



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/Sub.2/2004/22/Add.1
8 June 2004

ENGLISH ONLY

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion and
Protection of Human Rights
Fifty-sixth session
Item 4 of the provisional agenda

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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

Progress report of the Special Rapporteur, Paulo Sérgio Pinheiro

Addendum

**Commentary on the Draft Principles on Housing and Property Restitution
for Refugees and Displaced Persons**

Introduction

1. This commentary on the Draft Principles on Housing and Property Restitution for Refugees and Displaced Persons (hereinafter “Draft Principles”) is meant to provide an overview of the international human rights and humanitarian legal standards which serve to support the Draft Principles. The commentary is organized in parallel to the Draft Principles.

2. As with the Draft Principles, it is hoped that over the course of the next year, the scope of consultation can be further expanded in order to invite the participation of all relevant agencies and organs of the United Nations, Governments and non-governmental organizations in the development of the commentary. In particular, the Special Rapporteur would like to suggest that a high-level international meeting be convened in early 2005 to discuss the Draft Principles. It is hoped that the draft commentary, along with the Draft Principles, will be disseminated as widely as possible in order to facilitate the consultation process before the Special Rapporteur submits his final report in 2005.

3. While the mandate given to the Special Rapporteur refers to “refugees and internally displaced persons”, it should be noted that the issues, norms and standards regarding housing and property restitution also pertain to persons in similar situations. The phrase “refugees and internally displaced persons” unfortunately overlooks those persons displaced across borders, for example following a conflict or disaster, who may not meet the legal definition of a refugee under international law. Because such populations have the right to housing and property restitution, as refugees and internally displaced persons do, the Draft Principles incorporates the language “refugees and displaced persons”.

4. For the purpose of the Draft Principles, “housing and property” refers to housing and real property, including land and other forms of immovable property.

Commentary to Section I of the Draft Principles on The Right to Housing and Property Restitution

5. Section I outlines overarching principles which shall be applied to all of the rights spelt out in the Draft Principles. In paragraph 1.1, and throughout the text, the term “restitution” refers to an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position. The recognition of the right to housing and property restitution for refugees and other displaced persons is based on the standards articulated throughout the Draft Principles, inter alia, the right to safe and dignified return and the right to a remedy for violations of international human rights and humanitarian law.

6. The right to non-discrimination and equality are protected in virtually every major international human rights instrument, including article 2 of the Universal Declaration of Human Rights, articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights,¹ and articles 2 and 3 of the International Covenant on Civil and Political Rights.² Discrimination is also prohibited under the International Convention on the Elimination of All Forms of Racial Discrimination³ and the Convention on the Elimination of All Forms of Discrimination against Women,⁴ as well as under article 2 of the Convention on the Rights of the Child.⁵ Discrimination is similarly prohibited under article II of the American Declaration on the Rights

and Duties of Man,⁶ article 1 of the American Convention on Human Rights: “Pact of San José, Costa Rica”,⁷ article 2 of the African Charter on Human and Peoples’ Rights,⁸ and article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).⁹

7. The right to equality between men and women is guaranteed in article 3 of the International Covenant on Civil and Political Rights¹⁰ and in article 3 of the International Covenant on Economic, Social and Cultural Rights.¹¹ In cases where the status quo ante discriminated on the basis of social status, for example on the basis of gender, additional measures may be needed to ensure that housing rights are realized by all sectors of the population without discrimination.

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

Commentary to Section II of the Draft Principles on Protection From Displacement

9. Section II of the Draft Principles articulates several rights which are relevant to all points of the displacement cycle, and are of particular significance in terms of protecting people from forced displacement in the first place. As such, the Draft Principles address not only the issue of providing a remedy (i.e. restitution) to those persons already displaced, but also seek to avert the crisis of forced displacement itself. The rights articulated in section II include the right to be free from forced eviction, the right to privacy and respect for the home, the right to be free from the arbitrary deprivation of one’s property, the right to non-discrimination and equality, the right to adequate housing, and the right to freedom of movement and freedom to choose his or her residence.

10. “Forced eviction” is the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. Forced evictions are a particular type of displacement which are most often characterized by a relation to specific decisions, legislation or policies of States or the failure of States to intervene to halt evictions by non-State actors and an element of force or coercion, and which are often planned, formulated and announced prior to being carried out. The right to be free from forced eviction is implicit in the right to adequate housing, as well as in the right to privacy and respect for the home.

