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The Property Rights of Refugees and Internally Displaced Persons

Beyond Restitution

Anneke Smit

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The Property Rights of Refugees and Internally Displaced Persons

The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution explores how the protection of housing and property rights can contribute to durable solutions to displacement. The focus of most of the international community's recent protection efforts has been on returning displaced persons to their homes following armed conflict. This prioritization has been entrenched further by the 2005 *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (the 'Pinheiro Principles'). Yet as Anneke Smit chronicles in this book, the international community's attempts to promote widespread return through establishing housing and property restitution mechanisms have largely failed. Further, this focus on return and restitution of property has come at the expense of supporting effectively local integration and resettlement as possible durable solutions.

This book argues that particularly in cases of protracted displacement, a range of accepted approaches to the protection of housing and property rights would be preferable. In addition to more than a dozen case studies, the discussion draws throughout on international human rights and refugee law, property law and theory, and sociological and anthropological literature on displacement and the meaning of 'home'. *The Property Rights of Refugees and Internally Displaced Persons* is based on more than a decade of the author's extensive academic research and practical experience on displacement issues. It will be of considerable interest to those with academic and policy interests in the rights of refugees and displaced persons, and theories of property.

Anneke Smit is Assistant Professor in the Faculty of Law at the University of Windsor, Canada.

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Contents

<i>Acknowledgements</i>	<i>xi</i>
Introduction	1
<i>Protracted displacements and the quest for durable solutions</i>	2
<i>Durable solutions and the protection of housing and property rights</i>	3
1 The development of the right to return to one's home of origin	9
<i>Traditional limits of the right of return at international law</i>	11
<i>Enunciation of the right to return to one's home of origin</i>	14
Instruments ending conflicts	15
International and regional case law	16
United Nations 'soft law' developments	21
Customary international law	29
Advocacy	32
<i>Conclusion</i>	33
2 Modern experiences with post-conflict restitution and return	43
<i>Israel/Palestine</i>	48
<i>Cyprus</i>	51
<i>Cambodia</i>	54
<i>Mozambique</i>	55
<i>Tajikistan</i>	57
<i>Rwanda</i>	58
<i>Guatemala</i>	60
<i>Bosnia-Herzegovina</i>	61
Domestic property rights legislation	62
An internationalized commission	63
Restitution and return	64
<i>Kosovo</i>	65
<i>Timor-Leste</i>	69
<i>Afghanistan</i>	71

<i>Iraq</i>	73
<i>Georgia/South Ossetia</i>	75
Legislative frameworks on IDPs	76
Use of the courts to regain pre-conflict property	78
Law on Restitution	78
<i>Conclusion</i>	82

3 Restitution and return ‘home’ **98**

<i>Return as the preferred durable solution</i>	100
<i>Establishing the restitution/return nexus</i>	103
<i>The success of restitution and the failure of return</i>	104
<i>Return and the meaning of ‘home’</i>	108
Nuancing understandings of return and home	109
Balancing practical considerations and dreams of home	110
Deconstructing the house as home	115
<i>De facto durable solutions following restitution</i>	118
Sale/exchange of restituted property	118
Transnational uses of restituted property	121
<i>Conclusion: re-establishing the restitution/return nexus?</i>	123

4 Local integration and the regularization of collective centre space **135**

<i>Local integration as acceptable durable solution</i>	136
Host community as home	136
Policy implications for local integration (and resettlement)	138
<i>Housing and property rights and local integration</i>	139
Shelter arrangements for RDPs during displacement	140
Protecting housing and property rights in the host community	142
<i>Regularizing rights in collective centre space</i>	145
Collective centre as home	146
Recognizing property rights in the collective centre	147
The (in)sufficiency of informal ownership	151
The use of non-ownership tenures	153
<i>Conclusion</i>	157

5 Compensation and regularizing secondary occupation	167
<i>Shifting homes, changing 'social fabric' and the secondary occupier</i>	168
<i>Lessons from the 'ordinary' law of property</i>	173
The legal meaning of 'home'	173
Adverse possession/squatters' rights	176
Expropriation	182
<i>Restitution in transitional states</i>	186
Restitution in Eastern Europe/former Soviet Union	186
Restitution in South Africa	189
<i>Determining adequate compensation</i>	192
<i>Conclusion</i>	194
Conclusion	206
<i>Bibliography</i>	211
<i>Index</i>	251

