented.

Panel 3: Strategies to Operationalise the Housing, Land and Property Rights of the Displaced

Speaker: José Arraiza is the Chief of the Property Section at the OSCE Mission in Kosovo, a monitoring, advisory and awareness raising unit. Since 2005, he has co-ordinated on behalf of the UN Mission in Kosovo the 'Property Rights Standars' within the 'Standards for Kosovo' plan. He has facilitated the development and implementation of strategies on returns and property restitution, the regularisation of informal settlements and other transitional refors, and supervised the implementation of field monitoring projects, awareness raising campaigns and a manual on property rights of field monitors. José spoke on lessons identified in Kosovo in the strategic planning and implementation of returns and property restitution programmes.

Panelists: Giovanni Cassani, IOM, Mr. Thusyanathan and Mr. Satheestharan, NRC joined the Panel for a discussion on the issues presented.

Panel 4: Restitution Claims Procedures and Integrated Development Planning – The Case of South Africa

Speaker: Dr. Johan J. Roodt was involved in a number of mass restitution claims procedures in his capacity as Investigation Division Manager and Research Coordinator at the Commission on Restitution of Land Rights of the Eastern Cape, South Africa. He spoke on the South African experience of restitution and focused on restitution claims procedures and standards for integrated development at the central and peripheral levels of government.

Panelists: Conrad de Tissera, UN Habitat and Vasant Pullenayegem, Practical Action joined the Panel for a discussion on the issues presented.

Appendix II

PUBLICATIONS

The following publications were given to participants of the seminar. They provide useful background information on housing, land and property restitution from different perspectives. Please contact COHRE Sri Lanka at cohresrilanka@cohre.org if you would like a copy of any of these publications.

- The Contemporary Right to Property Restitution in the Context of Transitional Justice, Rhodri C. Williams, International Center for Transitional Justice, May 2007

- You are displaced, your rights are not: Kosovo experiences in operationalising the right of displaced persons to return home and to recover possessions, José Arraiza

- Land Restitution in South Africa – Overview and Lessons Learned, Working Paper No. 6, Jean Du Plessis, COHRE & Badil Resource Center for Palestinian Residency and Refugee Rights, December 2004

- Land Restitution in South Africa, Monty J. Roodt in Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons, Scott Leckie (ed.), Transnational Publishers 2003

Housing Rights for Everyone, Everywhere...

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