

# Housing, Land and Property in Conflict and Displacement Settings

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## Abstract

Housing and land are the main things that displaced persons lose when they are forced to leave their places of origin. Once peace and security has been restored in the country, IDPs often find it difficult to reclaim their homes and lands that have been either destroyed or occupied by others. This is a common feature in almost all post-conflict situations. And it is a major obstacle to the establishment of other durable solutions. The tensions in property disputes pose a serious threat to post-conflict stabilisation. This article discusses the importance of issues relating to housing, land and property throughout the displacement cycle. Violations of the rights to housing, land and property are at the same time, both cause and consequence of displacement. The loss of shelter and soil brings new vulnerabilities for displaced populations that may jeopardize their health and physical safety and limit their opportunities to earn a living. The restitution of housing and property is also a key element to achieving durable solutions. The existence of effective mechanisms for conflict resolution plays an important role in consolidating peace. This paper will examine specific challenges to address land disputes in the context of informal occupation of land and will provide an overview of how humanitarian actors address this issue.

*Key words:* Land, Forced displacement, restitution, postconflict.

## Resumen

La vivienda y el suelo son las primeras cosas que las personas desplazadas pierden cuando son obligadas a abandonar sus lugares de origen. Una vez recuperada la paz y asentada la seguridad en el país las PDI, a menudo, tienen dificultades para recuperar sus viviendas y tierras que o bien han sido destruidas o bien ocupadas por otras personas. Tal situación constituye una característica común a casi todos los contextos post-conflicto. Y constituye un obstáculo importante para la instauración de otras soluciones duraderas. Las tensiones surgidas en disputas sobre propiedad suponen una amenaza seria para la estabilización post-conflicto. Este artículo aborda la importancia de las cuestiones relativas a la vivienda, el suelo y la propiedad a lo largo del ciclo de desplazamiento. Las violaciones de los derechos a la vivienda, el suelo y la propiedad son, al mismo tiempo, causa y consecuencia del desplazamiento. La pérdida de cobijo y de suelo acarrea nuevas vulnerabilidades para las poblaciones desplazadas, puede poner en riesgo su seguridad sanitaria y física y limitar sus oportunidades para ganarse la vida. La restitución de la vivienda y las propiedades también es un elemento fundamental para lograr soluciones duraderas. La existencia de mecanismos eficaces para la resolución de conflictos juega un papel relevante en la consolidación de la paz. La presentación analizará retos específicos para abordar disputas sobre suelo en un contexto de ocupación informal de suelo y ofrecerá una perspectiva general del modo en que los agentes humanitarios abordan dicha cuestión.

*Palabras clave:* Tierra, desplazamiento forzado, restitución, post-conflicto.

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## Introduction

Homes and lands are the first things people displaced by conflict lose when they are forced to leave their place of origin. Once peace is restored and the security situation improved, IDPs often face considerable difficulties in repossessing their homes and land, which are often destroyed or occupied by other people. This situation is a common feature of most post-conflict environments. Occupancy and land grabbing occurring in IDPs' absence often results in tensions and property disputes between returning owners and occupants which, if generalized can present a threat to post-conflict stabilisation. This also represents a serious obstacle to return and other durable solutions.

In the past 10 years, there has been a growing recognition among the humanitarian community that addressing housing, land and property issue is crucial in post-conflict situations to facilitate durable solutions for displaced populations. This has resulted in the publication of various UN guidelines and policy documents as well as programmes in order to ensure that displaced populations could repossess their property.

Despite this positive evolution, there are some limitations to the involvement of humanitarian actors. Their interest and involvement has tended to focus mainly on one particular aspect which is property restitution in the perspective of return. While this is indeed a very important element, there are many other aspects of housing, land and property which deserve consideration. This is why I will be using the terms "housing, land and property" (HLP) throughout this paper to highlight the diversity of the topic as well as the different type of response to it.

The purpose of this presentation is to give an overview of the different aspects of housing, land and property in conflict and displacement situations. This presentation will then examine the links between displacement and HLP issues throughout the displacement cycle. Then present the legal basis for HLP restitution rights, and finally expose the particular challenges faced by HLP restitution in contexts of informal land tenure.

## 1. HLP Throughout the Displacement Cycle

Access to land and housing is a major concern for IDPs throughout the displacement cycle. Violations of housing, land and property rights are a cause as well as a consequence of the conflict. Once displaced, IDPs lose their shelter and access to livelihood which increases their vulnerability. When the conflict ends, the achievement of durable solutions is also closely linked to the capacity of displaced persons to repossess their homes and land, or enjoy adequate housing. The IDMC Global Overview<sup>2</sup> 2010 illustrates how HLP issues have affected internally displaced people (IDPs) over the past year.