Introduction

At the beginning of 2011 an estimated 15.1 million refugees¹ and a further 27.5 million internally displaced persons (IDPs)² remained unable to return to their homes worldwide. The majority of these displacements were caused by armed conflict. The provision of assistance to refugees and IDPs during their displacement draws together a variety of issues and approaches. At the beginning of a forced displacement, the most immediate concerns are humanitarian in nature: individuals who have fled their homes must be fed and sheltered in the short term. A variety of governmental and non-governmental, local and international actors may become involved with the coordination of such assistance. Over time, however, the focus shifts to ending the displacement. It has been said that a 'durable solution' to displacement has been achieved for refugees and IDPs 'when they no longer have specific assistance and protection needs that are linked to their displacement, and can enjoy their human rights without discrimination on account of their displacement'.³ Three durable solutions are typically envisaged: return, local integration, or resettlement.

This book is about the role of the protection of property rights in finding durable solutions to end forced displacement. Specifically, it makes the argument that the legal framework for the protection of housing and property rights for refugees and IDPs should go beyond restitution to a range of other remedies and approaches. As the concluding agreed statement from a recent international conference on local integration (attended by representatives of governments, NGOs, IDP communities, charities, and academics) stated, 'Security of tenure and land is among the most important issues to be resolved for a durable solution to be achieved through local integration'.⁴ Whatever the durable solution envisaged, the effective treatment of land and property issues is key to making the solution sustainable.

Protracted displacements and the quest for durable solutions

The majority of the world's refugees and IDPs are locked in long displacements, known as 'protracted refugee situations'. The United Nations High Commissioner for Refugees (UNHCR) uses the following definition:⁵

[A] protracted refugee situation is one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile ... Using a crude measure of refugee populations of 25,000 persons or more who have been in exile for five or more years in developing countries, and excluding Palestinian refugees who fall under the mandate of UNRWA, it is estimated that, at the end of 2003, there were 38 different protracted situations in the world, accounting for some 6.2 million refugees in total.

When displacements become protracted, as they usually do, finding durable solutions becomes a far more complicated task than immediately following the end of a conflict.

While the other durable solutions have had periods of particular favour, return has for some time been the international community's preferred durable solution. Further, it has come to be widely accepted that the right to return of refugees and IDPs entails the right to return *to their homes of origin* – that is, to return specifically to their pre-conflict housing and property. Yet there is in recent years an increasing acceptance that sustainable return is a relatively rare occurrence, particularly in the context of displacements of long duration. Through the passage of time, refugees' and IDPs' priorities, and experiences of 'home', may shift away from the property and community of origin despite ongoing desires to return. While it is probably still safe to say that return remains the preferred durable solution, the attentions of the international community have of late begun to turn with greater intensity to the other (non-return) durable solutions – local integration and resettlement. The shift toward the range of durable solutions has arguably also been spurred on by developing understandings that displacement crises must be solved within the larger post-conflict context, where the needs of many different actors – and society as a whole – must be considered. As Walter Kälin, United Nations Special Rapporteur on IDPs, has written with John Holmes, 'durable solutions are not simple solutions, because they are usually linked to larger struggles for peace, security, territorial control, equal treatment and an equitable distribution of resources'.⁶

Durable solutions and the protection of housing and property rights

Along with the right to return to home of origin, the last decade has seen corresponding major developments in the international legal framework surrounding post-conflict housing and property restitution. The establishment of discrete, quasi-judicial housing and property restitution mechanisms has become a core element of the international community's engagements with some post-conflict peacebuilding processes, in particular in Bosnia and Kosovo. Their attractiveness is that they promise both a means of legal redress for a conflict-related infringement of human rights (one which in some cases the international community, by its military intervention or lack thereof, has been accused of exacerbating), as well as a practical outcome – the return of refugees and IDPs to their homes.

