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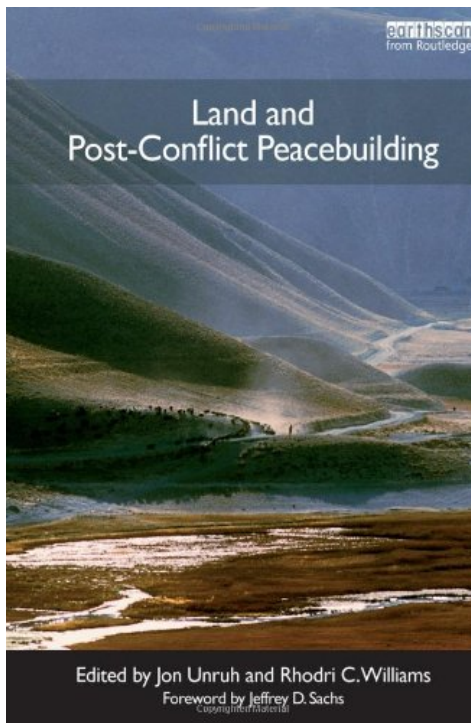
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The role of restitution in post-conflict situations

Barbara McCallin^a

^a Norwegian Refugee Council

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The role of restitution in post-conflict situations

Barbara McCallin

Land and property disputes are a frequent cause of conflict and an unavoidable consequence of it. People displaced by conflict leave behind their land and property, which may be occupied or destroyed in their absence. In the post-conflict period, this situation is an obstacle to return and other durable solutions. As disputes between pre-conflict owners or users and current occupants can endanger the fragile post-conflict environment, there has been a growing recognition within the international community that housing, land, and property (HLP) issues should be addressed more systematically in post-conflict national and international responses.

While land issues have so far been mainly addressed through development programs, humanitarian organizations, typically dealing with emergency relief and early recovery, have shown increased interest in addressing HLP issues by supporting a restitution approach. In places such as the Balkans, Timor-Leste, and Iraq, UN agencies and peacekeeping missions have supported property dispute resolution efforts. By returning property to its original owner or user, property restitution provides a remedy for earlier violations and displacement and attempts to consolidate the peacebuilding process. Humanitarian activities include relief but also protection, advocacy, and support for livelihood projects. The aim of humanitarian efforts is not to engage in long-term reform but rather to intervene in the short term, during conflicts or in the first few years of peace, to help the most vulnerable populations. This may explain why the involvement of humanitarian organizations in HLP issues has focused mainly on return, displaced people, and restitution of land and property.

Several land specialists, more familiar with the complexity of the social, economic, political, and legal relations that constitute land tenure relations, have underlined the limitations of the current humanitarian approach. A 2009 publication, *Uncharted Territory: Land, Conflict and Humanitarian Action*, with contributions from land experts, academics, and practitioners, reviews key criticisms and

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suggests improvements (Pantuliano 2009). The book argues that by limiting interventions to restitution, humanitarian efforts fail to address the structural causes affecting land tenure, which are often the origin of conflict in agrarian societies. When this is the case, a return through restitution to the status quo ante is unlikely to be sufficient to build a sustainable peace. For that, phenomena such as unequal distribution of land; large-scale land acquisitions (often referred to as *land grabbing*) by governments, elites, and private investors; and insecure land access require forward-looking structural reform more than restorative justice, according to this critique.

While it is clear that restitution cannot address all HLP issues resulting from a conflict, this does not mean that its value should be denied in all circumstances, and advocating for a broader approach to land problems should not result in eliminating the restitution option where it proves appropriate.

Criticisms of the humanitarian approach have recently focused on the UN's 2005 Principles on Housing and Property Restitution for Refugees and Displaced Persons (also called the Pinheiro Principles, after the rapporteur Paulo Sérgio Pinheiro)—an important summary of legal and best-practice documents on displaced populations and restitution—arguing that the principles ignore the root causes of conflict over land and are difficult to apply in situations in which landownership and registration do not follow Western norms. These critiques often focus on what the Pinheiro Principles are not (a guide to all post-conflict HLP issues) rather than what they are (a guide to restitution).

This chapter describes the Pinheiro Principles, the context in which they were created, and examples of situations in which they have been applied. Examples draw on the experience of the Norwegian Refugee Council, which has significant experience in providing legal assistance and mediation on HLP issues. It highlights some shortcomings as well as creative ways to adapt the Pinheiro Principles to situations in which informal and unregistered property predominates. The first section describes how the right to restitution has been recognized by international law and in UN resolutions. The second section reviews the Pinheiro Principles. Next, the chapter assesses the principles' impact at the global, regional, and national levels by analyzing treaties and other documents and nongovernmental organization (NGO) field practices. The fourth section examines the challenges faced by restitution in informal land tenure systems. Lastly, the chapter discusses the limitations of the restitution approach and the need for humanitarians to coordinate with land experts to develop a broader approach to HLP issues.