### *HLP as a cause of displacement*

Tensions over access to land and valuable resources, and violations of HLP rights such as land encroachment are a frequent cause of conflict and displacement, and can take different forms. In many countries, such as in Côte d'Ivoire, Kenya, Liberia, Nigeria, Somalia and Sri Lanka, disputes between communities and historical grievances over land and access to natural resources have escalated to become a cause of conflict. In many post-colonial countries, the unequal distribution of land resulting from the colonial era was not reversed but rather consolidated by post-independence governments. As a result, land inequalities are deeply entrenched and have often led to tensions over land access. In Kenya, historical grievances have resulted in regular tensions and clashes over land on the occasion of elections. In Afghanistan, it was disputes over grazing rights opposing Kuchis nomads and Hazaras which displaced 14,000 IDPs in 2010. Most of the countries affected by displacement are developing countries where the economy and the population's livelihood depend largely on agriculture. In rural areas, subsistence is tightly linked to access to land which can explain why insecure or unequal access can trigger violent reactions by affected population.

When land is not only used for subsistence but for making significant profit through the commercial or illegal exploitation

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<sup>2</sup> Examples given in this section are taken from IDMC's Global overview of trends and development, 2010. <http://www.internal-displacement.org/publications/global-overview-2010.pdf>

of high value resources such as diamonds, fuel, or profitable crops, the level of violence can increase even further. Control of valuable land resources continued to fuel conflicts in 2010, by providing income to combatants. It even became the main incentive for continuing the conflict in DRC. In Colombia, populations continued to be displaced in 2010 by armed groups and associated economic interests seeking to grab their land and use it for cultivation of profitable crops including palm oil and coca.

HLP violations can also be used as a tool of displacement. Land confiscation, destruction of houses and crops persist as a common and deliberate objective of combatants and other parties to conquer territories and force populations to flee or to target groups specifically and make their return more difficult. This has been the case with the Indonesian military operations conducted in the Central Highlands of Papua province during 2010 where destructions of houses and killing of livestock forced indigenous Papuans to flee in the forest for safety. In Pakistan and the Philippines, the burning of houses and crop has also been used as a sanction and punishment of civilians suspected of collaborating with the enemy.

Legal restrictions can also be used as a more subtle and gradual way to induce displacement. In the Occupied Palestinian Territories (OPT), many Palestinians are compelled to leave their homes due to a combination of legal provisions restricting their access to building and rehabilitation permits, limited access to rights, acts of violence and intimidation discriminately affecting them. The difficulty to obtain building and rehabilitation permits leads to illegal constructions or dilapidated houses which results in evictions, house demolitions, destruction of livelihoods, and restricted access to land. This situation has occurred on a wide scale in East Jerusalem and other parts of West Bank under Israeli administration.

### *Housing during displacement*

Internal displacement inevitably results in the loss of access to IDPs' homes and lands, raising a range of challenges and protection concerns, in particular for groups at risk.

The loss of their homes and shelter puts at risk the physical security and health of women, children and the elderly. In Nepal, many IDP women had to resort to prostitution in exchange

for safe shelter for themselves and their families. In Kenya, Ethiopia and Somalia, IDP shelters in camps or collective centers often lacked privacy, security and adequate access to water and sanitation therefore increasing the risks of sexual violence and the spread of diseases.

Many IDPs tend to join urban informal settlements in search of safety or livelihood opportunities. Housing conditions in urban informal settlements are often worse than camps as they lack access to basic services and sanitation. Moreover, since such settlements have not been put in place or recognized by authorities, IDPs lack security of tenure - or the right to occupy and stay in a location and be protected from forced eviction - and are at high risk of forced evictions and secondary displacement as it has been the case in Kenya and Somalia in 2010. The right to legal security of tenure in one's home is a component of the right to adequate housing and applies regardless of whether the home is owned or rented. Tenure security varies depending on the type of contract (title deed, renting contract) and user's rights (customary rights), but even in cases of informal rights and settlements, evictions have to follow certain rules (such as provision of alternative housing or land) in order to respect tenure security rights. Tenure security is also a key element of durable solutions to displacement.

In protracted situations the move from emergency shelter to adequate housing can take decades, leaving IDPs in dire living conditions and with little tenure security. While the risk is higher in informal settlements, IDPs settled by authorities in camps or collective centres are also exposed to secondary displacement and forced evictions as illustrated by Georgia and Russia where a significant number of IDPs (over 1000 families in Georgia) were moved out of their camp or collective centre in 2010 without meaningful consultation. When alternative accommodation was offered, it resulted in poorer living conditions or relocation to rural areas with limited economic opportunities which affected IDPs' capacity to integrate. In Zimbabwe, authorities threatened to forcibly evict 20,000 people from Hatcliffe Extension, a settlement created to accommodate those displaced by the 2005 urban evictions. The impossibility for most of the residents, among the poorest people of the country, to pay the high lease renewal fees puts them at risk of new displacement and eviction.