The culmination of years of consultation, discussion and operational experience, the *Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* were passed in 2005.⁷ While non-binding, they are a significant development on the protection of housing and property rights for refugees and IDPs. The *Principles* articulate the importance of assuring that refugees and IDPs enjoy the right to return to their homes of origin after conflict, and provide a guarantee of the right of refugees and IDPs to restitution of their pre-conflict property.

Yet while important, the *Principles* are disappointing in their oversimplification. Rather than reflecting increasingly refined understandings about the nature of long displacements and the importance of making available the range of durable solutions, the *Principles* are instead quite singularly focused (both in their justifications and in their specific legal principles) on the need to effect the return of refugees and IDPs and to provide restitution 'in kind' (*restitutio in integrum*), or the return of the property – to the pre-conflict owner. There is therefore a significant disconnect between the larger durable solutions discourse (increasingly accepting the need for the range of durable solutions) and this international framework on post-conflict housing and property rights (clearly prioritizing return). Indeed the term 'durable solutions' receives only one mention in the entirety of the *Pinheiro Principles*, while the right to return is iterated more than a dozen times.⁸

Undoubtedly this simplification of the goals of housing and property restitution makes the task of restitution in kind seem a less complex and more manageable one.⁹ It likely contributes to the perceived suitability of 'mass claims' approaches to settling restitution claims, which have gained favour in post-conflict contexts for their efficiency and cost-effectiveness.¹⁰ However, it also makes the process one which is more likely to lack direct relevance to refugees and IDPs who have lost their properties and seek a sustainable end to their displacement. In their failure to address housing

and property issues in the context of the larger durable solutions discourse, the *Principles* fail to contribute in any meaningful way to the use of local integration and resettlement as durable solutions.

Further, the international legal framework as it is developing largely ignores the rights and needs of other affected individuals. These may include 'secondary occupiers' – those individuals, often displaced themselves, who inhabit the property of those who have fled. It also ignores the needs of the larger society seeking to rebuild, socially and economically – a society which has to be prepared to support the reintegration of those refugees and IDPs who return. To be truly successful in supporting durable solutions and reconciliation, a restitution programme must take all these interests into account. It must also form part of the larger task of (re) creating a culture of respect for the protection of property rights, which, arguably, is necessary for the development of a rule of law culture and economic recovery.

It is interesting to contrast the prioritization of restitution in kind in housing and property restitution cases with recent trends regarding reparations for other types of conflict-induced human rights violations. The UN Reparations Principles enunciate a range of remedies including restitution (in kind), compensation, rehabilitation of victims, satisfaction and guarantees of non-repetition as possible forms of reparations for violations of human rights.¹¹ Of these, as Williams has written, 'restitution has lost much of its emphasis relative to other forms of reparation in general human rights practice'.¹² Various types of satisfaction including conciliatory acts, such as apologies¹³ or truth and reconciliation commissions have grown in popularity recently. Yet when dealing with housing and property, where the logistical hurdles to restitution in kind are the greatest, alternative remedies have been largely ignored.

Following initial praises of the *Pinheiro Principles* (justified, given the magnitude of the feat of passing any sort of new human rights instrument at the UN level) a 'second generation' of analysis is beginning to emerge. While still laudatory this analysis has become more critical of the bright-line approach taken. Ballard denounces the *Principles*' 'one-size fits all' approach and argues that 'scholars, human rights workers, and international actors should critically analyze the merits of a uniform system of post-conflict property restitution'.¹⁴ Paglione argues that 'despite being largely publicized as groundbreaking and innovative', the *Principles* remain 'conventional in their essence' and that in the passing of the *Pinheiro Principles* a valuable opportunity to reconsider how displacement and durable solutions are addressed was lost.¹⁵

It is to this discussion that this book aims to contribute. It seeks to push the discussion on post-conflict housing and property rights further by arguing for the legitimacy of a broader array of remedies for the conflict-related infringement of private property rights. Such approaches, it is

argued, might better support the range of durable solutions for refugees and IDPs. In particular, the book argues that in addition to contextualizing housing and property restitution amongst other elements of post-conflict justice, it must also be seen alongside broader conceptions of what it means to protect private property rights in a range of contexts. How competing rights in property are addressed, and how these interests are balanced with the overriding public interest, in property law systems outside the post-conflict sphere can provide important lessons and justifications for a more nuanced approach to post-conflict property rights.