The criticism of the humanitarian approach to HLP issues helped many humanitarian organizations realize that addressing HLP sustainably requires envisaging other types of intervention besides restitution. This does not invalidate the Pinheiro Principles but situates them as one of the tools available. An adequate response requires that humanitarians, development specialists, and land experts coordinate their efforts from the beginning of the post-conflict phase to combine the best of both approaches—a human-rights-based approach providing restorative justice for violations resulting from the conflict, and a reformative approach promoting changes required to the land tenure system to address the structural causes of land disputes.

THE EMERGENCE OF A RIGHT TO PROPERTY RESTITUTION

Addressing HLP issues in post-conflict situations has increasingly been recognized as essential to achieving sustainable peace and durable solutions for displaced people. Until now, the international community has addressed these issues mainly through property restitution. This focus is the result of two parallel evolutions, one political and the other legal.

After the end of the Cold War, the ideological incentive to provide asylum quickly faded. Support grew for solutions facilitating return (Williams 2007; Leckie 2003) and the protection of displaced people within their own countries. Access to and repossession of housing and property were key to sustainable return, and thus the international community's interest in HLP issues increased. The Office of the United Nations High Commissioner for Refugees (UNHCR), as a result of its role in repatriation of refugees, particularly emphasized the link between return and property repossession.¹ This has been reflected in voluntary repatriation agreements between the UNHCR and refugees' countries of origin, in which the recovery of homes has often been mentioned as one of the elements creating the conditions for return in safety and dignity (Leckie 2003). Similarly, numerous recent peace agreements have explicitly referred to the right of displaced people to return to their homes and have their property returned to them.²

The increased interest in return and HLP issues has corresponded with the progress of the notion of restorative justice, which aims to restore victims to the situation they were in before their rights were violated (Williams 2007). For displaced people whose housing rights have been violated, restitution of property can undo and physically reverse the consequences of past violations. Restitution also contributes to the return of the rule of law after a conflict. Redressing past violations helps deter future violations; restoring justice removes a potential source of tension, therefore contributing to a sustainable peace. Of course, this can only be effective if the political, social, and security conditions exist that allow returnees to continue to have control over their reposessed property.

The human rights instruments that appeared after World War II upheld the need for reparations and restitution not only between states but also between a state and its nationals (Williams 2007). This approach has since been reaffirmed repeatedly, establishing a strong basis for restitution. The UN's approach to this issue, expressed in its Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

¹ In a 2001 internal memorandum, UNHCR underlined the importance of HLP issues: "Experience has shown that voluntary repatriation operations are unlikely to be fully successful or sustainable in the longer term if housing and property issues—being an integral part of return in safety and dignity—are left unattended."

² Parties to such agreements have included Bosnia and Herzegovina, Cambodia, El Salvador, Eritrea, Ethiopia, Guatemala, Kosovo, Liberia, Mozambique, Rwanda, Sierra Leone, Sudan, and Tajikistan. For the details on HLP provisions in such peace agreements, see Leckie (2007).

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Law and Serious Violations of International Humanitarian Law (UNGA 2005), confirms restitution as one form of reparation for human rights violations—along with compensation, rehabilitation, and guarantees of nonrepetition. International humanitarian law, which prohibits arbitrary displacement and destruction of property, also envisages restitution as a key remedy as specified in the Rome Statute of the International Criminal Court.³ Decisions from human rights treaty bodies on adequate housing, rights of indigenous people, and the right to respect of privacy and the home also affirm the right to restitution. Numerous UN resolutions (addressing either specific country situations or themes such as eviction, freedom of movement, and displaced people's rights) also affirm the right of displaced people to repossess their land and property (Leckie 2007). As mentioned earlier, these rights are also upheld in a number of peace agreements.

Restitution rights are therefore firmly established in a variety of international documents. But at the national level, restitution programs and attention to HLP issues have had varying degrees of success (Leckie 2007), depending on the political and security situation but also the attention given to the matter by the international community. Bosnia and Herzegovina's restitution process can be considered a success, since 93 percent of the 200,000 people who submitted a restitution claim repossessed their property; but this was the result of close monitoring by the international community combined with sanctions, which overcame national resistance. In contrast, in Cambodia, the United Nations Transitional Authority did not systematically address HLP issues (UNSC 2007).