Political resistance to improve IDP housing conditions and tenure security persisted among several governments in 2010, for fear that it could encourage IDPs to settle at locations where

they were displaced, and forfeit the return option. This has for a long time been the case in Georgia or in Serbia but it has not improved (see part on durable solutions).

### *Land in displacement*

In countries where livelihood is mostly based on agriculture, the loss of land associated to displacement has continued to be a serious protection concern as it can directly affect people's right to food and lead to tensions with host communities when camps have been settled on their land without consultation or compensation, or when IDPs have encroached on their land in search of subsistence means. The increased pressure on limited resources created by IDPs has been another source of tension. This is why it is particularly important for authorities to consult with host population when settling IDP camps and to agree on types of compensation they can get when their land is being used for or by IDPs. Such negotiation can help prevent or limit tensions.

Certain groups with a special attachment to their land such as indigenous people or pastoralists are particularly affected when forcibly displaced as in Afghanistan, Colombia, Ethiopia, Kenya and Somalia. For these groups, land is not only a mean of subsistence but is closely linked to their identity and way of life which makes it difficult for them to adapt to their displacement situation.

### *HLP and durable solutions*

The achievement of durable solutions is closely linked to access, restitution of or compensation for lost HLP assets. The typical scenario during a conflict is that the property left behind by IDPs is either destroyed or occupied. It may also have been sold illegally to a third person who bought it in good faith which makes restitution even more complicated as restitution to the original owner penalizes a bona fide third party and creates a new injustice if this is done without compensation.

Restitution is both a remedy for past violations and a way to facilitate return as IDPs' lack of access to their pre-war homes and properties constitutes a major obstacle to return. Restitution can also support other durable solutions than return: if they do not wish to return, owners of repossessed property can decide

to sell the repossessed property or to rent it until the conditions are more suitable to return. The income derived from the sale or rent can then facilitate their local integration or settlement elsewhere in the country.

The restitution process in Bosnia and Herzegovina is one of the most successful examples of the kind with over 94% repossession rate (out of some 200.000 claims). Unfortunately the Bosnian example is hard to replicate elsewhere for two major reasons:

- It applies to registered property where identification of the owner is relatively easy (as opposed to land held under customary tenure)
- It benefited from a very strong involvement of the international community, with the creation of a coordination body between different agencies in charge of monitoring the implementation of property laws, and the existence of executive powers held by the Office of the High Representative in charge of monitoring implementation of the Dayton peace agreement.

In Croatia, where the pre-war legal system was the same as in Bosnia, with the same organizations present but no executive powers of the international community, it has remained impossible to obtain restitution of socially owned flats.

If we look at 2010 displacement situations, several restitution processes remain stalled in Azerbaijan, Cyprus, Kosovo, and Georgia mostly for political reasons. In Russia, the compensations paid to dispossessed IDPs remain insufficient to secure permanent housing and is marred by corruption, illegal sales and lack of documentation. In Colombia where displacement has been ongoing for decades a bill on land restitution was introduced in 2010 by the newly-instated Santos administration. The bill comes after previous initiatives that have so far shown little result in addressing violation of HLP rights, but it gives a positive signal of the government's intent to address the issue. However, it will remain very difficult to pursue restitution at the same time as violence displaces more people.

In most situations of displacement, land is held informally and transferred customarily which renders the identification of the owner more difficult in the absence of written documents proving ownership or users' rights. The longer displacement lasts the higher the risk that the customary knowledge related to users' rights is lost making it more difficult to solve disputes

between those who left and those who occupied or sold their land in the interim. In countries where informal land rights dominate, the overwhelming majority of rural land is administered customarily. The weakness of state institutions or their absence at the local level lead people to turn to customary bodies to address their land disputes. The conservative and traditional approach of customary bodies as well as their focus on their own community can lead to discriminatory decisions against certain groups in particular outsiders such as migrants, or women and girls whose land rights are often limited by customary rules as in Nepal and most African countries.

Address IDP land disputes remains one of the major obstacles to sustainable return in many countries such as Afghanistan, Côte d'Ivoire and Uganda. It can also be an obstacle to local integration as in Burundi, where land disputes between host population and IDPs occupying their land prevent the local integration of IDPs on the sites they have been living on for over 15 years. In the absence of accurate and updated land registries it has been difficult to assess whether the land on which IDPs have been settled by authorities in the past, is publicly or privately owned. This makes it difficult to resolve disputes where domicile residents claim that IDPs are using their private land.