11. In its general comment No. 7, the Committee on Economic, Social and Cultural Rights stated that “forced evictions are prima facie incompatible with the requirements of the Covenant” and can only be justified in the most exceptional circumstances, and in accordance with the

relevant principles of international law.¹² The Committee further considered that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

12. The Geneva Convention relative to the Protection of Civilian Persons in Time of War states, in article 33, that “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited” and that “Reprisals against protected persons and their property are prohibited.”¹³ Article 53 stipulates that “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” Article 14 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)¹⁴ states that “Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”

13. Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁵ states that “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

14. In applying article 16, the Committee against Torture has interpreted the Convention to protect persons from forced evictions. In *Hajrizi v. Yugoslavia*, for example, the Committee held that the forced eviction and destruction of a Roma settlement in Serbia and Montenegro violated the Convention, even though the eviction was not perpetrated by public officials. The case concerned the forced eviction and destruction of the Bozova Glavica settlement in the city of Danilovgrad by private residents who lived nearby.¹⁶ Furthermore, in its concluding observations on the third periodic report of Israel (A/57/44, paras. 47-53), the Committee held that Israel’s policies of demolishing housing may amount to cruel, inhuman or degrading treatment or punishment, in violation of article 16 of the Convention.

15. The Commission on Human Rights, in its resolution 1993/77, has also affirmed “that the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing”. Similarly, the Sub-Commission, in its resolution 1998/9, reaffirmed that “every woman, man and child has the right to a secure place to live in peace and dignity, which

includes the right not to be evicted arbitrarily or on a discriminatory basis from one's home, land or community". In the same resolution, the Sub-Commission further reaffirmed that "the practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment".

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

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

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

19. Article IX of the American Declaration of the Rights and Duties of Man also states that "Every person has the right to the inviolability of his home." This right is also codified in the American Convention on Human Rights, which states, in article 11 that "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation", and in article 8 of the European Convention on Human Rights: "Everyone has the right to respect for his private and family life, his home and his correspondence."

20. "Property", within the context of the Draft Principles, refers primarily to real and immovable property, and in particular, but not exclusively, to housing and land. Article 17 of the Universal Declaration of Human Rights stipulates that "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property." Article XXIII of the American Declaration of the Rights and Duties of Man states that "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." Article 21 of the American Convention on Human Rights states that "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society" and provides that "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to

the forms established by law.” Similarly, article 14 of the African Charter on Human and Peoples’ Rights states that “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms states: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries¹⁷ provides that “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized” (art.13). Article 16, paragraph 3, further stipulates that “Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.”

21. The right to adequate housing is enshrined in several international human rights instruments. The Universal Declaration of Human Rights stipulates that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (art. 25).

22. The leading statement of international law relating to housing rights can be found in the International Covenant on Economic, Social and Cultural Rights, which states, in article 11, paragraph 1, that “The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” Housing rights are also enshrined and protected within other international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁸ the Convention on the Elimination of All Forms of Discrimination against Women,¹⁹ the Convention on the Rights of the Child,²⁰ the Convention relating to the Status of Refugees,²¹ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.²²

23. The right to adequate housing has been defined by the Committee on Economic, Social and Cultural Rights in its general comment No. 4. The Committee notes that the approach to the right to adequate housing should be holistic, encompassing the right to live somewhere in security, peace and dignity. In this regard, the Committee identified seven key criteria which comprise the right to adequate housing - legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.

24. The right to freedom of movement and residence is recognized in article 13, paragraph 1, of the Universal Declaration of Human Rights, which states that “Everyone has the right to freedom of movement and residence within the borders of each State.” This right is also protected under article 12, paragraph 1, of the International Covenant on Civil and Political

Rights,²³ as well as under article VIII of the American Declaration of the Rights and Duties of Man,²⁴ article 22, paragraph 1, of the American Convention on Human Rights,²⁵ and article 12, paragraph 1, of the African Charter on Human and Peoples' Rights.²⁶

25. General comment No. 27 of the Human Rights Committee on freedom of movement notes that "Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence." The Committee further notes that "The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place [...]. Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory."