THE PINHEIRO PRINCIPLES

It was against this background that the Pinheiro Principles were adopted by the United Nations in 2005 after a consultation process involving NGOs, governments, specialized agencies such as UNHCR and the Office of the High Commissioner for Human Rights, and property experts. The Pinheiro Principles (UN 2005) build on international human rights and humanitarian standards. They reaffirm displaced people's right to voluntary return to their homes as well as the notion that housing and property restitution contributes to the establishment of the rule of law and consolidation of peace, therefore preventing future displacement. They consolidate in one document various legal standards supporting HLP restitution for returnees and displaced people.

The objective of the Pinheiro Principles is to help national and international actors address legal and technical issues related to HLP restitution where displacement has led people to be arbitrarily deprived of their homes, land, and properties—regardless of the cause of displacement (conflict or natural disaster). The Pinheiro

³ Article 75, paragraph 2 of that statute says: "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." (For complete text of the Rome Statute of the International Criminal Court, see <http://untreaty.un.org/cod/icc/statute/rome.htm>.)

Principles also recognize compensation as a potential solution (principle 21), but emphasize restitution as the preferred remedy and limit compensation to cases in which restitution is impossible (principles 2.1, 2.2, and 21.2) or the injured party voluntarily accepts compensation in lieu of restitution (principle 21).

There are three durable solutions to displacement—return, local integration, and resettlement. Restitution is considered a better remedy than compensation because it restores victims to the situation that existed before they were displaced and allows them to choose between these three options, while compensation is less favorable to the return option. To prevent pressure on the choice between these solutions, the Pinheiro Principles state that return should not be a precondition of restitution, which exists as a distinct right (principle 10.3). Another purpose of this provision is to ensure that the remedies offered are not guided by political interests but remain the choice of the victims. Countries wanting to limit the return of displaced people would rather provide compensation than restitution. Compensation can be seen as a way to consolidate ethnic cleansing—for example, in Bosnia and Herzegovina, where the compensation fund envisaged in the Dayton Peace Agreement never received funds from the international community for fear that it would compromise victims' ability and desire to return home by too quickly offering an easy alternative. In contrast, Bosnian and Herzegovina politicians opposed to multiethnicity pushed for the compensation option to facilitate local integration of the displaced in areas where they would belong to a majority group.

The Pinheiro Principles do not create new legal standards, and are not binding in themselves, but they restate rights expressed in a variety of binding international instruments (Pinheiro 2005). They cover a wide range of rights related to displacement and HLP such as nondiscrimination, freedom of movement, and protection from arbitrary displacement. Under the latter category, they prohibit forced evictions and destruction of houses and crops and arbitrary confiscation or expropriation of land. Individuals' rights to privacy, respect for the home, and peaceful enjoyment of possession limit states' interference with homes and possessions to situations in which the interest of society is at stake. Principle 4, which addresses gender equality, mentions aspects that can be particularly problematic for women and girls, who often do not enjoy secure tenure because, in many cases, they access land through their male relatives. Widows may also become landless or homeless if no equal access to inheritance exists. Principle 4 recommends that restitution programs and policies recognize joint ownership rights of both male and female heads of household and do not disadvantage women and girls.

In addition to reaffirming legal standards, the Pinheiro Principles provide guidance on practical, legal, procedural, and institutional aspects of restitution based on lessons learned, notably in the Balkans but also in Iraq and South Africa. The intention is to facilitate an approach to HLP restitution that is consistent and in line with international standards. In terms of process, the Pinheiro Principles recommend that restitution mechanisms should be accessible and sensitive to age and gender (principle 13), and should ensure consultation and participation of affected individuals and groups (principle 14). To address the absence or loss of

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ownership documents, principle 15 provides that authorities should replace such documents at minimum cost and that HLP records should be protected or formalized if necessary to ensure security of tenure. This last provision recognizes that formalization may not always be the best way to ensure secure tenure.

The Pinheiro Principles call for restitution programs to recognize not only owners but also tenants and other legitimate users of land and houses (principle 16). Existing occupants of housing or land subject to restitution are another category of people who may be in need of protection when restitution takes place, as some might themselves become displaced and homeless. While their rights should not prejudice those of legitimate owners, they should be protected from forced eviction and provided with alternative accommodation if they have nowhere else to go. If they invested in good faith in the property, their right to compensation should be examined (principle 17).

To be efficient, restitution mechanisms also need to provide for enforcement. Measures should also be taken to discourage looting of vacated HLP through information campaigns and prosecution when necessary (principle 20), as looting renders homes uninhabitable and is a serious obstacle to return. Finally, the Pinheiro Principles underline the responsibility of the international community to promote and protect the right to HLP restitution and to voluntary return. The international community can also be instrumental in promoting the inclusion of HLP restitution provisions in peace agreements and voluntary repatriation agreements, cooperate with national governments to ensure compatibility of HLP restitution policies with international standards, and monitor implementation (principle 22).