The tendency of states and humanitarian community has usually been to support return over other durable solutions which has limited the opportunity for IDPs to make a genuine choice between return and other settlement options such as relocation or local integration. Initiatives such as the Framework for Durable Solutions<sup>3</sup> adopted by the IASC in December 2009 have emphasized the need to ensure that IDPs can make an informed and voluntary choice on what durable solutions to pursue and that they should in no way be compelled to return. The Framework also highlights the need for IDPs to be associated to the development of durable solutions programmes of concern to them. The Framework envisages durable solutions as a gradual process during which IDPs can successively choose different settlement options depending on their interest and changing circumstances. This liberty for IDPs to settle where they please is an integral part of the right to freedom of movement. IDPs can therefore decide to choose local integration as a durable solution, but, should return become possible, they would still

be free to move back if this is their desire. This approach is very useful as it helps to address some of the concerns many governments have with regard to local integration.

In practice, local integration is often perceived as an acceptance of the fact of war while return seems to better address and redress forced displacement. In addition, in situations where the conflict aims at territorial gains or secession of one part of the country, the return of displaced populations is a way to reassert the government's claim on the seceding part. This is why for years, Serbia has been reluctant to openly support local integration, with the hope that the return of Kosovo Serbs would make the province's independence more difficult. As a result, Serbia authorities were reluctant to even improve living conditions in collective centres where IDPs were accommodated, for fear that it would encourage them to locally integrate and renounce to return. Since Kosovo's declaration of independence, where it has become clear that very few Serbs would actually be in a position to return to Kosovo in the short term, authorities have been more open in supporting durable solutions other than return. Several housing options have been provided to IDPs such as housing construction by distribution of self-help materials, purchase of village houses for IDPs, and accommodation of particularly vulnerable IDPs into social housing in protected environments where a tutor family assists residents in their relations with social welfare institutions, therefore providing an alternative to institutionalization.

In Georgia, which also presented resistance against local integration, measures were taken to improve IDPs' housing and tenure security. Authorities have renovated collective centers and facilitated their privatization at very advantageous cost for IDPs though renovations varied in quality and registration of new property has been slow.

The above illustrate the different types of problems faced by IDPs in relation to housing, land and property disputes throughout the displacement cycle. It also shows that property restitution and return are just one aspect of the responses to internal displacement and that other options of durable solutions and other solutions such as social housing or land allocation, can be envisaged to address efficiently IDPs needs.

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<sup>3</sup> IASC Framework for Durable solutions, April 2010 [http://www.brookings.edu/reports/2010/04\\_durable\\_solutions.aspx](http://www.brookings.edu/reports/2010/04_durable_solutions.aspx)

## 2. Legal Basis for HLP Rights

There are two main texts gathering the legal basis for the protection of housing, land and property rights in contexts of displacement:

- Guiding principles on internal displacement<sup>4</sup> adopted by the UN in 1998 and now recognized as a reference document on the issue
- Principles on housing and property restitution for refugees and displaced persons<sup>5</sup>, adopted in 2005 by UN sub-commission on protection of HR (also called “Pinheiro principles” after the name of the UN Rapporteur who presented them).

Both texts are not binding but their principles draw from binding international instruments pertaining to human rights and humanitarian law such as the Geneva Conventions, the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant for Economic, Social and Cultural Rights (ICESCR), all binding and widely ratified by States. The purpose of the Guiding Principles and the Pinheiro Principles is to gather in one document the most relevant legal provisions in order to facilitate IDPs’ protection.

### *The Guiding principles on internal displacement and HLP issues*

The Guiding Principles covers different aspects of HLP throughout the displacement cycle. In terms of prevention, the Principles recall the right not to be arbitrarily displaced from home<sup>6</sup>. This necessity to protect from arbitrary displacement is particularly strong in the case of indigenous people and people with special attachment to land<sup>7</sup> for whom displacement is particularly traumatic because of their tight to their original land. They also provide that no one should be arbitrarily deprived of their property and pos-

session which is one of the main cause of displacement. Once their occupant has been displaced, IDP houses and possessions should be protected against destruction, illegal appropriation or use<sup>8</sup> and the state has a responsibility to establish conditions facilitating durable solutions and restitution of or compensation for the properties or possessions left behind<sup>9</sup>.

### *Pinheiro principles: focus on restitution but expansion of concept from property to HLP<sup>10</sup>*

The Pinheiro Principles apply to both IDPs and refugees and regardless of the cause of displacement (conflict, development projects or natural disasters). They consolidate in one document various legal standards supporting the right to HLP restitution.

The Principles are based on human rights and humanitarian standards, or are derived from best practices taken from various restitution programmes. The purpose of the Pinheiro Principles is to improve the consistency of HLP response in situations of displacement by helping national and international actors address legal and technical issues related to HLP restitution. The Pinheiro principles reaffirm displaced people’s right to voluntary return and the right to property restitution as the preferred remedy to HLP violations and to forced displacement. Compensation is limited to cases where restitution is impossible or when the victim voluntarily accepts compensation in lieu of restitution<sup>11</sup>.