Commentary to Section III of the Draft Principles on Protecting the Rights of Refugees and Displaced Persons

26. Section III of the Draft Principles addresses the rights of displaced persons, in particular, with respect to the right to safe and dignified return and the right to a remedy for human rights violations. Safe return encompasses the physical, legal and material aspects of safety. The right to housing and property restitution is seen as fundamentally connected to the realization of these human rights.

27. The right to return is guaranteed in article 13, paragraph 2, of the Universal Declaration of Human Rights,²⁷ article 12, paragraph 4, of the International Covenant on Civil and Political Rights,²⁸ articles 45, 127, 132, 134 and 135 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,²⁹ and article 12, paragraph 2, of the African Charter on Human and Peoples' Rights.³⁰

28. General comment No. 27 of the Human Rights Committee on freedom of movement also notes that "The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."³¹

29. The right to return is increasingly seen as encompassing not merely returning to one's country, but to one's home as well. Indeed, the right of refugees and displaced persons to return to their homes is recognized by the international community as a free-standing, autonomous right in and of itself. In its resolution 35/124 on international intervention to avert new flows of refugees, the General Assembly reaffirmed "the right of refugees to return to their homes in their homelands". This understanding is important in order to protect effectively the right to return of refugees and displaced persons and to improve situations leading to instability and displacement.³²

30. The United Nations has also consistently reaffirmed this principle when addressing specific cases of displacement. For example, the Security Council, in its resolution 820 (1993) on Bosnia and Herzegovina reaffirmed that "all displaced persons have the right to return in

peace to their former homes and should be assisted to do so". Similar language can be found in other resolutions of the Security Council, addressing displacement in numerous countries and regions, such as Georgia including Abkhazid,³³ Azerbaijan (853 (1993)), Bosnia and Herzegovina (752 (1992)), Cambodia (745 (1992)), Croatia (1009 (1995)), Cyprus (361 (1974)), Kosovo (1244 (1999), 1199 (1998)), Kuwait (687 (1991)), Namibia (385 (1976)) and Tajikistan (999 (1995)).

31. Other United Nations bodies have also reaffirmed the right to return to one's home. In addition to resolution 35/124 mentioned above, the General Assembly has, for instance, reaffirmed or recognized the right to return to one's home in resolutions 1672 (XVI) on Algeria, 3212 (XXIX) on Cyprus, 194 (111) on Palestine, 51/126 on persons displaced as a result of the June 1967 and subsequent hostilities and 51/114 on Rwanda. In resolution 1998/26, adopted without a vote, the Sub-Commission reaffirmed "the right of all refugees [...] and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish".

32. The Committee on the Elimination of Racial Discrimination also reaffirmed this principle in its general recommendation XXII: "all ... refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety". Similarly, in the Declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in September 2001, the international community unequivocally declared its universal recognition: "We recognize the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge all States to facilitate such return" (para. 65).

33. The forced return of refugees and other displaced persons is, *prima facie*, incompatible with international human rights standards, as forced repatriation violates the principle of non-refoulement. Article 33, paragraph 1, of the Convention relating to the Status of Refugees provides that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Similarly, Principle 15 of the Guiding Principles on Internal Displacement provides that "Internally displaced persons have ... [t]he right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk" (E/CN.4/1998/53, Add.2).

34. The right to a remedy for human rights violations has perhaps been best articulated in The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (E/CN.4/2000/62), which is itself based on well-established principles of international human rights and humanitarian law. Section II of The Draft Basic Principles and Guidelines provides that "The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, *inter alia*, a State's duty to: (a) Take appropriate legal and administrative measures to prevent violations; (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law; (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation; (d) Afford appropriate remedies to victims; and (e) Provide for or facilitate reparation to victims."

35. The Commission on Human Rights, in its resolution 2000/41, also reaffirmed that “pursuant to internationally proclaimed human rights principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation”, and called upon “the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights”.

36. The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law also stipulate, in paragraph 15, that “Reparation should be proportional to the gravity of the violations and the harm suffered”, and, in paragraph 22, that “Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.”