THE IMPACT OF THE PINHEIRO PRINCIPLES

The Pinheiro Principles helped put HLP issues on the humanitarian agenda. In 2005, the year they were adopted, the United Nations carried out a review of the humanitarian response capacity of UN agencies, NGOs, the Red Cross/Red Crescent, and other key humanitarian organizations. The resulting report recommended dividing the humanitarian response into sectors or clusters and assigning to each a lead agency responsible for the coordination of assistance (United Nations Emergency Relief Coordinator and Under-Secretary for Humanitarian Affairs 2005). It also recommended steps to improve leadership and coordination in humanitarian emergencies as well as humanitarian financing. Eleven clusters were identified, including protection,⁴ and were established at the global level and in some cases at the country level.

The review identified shelter, land, and property as areas with a significant response gap. As a result, HLP became one of five areas of responsibility in the protection cluster, and an HLP subcluster was created in 2007, chaired by the

⁴ The other clusters were agriculture, camp coordination and management, early recovery, education, emergency shelter, emergency telecommunication, health, logistics, nutrition, and water, sanitation, and hygiene.

United Nations Human Settlements Programme (UN-HABITAT). Its main objectives are to develop and disseminate HLP standards, tools, and guidelines; promote a rights-based approach to HLP issues; and educate humanitarians, authorities, and affected populations on HLP rights.

In 2007, a group of agencies published the *Handbook on Housing and Property Restitution for Refugees and Displaced Persons* to facilitate the implementation of the Pinheiro Principles.⁵ Since the handbook's publication, however, there have been few initiatives promoting the Pinheiro Principles, even among these agencies. This may be the result of early criticism that the handbook, the Pinheiro Principles, and restitution in general were not adapted to countries without land and property registries—the large majority of countries affected by displacement. As a result, dissemination of and training on the Pinheiro Principles has been limited, and there has been no systematic effort to document their use in post-conflict situations.

There have, however, been a few significant direct and indirect references to the Pinheiro Principles. In 2007, a UN report on the protection of civilians (UNSC 2007) identified the need to address post-conflict HLP issues as a major challenge for the protection of civilians. This significantly raised the profile of HLP issues in the humanitarian sphere. The report listed HLP issues in conflict and post-conflict situations, such as forced evictions, destruction of property, and loss of ownership documentation, and made suggestions to address them. While it did not refer specifically to the Pinheiro Principles, its recommendations were clearly informed by them. It recommended that the United Nations systematically address HLP issues through preventive action and that references to HLP issues be included in future peace agreements and Security Council resolutions as part of the terms of reference for peacekeeping missions. The report also underlined the need to facilitate registration of land and property and issue ownership documents.

In 2010, the Parliamentary Assembly of the Council of Europe adopted recommendations on property issues faced by refugees and displaced people (PACE 2010). These built on the European Convention on Human Rights and the European Court's jurisprudence as well as the Guiding Principles on Internal Displacement (UNCHR 1998) and the Pinheiro Principles. They called for member states trying to resolve post-conflict HLP issues of refugees and internally displaced persons to take into account the Pinheiro Principles as well as other relevant Council of Europe instruments. The Pinheiro Principles could indeed be relevant for several members of the Council of Europe facing property restitution issues, including Croatia, Cyprus, Georgia, Kosovo, and Turkey.

⁵ Participants included several UN agencies—the Office for the Coordination of Humanitarian Affairs' Inter-agency Internal Displacement Division; Office of the High Commissioner for Refugees; Food and Agriculture Organization; and Office of the High Commissioner for Human Rights—and the Norwegian Refugee Council's Internal Displacement Monitoring Centre. For the handbook, see www.unhcr.org/refworld/docid/4693432c2.html.

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In Africa, the Pact on Security, Stability and Development in the Great Lakes Region (Great Lakes Pact), which entered into force in June 2008, adopted (in article 13) the Protocol on the Property Rights of Returning Persons.⁶ The protocol, adopted in November 2006, represents an interesting adaptation of the Pinheiro Principles to the African context, and it refers to the Pinheiro Principles as a reference to consider when addressing illegal appropriation, occupation, or use of property.⁷

This protocol is the first binding multilateral instrument affirming the property restitution rights of displaced people. Its main objectives are to protect the HLP of displaced people, facilitate their restitution, and create a framework for addressing HLP disputes. Compensation is also envisaged for land and property lost or destroyed in the context of development-induced displacement (article 8). While based on preexisting international and regional standards, the protocol is also designed to address the specific needs of the region. Since it applies to countries with limited state institutions at the local level and almost no rural land and property registration, it recognizes the role of alternative and informal community-based mechanisms and recommends that formal judicial procedures adopt simplified requirements for proof of ownership, such as testimonies (article 4.3). It calls for specific protections for women and children (articles 3, 5, and 6), who are often disadvantaged by customary and traditional rules. It also calls for protection of the rights of pastoralists and other groups “whose mode of livelihood depends on special attachment to their lands” (article 7) and requires that they be allowed to return to their land or, if that is not possible, that they be provided alternative land of equal value, failing which compensation should be given. The protocol also calls for land registration schemes to recognize statutory and customary land tenure systems (article 4).