The Pinheiro principles clarify and spell out the different types of rights related to housing, land and property and highlight that restitution should not be limited to registered property but that informal land or housing rights are also be protected and subject to restitution.

Housing rights are actually much more established in universal and regional instruments than property rights which are mainly mentioned in the Universal Declaration of Human

<sup>4</sup> [http://www.internal-displacement.org/8025708F004BE3B1/%28httpFiles%29/A2D4116C222EB1F18025709E00419430/\\$file/GPsEnglish.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpFiles%29/A2D4116C222EB1F18025709E00419430/$file/GPsEnglish.pdf)

<sup>5</sup> <http://procaonline.unocha.org/docs/library/Pinheiro%20Principles%20%5BEnglish%5D.pdf>

<sup>6</sup> Guiding principles on internal displacement, Principle 6.

<sup>7</sup> Guiding principles on internal displacement, Principle 9.

<sup>8</sup> Guiding Principles on internal displacement, Principle 21.

<sup>9</sup> GPs, Principle 28 and 29.

<sup>10</sup> For a more indepth analysis of the Pinheiro principles, see: Strengthening peace-building through land management resources, volume 2 Land and post-conflict peace-building, Environment Law Institute, UNEP, University of Tokyo, “The role of restitution in post-conflict settings”, Barbara McCallin, forthcoming.

<sup>11</sup> Pinheiro principles, Principle 21.

Rights<sup>12</sup> and the European Convention for Human Rights<sup>13</sup>. Housing rights are covered in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which establishes the right to adequate housing as an element of the right to an adequate standard of living<sup>14</sup>. The scope of the right to adequate housing has been more precisely defined by two General Comments of the UN Committee on Economic Social and Cultural Rights: General comments no.4 and 7. Comment no.4 lists seven constitutive elements of adequate housing: security of tenure, availability of services, affordability, habitability, accessibility, location and cultural adequacy. Comment no.7 focuses on forced evictions which violates one of these components, legal security of tenure. Tenure security is the legal protection from forced eviction, harassment or threats. In the comments, forced evictions are defined as “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”. The right to adequate housing, tenure security and protection from forced evictions applies to everyone, whether they are owners, tenants or users under customary law. Even squatters have a basic right to tenure security. Another interesting aspect of Comment no7, is that it links forced evictions to civil and political rights protected under the International Covenant of Civil and Political Rights (ICCPR) such as the right to non-interference with private life, family and home, and the right to peaceful enjoyment of possession. Such rights also exist independently of the tenure held by the occupant (ownership, tenancy contract, customary user’s right).

Land rights are much less established in international law and appear mainly in relation to indigenous land right to restitution<sup>15</sup>. However, Miloon Kothari, the UN Special Rapporteur on Adequate Housing, noted in 2005 the strong links between the right to adequate housing and access to land: “Land is often a necessary and sufficient condition on which the right to adequate housing is ab-

solutely contingent for many individuals and even entire communities<sup>16</sup>” and went as far as suggesting the recognition of a right to land. However this proposal did not receive wide support from states. The right to land can also be indirectly deducted from the right to adequate standards of living of which it is an essential element in rural areas, but also from the right to food.

In terms of technical guidance for the design and implementation of restitution mechanisms, the Pinheiro principles recall the necessity to ensure participation of affected population (principle 14), to respect the principle of non-discrimination, and gender equality (principle 4). In many countries affected by displacement, in particular where land is administered customarily, women access land through their male relatives (father, uncle or husband), and do not own the land directly. This limits their possibility to inherit from their father or husband if these died or disappeared during the conflict. It is therefore impossible for them to repossess their family land which exposes them to homelessness and landlessness. Principle 4 recommends that restitution programmes recognize joint ownership rights of both men and women to prevent such situation. Restitution mechanisms should also be accessible and sensitive to age and gender (principle 13).

In case of loss or absence of ownership documents, principle 15 provides for the replacement of such documents at minimum cost, and calls for the protection of HLP records. The same principle recommends the formalization of HLP rights after restitution “if necessary to ensure security of tenure”. This last element is particularly important to note as in many situations, formalization has not had a positive impact on tenure security but rather led to dispossession of the most vulnerable to the benefit of the elite.

The Pinheiro principles recognizes the rights of owners, tenants and customary right holders to restitution (principle 16). They also elaborate on the rights of people who occupied property left empty by the displaced. While the right of the legiti-

<sup>12</sup> Universal Declaration of Human Rights, 1948, Article 17: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”

<sup>13</sup> European Convention for Human Rights, 1950, Article 1, Protocol 1: “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”.

<sup>14</sup> ICESCR, Article 11 : States parties «recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions».