The discussion begins with a contextualization of housing and property restitution and the right to return to home of origin. Chapter 1 presents an analysis of the extent to which the right to return to one's home of origin has come to constitute a norm of international law, through treaty or customary international law. It concludes that while such a classification may be premature, a norm is clearly emerging. Chapter 2 discusses attempts in recent history to address the protection of housing and property issues in the context of encouraging refugee and IDP return. Through case studies of thirteen post-conflict situations, the difficulties inherent in implementing the right to return to one's home of origin are illustrated. Indeed, there are few historical successes. Further, recent attempts at implementing large-scale housing and property restitution mechanisms, heavily supported by the international community, have not been particularly successful in promoting the large-scale return of refugees and IDPs to their homes of origin following mass displacement.

Chapter 3 explores the phenomenon of non-return from a largely sociological perspective. Return is increasingly seen as a complex process which is about more than the return to a former house or piece of land; it is also about return to work, education and the larger community left behind. The 'home of origin' must be understood as encompassing much more than simply the physical structure of the house left behind. If return to home of origin is to be a goal of restitution processes, then restitution must be done quickly following the cessation of hostilities and it must take place in coordination with a larger movement of encouraging and coordinating return.

Yet, as Chapters 4 and 5 discuss, particularly following long displacements, even the most carefully-conceived return and restitution programme may not be enough to encourage refugees and IDPs to return to a past home. As such, the international community's prioritization of the right to return to one's home of origin should not take place at the expense of other options. Psychological connections to housing and property, and a sense of 'home' may exist not only at home of origin but develop over the time of one's displacement. The effect of this may be that return is no longer the preferred durable solution for the majority of refugees and IDPs.

Approaches to the protection of private property rights should be more nuanced to recognize and support these shifting realities.

Two possible alternatives to restitution in kind are considered as examples. The first of these, explored in Chapter 4, is the regularization of rights in refugees' and IDPs' 'temporary' housing in the host community. This might happen as an alternative remedy to restitution in kind, or might – an approach that has gained some favour – be seen as part of supporting local integration until return becomes possible (as such it might be a measure which is complementary to, rather than exclusive of, restitution). In any case it is consistent with recent trends in international development circles toward the formalization of informal rights in property. The second alternative, the subject of Chapter 5, is the increased use of compensation as a remedy rather than an exclusive reliance on restitution in kind, in concert with some recognition or regularization of secondary occupants' possession of the same properties. While this latter suggestion in particular will be controversial, it is argued that both approaches are quite well supported by reference to the larger housing and property rights discourse. Further, they would provide pragmatic solutions corresponding to the real desires of refugees and IDPs. Other types of creative approaches to the protection of property rights for refugees and IDPs, some of which have been attempted on a small scale in various displacement situations, are also canvassed briefly in the Conclusion.

It is not suggested that any of these options should replace the priority placed on restitution in kind. Rather, an international legal framework which prioritizes restitution in kind, but which recognizes the need for flexibility of approach, will be more in alignment with the needs and desires of refugees and IDPs and will support the range of durable solutions. Further, it will allow property rights in the post-conflict sphere to be treated with the nuance that characterizes them in most other contexts, thereby considering the rights of all affected parties and promoting the development of a property rights culture. How decisions should be made in a given displacement context about what remedies should be available is a complex matter; this will be touched upon briefly in the Conclusion of this book.

One note regarding terminology and the scope of this book should be made here. There are some key differences between refugees and IDPs, in particular with regard to legal status. IDPs are excluded from the technical definition of a refugee contained in the *Convention relating to the Status of Refugees*,¹⁶ and are often dealt with separately by international organizations. The mandate of the United Nations High Commissioner for Refugees (UNHCR), for example, does not officially cover IDPs. While this gap may be lessening in practice (for example in the field, UNHCR is often mandated to provide assistance to both refugees and IDPs), there are arguments for retaining a separate normative framework for the internally displaced.¹⁷ Yet for the purposes of this book, these distinctions are not always relevant.