Many of the provisions included in the protocol are very similar to those of the Pinheiro Principles, notably in relation to the protection of women, children, and people with special attachment to land and the recognition of various forms of ownership and possessory rights as subject to restitution.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (also called the Kampala Convention), adopted in

⁶ The Great Lakes Pact was ratified by eleven states: Angola, Burundi, Central African Republic, Democratic Republic of the Congo, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, and Zambia. For its complete text, see https://icglr.org/IMG/pdf/Pact_on_Security_Stability_and_Development_in_the_Great_Lakes_Region_14_15_December_2006.pdf.

⁷ Article 3, paragraph 3, of the Protocol on the Rights of Returning Persons states, “Member states shall ensure that the property of internally displaced persons and refugees shall be protected in all possible circumstances against arbitrary and illegal appropriation, occupation or use, taking into account the United Nations Principles on Housing and Property Restitution.” For the complete text of the protocol, see [www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/84E06BF26DBB560BC12572FB002C02D6/\\$file/Final%20protocol.PropertyRights%20-En%20r.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/84E06BF26DBB560BC12572FB002C02D6/$file/Final%20protocol.PropertyRights%20-En%20r.pdf).

October 2009, is less specific with regard to property and does not mention the Pinheiro Principles.⁸ Nevertheless, in article 11.4, it calls for simplified procedures where necessary to address disputes related to the land and property of internally displaced persons. Article 11.5 requires restitution to be provided, on their return, to communities with special dependency and attachment to their land, which refers to indigenous people and other groups such as pastoralists. This last provision actually contradicts Pinheiro principle 10.3, which states that restitution should exist independently from return. This contradiction reflects one of the difficulties in implementing the Pinheiro Principles in informal land tenure settings where land rights may be based on use more than ownership. In such cases, it is difficult to envisage restitution of land if return does not take place.

At the national level, Colombia's Constitutional Court recommended using the Pinheiro Principles to shape national restitution policy. A 2007 decision emphasized the obligation of the government to protect internally displaced people's right to reparation and restitution of HLP.⁹ It based this approach partly on the Pinheiro Principles, which it said were part of Colombia's constitutional framework and should therefore form the basis of any restitution policy.

Some NGOs—such as the Centre on Housing Rights and Evictions, Displacement Solutions, and the Norwegian Refugee Council (NRC)—have used the Pinheiro Principles for training purposes or legal assistance. The Norwegian Refugee Council's Information, Counselling and Legal Assistance (ICLA) program, which addresses HLP disputes, is an example of the need to better disseminate information on the Pinheiro Principles. This author consulted ten NRC country offices with an ICLA program and found that only two (in Colombia and Southern Sudan) actively use the principles in their practice, training, and advocacy.¹⁰ In Colombia, NRC's partners have organized workshops for public servants throughout the country using the Pinheiro Principles as a basis for discussion. The workshops were part of a consultation process on the drafting of the National Land Restitution Plan.

In other countries with ICLA programs, NRC's experience has been that the Pinheiro Principles are seldom or never mentioned as a reference or for advocacy purposes by NGOs, government officials, or even international organizations. NRC offices that do not incorporate the Pinheiro Principles in their work mention the lack of awareness of them (Liberia, Côte d'Ivoire) or the fact that they are not adapted to the complexities of customary land tenure and traditional dispute resolution (Afghanistan and Uganda). There is very little monitoring of how civil

⁸ For the convention, see www.africa-union.org/root/AR/index/Convention%20on%20IDPs%20_Eng_%20-%20Final.pdf.

⁹ Constitutional Court of the Republic of Colombia, Ref. T-1.642.563, Sentencia T-821, October 5, 2007, para. 60.

¹⁰ The ten countries were Afghanistan, Azerbaijan, Burundi, Colombia, Côte d'Ivoire, Georgia, Lebanon, Liberia, Sudan (particularly then Southern Sudan, now South Sudan), and Uganda.