<sup>15</sup> ILO Convention 169.

<sup>16</sup> Kothari Miloon, 2005, Study by the Special Rapporteur on Adequate Housing, UN Economic and Social Council 41, UN doc. E/CN.4/2005/48

mate owner or user should prevail, secondary occupants should also be protected from forced evictions and provided with alternative accommodation if they cannot provide for themselves. Those who invested in good faith in the property might be entitled to compensation (principle 17)

While the Pinheiro principles provide a very good recap of the legal basis for HLP rights and useful guidance, they have also been subject to various criticisms.

### *Criticism of restitution and the Pinheiro principles*

Several development actors and land specialists have criticised the focus of humanitarian actors on property restitution to the detriment of a broader approach to HLP issues in post-conflict situations<sup>17</sup>. Since this is the main topic of the Pinheiro principles, the critics were also directed at the principles. The argumentation is that, while restitution may address HLP violations resulting from the conflict, it cannot solve the root causes of the conflict when such conflict partly results from previous land tensions due to unequal distribution of land or landlessness. In such cases, the return of land to big land owners is not going to appease tensions. If there is a situation of widespread tenure insecurity characterized by land grabbing, restitution may not have a lasting effects if the causes of tenure insecurity are not addressed.

Such criticism show the need for humanitarian actors willing to design restitution or compensation mechanisms to coordinate with housing and land experts to ensure that their short term corrective actions do not go against mid to long term efforts to reform the land administration system. This does not mean that humanitarians should become experts on urbanism or land administration but that they should engage with others to ensure a broader and more coherent approach to HLP issues. This cooperation should actually go both ways and land experts would also benefit from the human rights and displacement expertise of humanitarians actors when supporting land reform or land titling initiatives.

In Côte d'Ivoire for instance, despite large scale displacement, occupation and illegal sale of land, authorities have not put in place any restitution mechanisms. The intention of authorities is

to use the 1998 Land law imposing the transition from customary land rights to registered rights to address land disputes pre-existing the conflict and those resulting from the conflict. Needless to say that this will be a rather daunting task considering the state capacity and limited availability of surveyors in the country. An IDMC report on land issues in post-conflict Côte d'Ivoire<sup>18</sup> highlights the specific needs of IDPs in relation to the implementation of the Land law. The procedures put in place in peace time are not adapted to the situation of displaced persons and limits their capacity to benefit from the law. The requirement for instance to apply for recognition of customary land title in the place of origin can be difficult for IDPs to comply with if they do not wish to return for security or other reasons. Also, recognition of customary land rights can only be achieved if the user can justify "continuous and peaceful" occupation, which in situation of conflict and displacement can easily be interpreted against IDP.

Another frequent criticism made to the Pinheiro principles is their limited applicability in situations of customary land rights.

### **3. Challenges in Informal Land Tenure Situations**

In most countries affected by displacement land is held and transferred according to customary, religious or traditional rules. Informal land tenure prevails in most of Africa (where only 1% of land is formally owned) and Asia. After displacement occurs, land is often occupied or sold like as is the case elsewhere. The difference is that in situations of informal land tenure, restitution is made much more complex due to the informal nature of land rights and the absence of registered land titles supporting restitution claims. In addition, the characteristics of informal land tenure as well as the existence of legal pluralism contribute to make restitution difficult or inappropriate.

#### *Customary land tenure and restitution*

In context of customary land rights, many different types of property and land rights can coexist on the same piece of land and include: classic western-type property right where most

<sup>17</sup> *Unchartered territory: land, conflict and humanitarian action*, ODI, 2009, <http://www.odi.org.uk/resources/details.asp?id=4409&title=unchartered-territory-land-conflict-humanitarian-action>

<sup>18</sup> *Whose land is this?* IDMC, 2009, <http://www.internal-displacement.org/publications/cotedivoire>



rights (use, right to rent or sell) are concentrated in the owner, and informal land rights such as user's rights, right to pass through to access water, wells, grazing rights for pastoralists, or right to cultivate seasonal crops. The co-existence of these various rights shows that there can be many parties to a restitution claim on one piece of land. Very often, these secondary land rights are not recognized or included in restitution processes which would make them difficult to implement. As a result, there is a tendency to focus on the main user which negatively impacts secondary users' access to land. It is also important to note that, under most customary land tenure systems, there is no right to sell the land, which is considered to belong to the community rather than an individual. Land is not perceived as a commodity but rather as an essential element of subsistence and as such cannot be alienated from the community. As a result what is usually "sold" is the right to use the land and not the land itself. It is to recognize this aspect of customary land tenure that the Pinheiro principles also provide for the submission of collective restitution claims<sup>19</sup>.