Commentary to Section IV of the Draft Principles on Ensuring The Right to Housing and Property Restitution

37. Section IV of the Draft Principles provides specific guidance regarding how best to ensure the right to housing and property restitution in practice. The principles articulated in this section are based, in part, on the findings of the preliminary report (E/CN.4/Sub.2/2003/11), which analysed some of the common obstacles to restitution programmes, including secondary occupation, property destruction, loss or destruction of property, ineffectual institutions and discriminatory restitution programmes. As such, the principles articulated in this section reflect some of the best practices which have been devised at the level of policy to address these common obstacles.

38. The right to adequate consultation and representation in decision-making has been articulated by the Committee on Economic, Social and Cultural Rights within the context of forced evictions. In its general comment No. 7, the Committee observed that affected communities should have a right to “an opportunity for genuine consultation”. Similarly, Principle 28, paragraph 2, of the Guiding Principles on Internal Displacement stipulates that “Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”

39. The provisions of the Draft Principles regarding housing and property records and documentation are meant in part to facilitate, from a logistical point of view, restitution processes through the establishment of property registration systems. In certain cases, alternative mechanisms may need to be established in order to create or recreate a system for the registration of property. One effective way to do this would be by integrating housing and property restitution protections in registration procedures for refugees and displaced persons. Many States have registration systems for the provision of humanitarian aid to the displaced, and many States include, in their registration processes, a mechanism for the collection of demographic data on the displaced population. It would seem quite feasible to widen the data collection component of these registration processes to include information regarding the

housing and property situation of refugees and displaced persons at the time they fled their homes - address, length of residency, estimated value, tenure status, ownership records and any other relevant personal information related to residency, ownership, possession or use and loss of property rights.

40. Because displacement often occurs in situations of armed conflict, including of ethnic cleansing, the Draft Principles stipulate that “States shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or which was otherwise coerced or forced.” Similar language was used in Security Council resolution 820 (1993) on the situation in Bosnia and Herzegovina.³⁴ This provision is consistent with basic tenets of contract law which stipulate that contracts entered into under duress or physical compulsion are void. Similarly, if a party’s assent to a contract is induced by a threat from another party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

41. Ensuring the rights of tenants and other non-owners is very important in situations of repatriation, resettlement and restitution, as in many cases only the minority of the affected displaced population will have actually owned their housing. Tenants and other non-owners do have rights of possession, including security of tenure, which protect them from forced eviction and displacement. The rights articulated in the Draft Principles apply equally to tenants and other non-owners as they do to persons who own their housing.

42. Ensuring the rights of secondary occupants is also a critical concern, as secondary occupation is itself a common phenomenon in situations of displacement. Secondary occupation is also a reality which often complicates the process of return for refugees and other displaced persons. Secondary occupation may at times occur when the perpetrators of human rights abuses forcibly evict residents and subsequently loot property and move into the abandoned homes themselves. Yet, most often, secondary occupiers are themselves displaced persons. Adequately addressing the phenomenon of secondary occupation has proven extremely delicate in practice. In all cases, however, secondary occupants must be protected against forced evictions and must benefit from the procedural protections outlined in general comment No. 7 of the Committee on Economic, Social and Cultural Rights. Similarly, secondary occupants have a right to adequate housing under international human rights laws and standards, and States should adopt adequate measures to ensure that secondary occupiers are protected against homelessness, unreasonable relocation and other violations of their human rights. Due process guarantees, and access to fair and impartial legal institutions, must be assured for all parties.

43. The term “compensation” refers to a legal remedy by which a person receives monetary payment for harm suffered, for example resulting from the impossibility of restoring the person’s property or house. Compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution. For example, an injured party should receive compensation to remedy the wrongful dispossession of housing only if that particular housing no longer exists or if the injured party knowingly and voluntarily decides it is in his or her interest not to return to his or her home. The Draft Principles do acknowledge, however, that

in some cases, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice. There is flexibility in this regard. Nonetheless, in all cases it is the injured party who should be able to knowingly and voluntarily decide whether to accept restitution, compensation, or a combination thereof.

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

45. Similarly, Principle 29, paragraph 2, of the Guiding Principles on Internal Displacement provide that “Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. *When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation*” (emphasis added).

Commentary to Section V of the Draft Principles on Strengthening, Restitution Procedures, Institutions, Mechanisms and Legal Frameworks

46. The provision that procedures, institutions, mechanisms, and legal frameworks related to the right to restitution shall be fully consistent and compatible with international human rights and humanitarian law and standards is important to ensure that principles of international human rights and humanitarian law are adequately reflected at the level of national policy-making as concerns restitution. Doing so will ultimately serve to protect all persons from future violations of human rights.