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society organizations, authorities, or international organizations such as UNHCR have used the Pinheiro Principles for program, policy, or advocacy purposes, so it is difficult to assess whether NRC's experience is representative of the overall picture. However, it provides information on how they could be used and on some of the difficulties in implementing them.

IMPLEMENTATION IN INFORMAL LAND TENURE SYSTEMS

The Pinheiro Principles were a significant achievement: a reference tool gathering relevant legal standards and best practices and promoting a more systematic and consistent approach to the HLP rights of refugees and displaced people. This achievement was, however, soon challenged by two main criticisms of the Pinheiro Principles and of restitution in general: (1) they are not adapted to informal land tenure systems, and (2) they may address individual claims effectively but fail to address the structural causes of land disputes.

Restitution faces several practical and conceptual challenges in countries with informal land tenure systems and legal pluralism—the coexistence of different sources of authority (traditional and statutory) that regulate similar matters. Jon Unruh has defined legal pluralism with regard to land tenure as “the different sets of rights and obligations concerning land and property, within multiple social fields” (Unruh 2009, 53–54). In many countries affected by displacement in Africa and Asia, rural lands are held and transferred mainly according to traditional or customary rules, which are not necessarily recognized and endorsed by the formal legal system. Restitution attempts in such contexts are particularly difficult in the absence of cadastral records or documents proving ownership or possessory rights.¹¹ The Pinheiro Principles do lack guidance in that regard. In Africa, the Great Lakes Protocol on Property Rights of Returning Persons elaborates on the Pinheiro Principles by suggesting the use of traditional dispute resolution mechanisms and alternative forms of evidence. The latter can include geographical boundary markers, community mapping, and the use of witnesses to determine rights to restitution.

Conflict and displacement add another layer of complexity to land disputes, as they disrupt the usual ways of regulating land relations by dispersing communities and undermining the capacity of authorities to carry out their land-related functions. New practices and actors emerge during the conflict, which may create problems in the post-conflict phase when displaced people and returnees are confronted with competing land tenure systems.

Côte d'Ivoire illustrates the diversity of overlapping bodies addressing HLP disputes in the aftermath of a conflict. In addition to the mechanism specified by the statutory system—the village land management committee (Comité

¹¹ *Possessory rights* are the rights that accrue from physically occupying a land parcel. Legal recognition of possessory rights can vary; in some cases, possession can give rise to ownership claims through adverse possession or occupation.

Villageois de Gestion Foncière Rurale, set up to implement the 1998 rural land law), which is hardly functional—certain traditional chiefs also address land disputes; and some ministries have encouraged NGOs to create peace committees whose role includes the resolution of land disputes. Many of these committees were set up before the return of the displaced, so their authority is often contested by returnees and traditional authorities. Certain regions have also seen the development of ad hoc committees set up by special-interest groups, such as the youth, who contest the authority of the chiefs and promote their own solutions to land disputes (IDMC 2009). This creates a situation of legal uncertainty in which any decision by one body can be contested by another.

Legal pluralism represents a practical obstacle to restitution programs, as it poses the question of which institution should be in charge of their implementation. Customary and traditional authorities are used by far the most frequently to address land and property disputes, mostly as a result of their proximity and accessibility. Their decisions are usually respected as a result of their own social acceptance. In contrast, state institutions are frequently absent at the local level or may have been weakened by the conflict, depriving them of effective means of implementing restitution. The Pinheiro Principles attempt to address this situation by recommending that HLP restitution programs integrate alternative or informal dispute resolution mechanisms as long as they comply with international standards.¹² However, it is unclear which institution or mechanism would ensure conformity of traditional authorities' decisions to such standards if the state lacks capacity to do so—which is usually the reason it had to rely on traditional institutions in the first place.

Another frequent but ill-informed criticism of the Pinheiro Principles (and of property restitution more generally) is that they can only be adapted to Western-style individual ownership and not to other types of tenure. It is admittedly difficult to implement restitution in informal land tenure systems. But the Pinheiro Principles were intended to protect not only property rights but also other possessory rights. The expression “housing, land, and property,” used throughout the Pinheiro Principles, aims precisely at ensuring that restitution benefits owners of property and nonowners equally through implementation of housing rights (Leckie 2003),¹³ and protects all types of tenure related to housing and land, including informal types. Principle 15.3 provides that registration systems should record or recognize the possessory rights of traditional and indigenous communities to collective land, and principle 16 addresses the rights of tenants and nonowners “to return

¹² According to principle 12.4 of the Pinheiro Principles, “States may integrate alternative or informal dispute resolution mechanisms into these [restitution] processes, insofar as all such mechanisms act in accordance with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination” (UN 2005, 9).

¹³ See also Pinheiro (2005), paragraphs 34–36, for legal references to the right to adequate housing.