In the absence of property titles, the Pinheiro principles recommend using alternative evidence such as witnesses. This is particularly useful where land boundary markers have been removed or disappeared during displacement. Other techniques, such as satellite pictures, or community mapping, where members of a community gather to delineate their respective land boundaries, can be used to address the lack of land registries and maps. However, if the community is dispersed as a result of displacement, or if displacement lasted for a long period of time, the exercise becomes more problematic as memory of land location may have faded away. This is valid for both community members and customary leaders in charge of addressing land disputes.

### *Legal pluralism*

Countries where informal tenure prevails are characterized by legal pluralism, defined as the co-existence of several sources

of authorities (statutory or religious) considered as legitimate to address similar matters. Where land is held customarily, disputes are overwhelmingly addressed by customary leaders while the statutory system is ill-equipped to deal with a type of land right which may not even be recognized legally. Legal pluralism is often the result of a limited presence of the state at local level, customary leaders therefore fills the gap left by statutory justice.

The conflict and post-conflict period may lead to an even more complex type of legal pluralism with new bodies or individuals emerging and claiming the competency to address land disputes. This may be the result of individuals acquiring legitimacy further to their actions or role during the conflict or, on the contrary, previous leaders losing theirs. Customary leaders may also have been displaced or died which leaves space for new dispute resolution mechanisms. In addition, national authorities and international community have sometimes encouraged the creation of administrative bodies run by local authorities or non-governmental organisations (NGOs) to address land disputes. While this can serve to fill a gap, it can also lead to forum shopping and legal uncertainty as claimants decide to approach one body after another, with no definite end or solution to the problem.

Considering the wide legitimacy normally enjoyed by customary bodies and the role they play in administering land disputes, as well as the difficulty for a state weakened by conflict, to intervene in such matters at local level, it is essential that restitution programmes take into account customary bodies. If the state decides to delegate its authorities officially in the resolution of HLP disputes, it should determine the conditions under which this delegation will be effective. This should include the respect of international and national human rights standards, in particular with regards to women's right to land.

The Great Lakes Protocol on Property Rights of Returning Persons<sup>20</sup> which covers 11 countries of the region<sup>21</sup> acknowledges the need for the state to work jointly with traditional resolution dispute mechanisms to facilitate HLP restitution of displaced per-

<sup>19</sup> Pinheiro principles, principle 13.6 "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".

<sup>20</sup> Great Lakes Protocol on Property Rights of Returning Persons, International Conference on the Great Lakes, November 2006. Link: [http://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)

<sup>21</sup> Angola, Burundi, Central African Republic, Republic Democratic of Congo, Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia.

sons. This protocol is the first regional binding instrument recognizing traditional land rights and confirming that they are protected and subject to restitution and compensation. The protocol recommends establishing affordable property registration scheme recognizing customary land rights. In the set up proposed by the protocol and its model law, traditional mechanisms are used as a first instance while administrative mechanisms act as a second instance. The Protocol entered into force in 2008 and there is so far little example of implementation of this particular provision although Burundi has been using a similar system.

In order to define the rules regulating the interactions between state institutions and traditional bodies when addressing post-conflict HLP disputes, it is worth going through the advantages and the shortcomings of such bodies to build on the positive and limit the impact of the negative aspects.

The main advantage of customary bodies is their accessibility in terms of geographical proximity and cost. They are also fast in comparison to the official judiciary system and usually perceived as less corrupt than statutory institutions. Because customary rules and procedures are familiar to the population, they usually feel more comfortable to use them and have a stronger sense of ownership and participation to the process. Customary dispute resolution mechanisms usually use mediation to address problems and propose compromise solution to the parties. This type of decision corresponds to one of the main function of customary leaders, which is to maintain social cohesion within the community. A compromise solution tends to limit tensions and facilitate the enforcement of decision. On the contrary, the judicial system and its adversarial approach are perceived as a source of tension which only the wealthiest or the most educated can access. Moreover, since the state presence and capacity at local level is limited there is less chance that the judicial decision will be implemented.

Despite the above mentioned advantages, customary dispute resolutions mechanisms also present numerous shortcomings. Their focus on the community cohesion tends to exclude or limit the rights of outsiders such as migrants or minorities, in particular in relation to land rights. It also tends to sacrifice individual land rights if deemed necessary to maintain peace and appease

the party who occupied the land by offering compromise, compensation or sharing solutions to the occupant. One serious downside of this approach is that such decisions do not represent a deterrent to the repetition of occupation<sup>22</sup>. If occupation of land results in sharing of occupied land, it may even be perceived as an encouragement to grab land from others. The rather patriarchal context and the fact that customary leaders are almost exclusively men contribute to seriously limit women and girls HLP rights notably in terms of inheritance. Lastly, there is little predictability and transparency in terms of decisions. While certain rules are clear, others are left to the interpretation of the customary leader which may vary greatly from one leader to another, and creates a lack of consistency of decisions. Moreover, customary decisions may be in contradiction with national laws and international standards.