47. Effective and competent national institutions are the cornerstone of successful restitution programmes. The provisions contained in Section V on restitution procedures, institutions, mechanisms and legal frameworks are meant to provide practical guidelines for the establishment and support of institutions at national level and other institutions responsible for implementing restitution policies. Whenever possible, it is important that these institutions be directly established within peace settlement and voluntary repatriation agreements, so as to ensure that restitution is seen as an integral component of post-conflict and peace-building strategies.

48. It should be noted, in the commentary, that judicial mechanisms are especially important and that the absence of effective and accessible judicial remedies severely compromises the restitution process. This is particularly the case in post-conflict situations where internal political divisions render domestic institutions incapable of effectively administering restitution programmes, either due to institutional bias, or due to a lack of capacity and resources.

49. The Draft Principles also provide for the accessibility of restitution claims procedures, with the understanding that institutions not only must be effective in their work to implement restitution policies, they must also be accessible to those constituencies which they are meant to benefit. As such, claims procedures must be physically, linguistically and financially accessible, and special measures should be taken to ensure that especially vulnerable groups or persons are able to benefit from such institutions in an equitable and just manner.

50. The legal recognition of the right to housing and property restitution for refugees and other displaced persons is indispensable to the adequate implementation of restitution programmes and policies and their adequate enforcement. Legal protections should be clearly articulated in an internally consistent manner, and legal protections should be consistent with international human rights and humanitarian principles. In order to establish an adequate legal regime for the protection of the rights articulated in these Draft Principles, States will need to pursue a range of legislative measures, including the adoption, amendment, reform, or repeal of relevant laws.

51. The prohibition of arbitrary and discriminatory laws builds upon the right to non-discrimination recognized in Section I of the Draft Principles. As pointed out in the preliminary report, one of the common obstacles to the successful implementation of restitution programmes has been the establishment of policies which favour certain groups while barring others from returning to their own homes, as has been the case with the application of discriminatory abandonment laws. Discriminatory restitution programmes further entrench social divisions and animosities, and are counter to post-conflict resolution, peace-building, as well as to fundamental human rights principles and international legal obligations. As such, it is essential for States to bring their national legislation into compliance with non-discrimination standards. It also deserves mention that the privatization of refugees' properties during their stay abroad can seriously complicate the exercise of property restitution rights. Efforts should be made to ensure that privatization does not result in the loss of property restitution rights of refugees.

52. The provision of legal aid and the additional provisions concerning enforcement are critical for the effective implementation of restitution policies and programmes. The provision of legal aid again increases the accessibility of restitution claims procedures, and ensures that persons are not deterred from benefiting from such procedures because of barriers associated with understanding and navigating the law. Similarly, the adequate enforcement of judgements related to restitution is essential to the effective implementation of restitution policies and programmes, and are especially important in situations where persons have been displaced due to violence.

Commentary to Section VI of the Draft Principles on the Role of the International Community and of International Organizations

53. Section VI of the Draft Principles outlines the role of the international community and of international organizations in facilitating restitution processes. In this regard, the Draft Principles note that the international community has a responsibility to act in ways which promote and protect the right to housing and property restitution, as well as the right to return.

54. The bodies and agencies of the United Nations system, in particular, have an important role to play in overseeing the successful implementation of restitution programmes. This role should be seen more generally, as part of the United Nations human rights monitoring activities. Most notably, the human rights treaty monitoring bodies and the Charter-based human rights bodies, including the Commission on Human Rights and the Sub-Commission, should monitor the implementation of restitution programmes within States in order to ensure that they comply with international standards. The Office of the United Nations High Commissioner for Refugees (UNHCR) also has a critical role to play in this regard, especially considering the central role that this body plays in the implementation of repatriation programmes.

55. The provisions articulated within Section VI on the role of international organizations in peacemaking and international peacekeeping recognize that while housing and property restitution is necessary to post-conflict resolution and peace-building, restitution programmes cannot be properly implemented under conditions which are overly volatile and unstable. As such, peacekeeping allows for the stabilization of conflict situations, paving the way for housing and property restitution programmes to be implemented and, perhaps even more importantly, enforced. The United Nations plays a unique role in this regard.