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and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights” (UN 2005, 12).¹⁴

If the Pinheiro Principles do apply to informal HLP rights, restitution of such rights may be more problematic than that of formal rights in situations where several rights coexist on the same piece of land (for example, grazing rights, the right to plant trees, and the right of access or easements) or where rights are held collectively. This situation is not covered in the Pinheiro Principles. Moreover, the provision for registering repossessed properties in order to increase security of tenure brings with it the risk of losing the recognition of some of these rights in the course of the formalization process.¹⁵ Many formalization processes tend to concentrate all land rights in an individual title deed. This is the case, for instance, in Côte d’Ivoire, where the rural land law provides for recognition of customary rights and their transformation into individual title deeds. In such a process, secondary access rights to the land such as those mentioned above disappear, dispossessing several types of users. This is typically a topic on which the Pinheiro Principles would need to be supplemented by guidance from land experts on ways to preserve multiple land rights with or without registration.

The Pinheiro Principles also provide for recognition and registration of collective land belonging to traditional and indigenous communities, and for filing of collective restitution claims.¹⁶ However, neither the Pinheiro Principles nor the *Handbook on Property Restitution for Refugees and Displaced Persons* provide guidance on how this could be done. In practice, it is widely admitted that humanitarian organizations trying to implement restitution programs in informal land tenure situations lack expertise on collective land titling, which could protect customary interests in post-conflict situations.¹⁷ Without such expertise, it is difficult to design adequate responses to the problem.

Restitution may also prove difficult where land tenure rights are strictly linked to the use of the land. In such cases, displacement, even if forced by conflict,

¹⁴ Paragraph 62 of Pinheiro (2005) states: “Tenants and other non-owners do have rights of possession, including security of tenure, which protect them from forced eviction and displacement.”

¹⁵ According to principle 15.2 of the Pinheiro Principles, “States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure” (UN 2005).

¹⁶ According to principle 13.6 of the Pinheiro Principles, “States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims” (UN 2005).

¹⁷ As one writer has put it, “a common shortfall is the sector’s overemph[is]is on the ownership of individual assets to the exclusion of the more expansive, valuable and threatened properties that are logically held collectively. . . . [There] is a lack of familiarity with the dynamics of a regime that is first and foremost a community-based system of property relations, with complex patterns of ownership and access” (Alden Wily 2009, 37).

may affect the persistence of land rights, especially if displacement lasted for a long time and if more recent occupants have invested in the land and acquired possessory rights to it. Principle 17 protects secondary occupants from arbitrary or unlawful forced eviction but gives precedence to legitimate owners, tenants, and other rights holders. In such cases, a strict application of the principle may not be understood or could be considered unfair by long-term occupants, in particular where customary and traditional justice tend to privilege reconciliation and compromise rather than restorative justice, which identifies a winner and a loser.

The experience of NRC's legal assistance program illustrates both the difficulties of applying the Pinheiro Principles in informal settings and their utility. As mentioned previously, very few NRC ICLA teams have been using the Pinheiro Principles. Several (in Afghanistan, Burundi, and Uganda) consider the principles difficult to adapt to traditional dispute resolution mechanisms. In Burundi, for instance, traditional mechanisms focus on conflict resolution and compromise, which often involve sharing between the parties rather than restitution. Systematic restitution in Burundi appears materially impossible as a result of the very long period of displacement, the lack of accurate land and property registries and documentation, and the risk of overlapping claims. The lack of state capacity, in particular at the local level, the ineffective judiciary, and the lack of resources combined with the high number of claims on a very small and densely populated territory are other challenges to restitution and compensation in Burundi. As a result, most claims presented before the Commission Nationale des Terres et Autres Biens (land commission), or in traditional dispute resolution mechanisms, result in sharing of the contested land in order to accommodate as many returnees as possible and defuse return-related land conflicts.

Several of the ICLA offices that are not using the Pinheiro Principles and consider their implementation difficult in customary contexts have nonetheless expressed interest in being trained on them. Their objective is to increase their knowledge of the Pinheiro Principles to explore possibilities to adapt them to their specific context (in Afghanistan, Côte d'Ivoire, and Liberia). This apparent contradiction reflects the dual nature of the Pinheiro Principles: a compilation of existing binding legal standards (nondiscrimination, gender equality, the right to protection from displacement), which should apply in all situations, and best practices, which may be more difficult to adapt universally, in particular with regard to some procedural and institutional requirements.