For all the reasons mentioned above, it is very important for the state define clearly the conditions under which it will accept that customary bodies address HLP issues when it can't be done by the state only. Several avenues can be pursued at the same time: One of the first steps would be to train customary and traditional leaders on national standards which are compatible with international human rights as most of them are not aware of those and do not consciously violate them. In parallel, efforts should be done to also inform the population directly or through the training of paralegals on national standards so that the population can also act as a monitoring body. The state should monitor to the extent possible the conformity of customary decisions to national law and grant legal recognition to customary decisions while preserving a right of appeal before statutory bodies.

#### *Land titling of customary rights as a way to address post-conflict HLP disputes?*

As described above, the characteristics of customary land tenure makes its restitution more difficult than the restitution of formal rights. As a result, many countries where informal land tenure prevails have not put in place restitution programmes. Instead, many have adopted land titling programmes to improve

<sup>22</sup> On this particular issue see the example of Liberia: The logic of encroachment in Lofa County, Liberia, NRC Liberia, 2010 <http://www.nrc.no/?did=9481900>

tenure security as it is widely believed that the main source of land insecurity come from its informal and unregistered nature. In the absence of dedicated mechanisms to address post-conflict HLP disputes, land titling legislation may become the only possibility for the displaced to claim their property back and obtain recognition of their customary land rights before eventually formalizing them. In such situations, it becomes essential for IDPs to have access to such land titling programmes.

However, in some cases, land titling legislation has been adopted before the displacement situation or does not take into account the specific circumstances of displacement<sup>23</sup>. It is therefore particularly important to ensure that the procedures or the conditions required by the law to recognize customary land rights are adapted to the situation of IDPs. A good practice for instance is to allow the registration of application in the place of displacement and to put in place information campaign and outreach measures to make sure that IDPs know how to avail themselves of the law.

Information is key to address one of the major problem with land titling: the capture of land by the political or economic elite. Those better informed of the interest they have in titling their land will use this opportunity at the expense of the less informed ones, in particular displaced persons, marginalized groups or women. Contrary to its purpose, land titling then leads to increased tenure insecurity for the most vulnerable.

The lack of institutional and financial capacity to implement land titling legislation may also limit the possibility for IDPs to repossess their property if there is no other mechanisms for restitution as it has been the case in Côte d'Ivoire. The limited expertise of humanitarian actors on land titling issues makes it difficult for them to adequately advocate for the interest of displaced person therefore underlining the need for humanitarians and land experts to consult each other and coordinate their activities.

#### 4. Conclusion

Housing, land and property issues are a key element of durable solutions to displacement. In recent years there has been

a growing recognition among humanitarians that HLP issues are crucial to building sustainable peace. Restitution of housing, land and property for lost assets has therefore been promoted as the main tool to provide a remedy to dispossession and forced displacement. Consequently, provisions for the resolution of property and land problems have been included in numerous peace-agreements or documents establishing the post-conflict environment<sup>24</sup>. The endorsement of the Pinheiro principles by the sub-Commission on the Promotion and Protection of Human Rights in 2005, consolidated this trend at the normative level. Despite providing useful and needed guidance on the legal basis as well as on procedural, institutional and substantive aspects of property restitution, the Pinheiro principles have rapidly been criticised by land experts and development actors denouncing the difficulty to implement HLP restitution in countries where informal land rights prevails and calling for a broader approach to land issues.

This debate and controversy has helped many humanitarians to recognise the limits of restitution in certain situations and the need to find alternative or complementary solutions to it. Progressively, humanitarians have started to look at HLP issues not only in the perspective of restitution and return but also in the context of other durable solutions such as local integration and relocation. In such situations the focus is not necessarily on restitution and property rights but rather on the obligation for the state to provide adequate housing to its citizens in particular the most vulnerable categories which often include IDPs. This opens a new and wide area of investigation and research for humanitarians such as the modalities to provide housing at affordable cost through social housing as in Serbia or the privatisation of collective centres to the benefit of IDPs as was done in Georgia. The debate has also highlighted the necessity for humanitarian actors and development ones, including land and urban experts to work together to share their respective expertise to the benefit of IDPs. Cooperation would hopefully help to make progress in several areas where guidance is still necessary such as HLP issues in urban areas, looking at ways to improve tenure security in urban slums, addressing HLP disputes in informal land tenure settings and defining principles regulating the relations between state institutions and customary bodies.

<sup>23</sup> See the example of Cote d'Ivoire described above on page 10-11.

<sup>24</sup> 16 countries affected by internal displacement included such provisions in 2006, Global overview of trends and developments in 2005, IDMC.

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