56. In many cases, the United Nations is also often called upon to negotiate and broker peace agreements between warring factions. As such, the Draft Principles stipulate that the international organizations, including the United Nations, should ensure that peace settlement and voluntary repatriation agreements which are brokered contain provisions related to the establishment of national institutions, procedures and mechanisms for the facilitation of the restitution process.

Commentary to Section VII of the Draft Principles on Interpretation

57. The interpretation of the Draft Principles includes a saving clause which prohibits any interpretation of the universal principles which limits, alters or otherwise prejudices the provisions of any international human rights or international humanitarian legal instrument or rights consistent with such standards as recognized under national law. Finally, the Draft Principles also recognizes that the present commentary, because it provides the legal and normative underpinnings for the Draft Principles, shall be regarded as their main authoritative interpretation.

Notes

¹ United Nations, *Treaty Series*, vol. 993, p. 3.

² United Nations, *Treaty Series*, vol. 999, p. 171.

³ *Ibid.*, vol. 660, p. 195.

⁴ *Ibid.*, vol. 1249, p. 13.

⁵ General Assembly resolution 44/25, annex.

⁶ *Basic Documents Pertaining to Human Rights in the Inter-American System* (OEA/Ser.L.V/II.82 6, rev.1).

⁷ United Nations, *Treaty Series*, vol. 1144, p. 123.

⁸ *Ibid.*, vol. 1520, p. 243.

⁹ United Nations, *Treaty Series*, vol. 213, p. 221.

¹⁰ Article 3 stipulates “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

¹¹ Article 3 stipulates “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

¹² See also Fact Sheet No. 25, Forced Evictions and Human Rights.

¹³ United Nations, *Treaty Series*, vol. 75, p. 287.

¹⁴ *Ibid.*, vol. 1125, p. 609.

¹⁵ General Assembly resolution 39/46, annex.

¹⁶ Communication No. 161/2000 (CAT/C/29/D/161/2000).

¹⁷ United Nations, *Treaty Series*, vol. 1650, p. 383.

¹⁸ Article 5 states: “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights [...] the right to housing.”

¹⁹ Article 14, paragraph 2 of the Convention stipulates that “State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right [...] (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

²⁰ Article 27, paragraph 3, of the Convention stipulates: “State Parties, in accordance with national conditions and within their means, shall take appropriate measure to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regards to nutrition, clothing and housing.”

²¹ United Nations, *Treaty Series*, vol. 189, p. 137. Article 21 of the Convention specifically addresses the issue of housing: “As regards housing, the Contracting States, insofar as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

²² General Assembly resolution 45/158, annex.

²³ Article 12, paragraph 1, states that “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

²⁴ Article VIII states that “Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will.”

²⁵ Article 22, paragraph 1, states that “Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.”

²⁶ Article 12, paragraph 1, states that “Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.”

²⁷ “Everyone has the right to leave any country, including his own, and to return to his country.”

²⁸ “No one shall be arbitrarily deprived of the right to enter his own country.”

²⁹ Article 45 states, inter alia “Protected persons shall not be transferred to a Power which is not a party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.” Article 127 states, inter alia “When making decisions regarding the transfer of internees, the Detaining Power shall take their interests into account and, in particular, shall not do anything to increase the difficulties of repatriating them or returning them to their own homes.” Article 132 states, inter alia “The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.” Article 134 states “The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.” Article 135 states, inter alia “The Detaining Power shall bear the expense of returning released internees to the places where they were residing when interned, or, if it took them into custody while they were in transit or on the high seas, the cost of completing their journey or of their return to their point of departure.”

³⁰ “Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

³¹ The Committee goes on to observe “In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.”

³² See, for example, Security Council resolutions 1287 (2000), 1244 (1999), 1199 (1998), 1036 (1996), 971 (1995), 876 (1993) and 820 (1993); General Assembly resolutions 35/124 and 51/126; resolutions 1994/24 and 1998/26 of the Sub-Commission; and general recommendation XXII on article 5 of the Convention on refugees and displaced persons of the Committee on the Elimination of Racial Discrimination.

³³ See Security Council resolutions 1287 (2000), 1036 (1996), 971 (1995) and 876 (1993).

³⁴ In operative paragraph 7, the Security Council reaffirmed “its endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so”.