The way NRC ICLA teams in South Sudan are using the Pinheiro Principles illustrates how they can be applied in informal land tenure situations. The Land Act for Southern Sudan includes a section on land restitution and compensation, which grants power to traditional authorities to address such matters. NRC ICLA teams in South Sudan are using the Pinheiro Principles and the *Handbook on Property Restitution for Refugees and Displaced Persons* to guide their interactions with traditional authorities, notably to underline principles, such as nondiscrimination and accessibility, called for in international human rights standards. For NRC's ICLA program in South Sudan, the Pinheiro Principles represent the only available guidance on the matter so far.

BEYOND RESTITUTION

The focus on restitution promoted by the Pinheiro Principles has been criticized by some land specialists, who argue that restitution fails to address the structural issues that are often a cause of land conflict in agrarian societies. Such issues include unequal distribution of land and the resulting landlessness, as well as the pressure over land resulting from economic or political interests, which can endanger the security of tenure of certain groups and lead to land grabbing and displacement, as has happened in Colombia. Because of these issues, some land experts have questioned whether restoring the status quo ante is practicable or even desirable if it results in return to an unjust situation that may have caused the conflict in the first place and that could continue to endanger peacebuilding efforts (Alden Wily 2009). The focus on restitution linked to conflict-related dispossession, they argue, also detracts attention from other HLP violations that often occur in post-conflict situations, such as land grabbing by governments, elites, and private investors (Alden Wily 2009). The breakdown of law and order associated with the conflict may even increase after peace is proclaimed, as some take advantage of the relative security to take land before displaced people return.

Addressing these issues in a way that supports sustainable peace requires forward-looking structural reform more than restorative justice. The resolution of certain land access problems also may be better addressed through development and urbanization rather than property restitution. In such cases, reparation in the form of grants for urban housing or business capital might be preferable to restitution (Alden Wily 2008). An increasing number of HLP and land specialists are calling for a broader approach to land that would address land and properties not only through restitution and compensation but also through a restructuring of land relations to address pre-conflict problems as well as those that arose during and after the conflict.

However, such reforms are often outside the ambit and expertise of humanitarians and their donors, who consider involvement with such issues too complex, politically sensitive, and development oriented. The challenge is therefore to bridge the knowledge and programmatic gap between humanitarians and land specialists in post-conflict situations, in order to improve mutual understanding and ensure that short-term humanitarian efforts do not hinder long-term efforts to address the structural causes of tensions over land. This broader approach to land issues should be integrated within the overall humanitarian and recovery response (Pantuliano and Elhawary 2009).

CONCLUSION

The Pinheiro Principles represent the culmination of long-standing efforts to assert the rights of refugees and displaced people to restitution. The utility of HLP restitution has been demonstrated on numerous occasions, notably in Bosnia and Herzegovina, where the process allowed for restitution of 200,000 homes (Williams

2007). The difficulties in implementing it in certain situations should not discredit its utility in helping to remedy the human rights violations suffered by refugees and displaced people. A recent ruling by the African Commission on Human and Peoples' Rights shows how HLP restitution can also benefit forcibly evicted people without formal land titles. The ruling condemned Kenya for the expulsion of the Endorois indigenous communities from their land and upheld their right to both restoration of their land and compensation. This decision was the first to define in detail indigenous people's rights to land in Africa (HRW 2010).

The Pinheiro Principles helped keep HLP restitution issues on the humanitarian agenda. Where their implementation proved difficult as a result of informal land tenure and limited state capacity, the Pinheiro Principles paved the way for locally adapted instruments such as Africa's Great Lakes Protocol on Property Rights of Returning Persons. Further practical guidance is needed, notably on ways to engage with traditional dispute resolution mechanisms where states lack capacity. This involves monitoring their decisions, ensuring conformity to international standards, and balancing restorative justice (which emphasizes restitution) with conflict resolution and community reconciliation (which emphasize compromise and sharing).

Since the Pinheiro Principles were adopted, thinking among human rights activists and humanitarians on HLP issues has evolved significantly, notably as a result of the criticisms made by land experts of their exclusive focus on restitution. Following the initial enthusiasm, many realized that what worked in the Balkans could be more difficult to achieve in most countries affected by displacement. The next step was to try to make restitution work by adapting the Pinheiro Principles to field reality. At the same time, recognition grew that, while restitution remains a valid approach, it does not suffice to address the land tensions at the origin of many conflicts and should be combined with broader land policies. The problem is therefore not the Pinheiro Principles themselves, which should not be blamed for what they are not, but the lack of guidance on ways other than restitution to address land issues in post-conflict situations.¹⁸ This need for an integrated and coordinated approach to land issues is increasingly recognized; such an approach should be at the heart of humanitarian and early recovery efforts, notably through the work of the HLP subcluster.

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¹⁸ UN-HABITAT is currently developing a document providing guidance on land issues in post-conflict situations, which should contribute to filling the gap.

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