Particularly from a sociological and/or humanitarian standpoint, many of the issues facing refugees and IDPs, both during their displacements and in consideration of return, are the same. Further, the discussion is primarily focused on the international community's involvement on restitution issues. As this often takes place in an environment in which the international community at least partially stands in the place of the state (as in Kosovo, which was placed under United Nations administration in 1999) the distinction between international and national protections is blurred. The term 'refugee and displaced person (RDP)' is increasingly used by members of the international community and academic observers to refer to both refugees and IDPs, and will be adopted in this book as well. However, at times reference will be made specifically to either refugees or IDPs, because the distinction is relevant to a particular discussion or because reference is to a specific group of displaced individuals falling into one of the two categories.

Endnotes

- 1 'Refugee Figures' *The UN Refugee Agency*. Online. Available HTTP: <<http://www.unhcr.org/pages/49c3646c1d.html>> (accessed 20 September 2011). This figure includes the 4.7 million Palestinian refugees who are looked after by the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA).
- 2 Ibid.
- 3 *IASC Framework on Durable Solutions for Internally Displaced Persons*, Brookings Institution/University of Bern Project on Internal Displacement (April 2010). Online. Available HTTP: <<http://ochanet.unocha.org/p/Documents/IASC%20Framework%20DS%20for%20IDPs.pdf>> (accessed 21 September 2011) (hereinafter *Framework on Durable Solutions for Internally Displaced Persons*).
- 4 'IDPs in protracted displacement: is local integration a solution? Report from the second expert seminar on protracted displacement, 19–21 January 2011, Geneva'. Online. Available HTTP: <http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1132.pdf> (accessed 21 September 2011) at 6.
- 5 'Protracted Refugee Situations', UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee, 30th Meeting (10 June 2004) EC/54/SC/CRP.14 at 2.
- 6 *Framework on Durable Solutions for Internally Displaced Persons*, op. cit. at v.
- 7 *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (11 August 2005) E/CN.4/Sub.2/2005 (hereinafter *Pinheiro Principles*).
- 8 G. Paglione, 'Individual Property Restitution: From Deng to Pinheiro – and the Challenges Ahead' *International Journal of Refugee Law*, 20(3), 2008, 391 at 403, 407.
- 9 On the operational difficulties of creating the Housing and Property Directorate and Claims Commission in Kosovo, see A.R. Smit, 'Property Restitution and Ending Displacement in Kosovo – Coordinated Effort or at Cross-Purposes' *Northern Ireland Legal Quarterly*, 55, 2004, 182.
- 10 On mass-claims approaches to restitution, see H. van Houtte *et al.*, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law*, Cambridge: Cambridge University Press, 2008, and H. Das and H. van Houtte, *Post-War*

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- 12 See R. Williams, 'Post-Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement' TESEV International Symposium on 'Internal Displacement in Turkey and Abroad', Istanbul, 5 December 2006. Online. Available HTTP: <http://www.brookings.edu/speeches/2006/~/media/Files/rc/speeches/2006/1205property/200612_rcw_TESEVpresentation.pdf> (accessed 21 September 2011) at 5.
- 13 See for example: D. Shelton, 'The World of Atonement Reparations for Historical Injustices' *Netherlands International Law Review*, 50, 2003, 289; C.W. Blatz *et al.*, 'Government Apologies for Historical Injustices' *Political Psychology*, 30(2), 2009, 219.
- 14 M. Ballard, 'Post-Conflict Housing and Property Restitution: Flawed Legal and Theoretical Foundations' *Berkeley Journal of International Law*, 28(3), 2010, 462 at 473 and 496.
- 15 *Pinheiro Principles*, op. cit.; see Paglione, op. cit. at 403.
- 16 *Convention relating to the Status of Refugees* (14 December 1951, entry into force 22 April 1954) 189 UNTS 150.
- 17 See C. Phuong, *The International Protection of Internally Displaced Persons*, Cambridge: Cambridge University Press, 2004 at 25.