

AN INTRODUCTORY GUIDE TO UNDERSTANDING AND CLAIMING HOUSING, LAND AND PROPERTY RESTITUTION RIGHTS IN MYANMAR:

QUESTIONS AND ANSWERS

March 2017



DISPLACEMENT SOLUTIONS



NORWEGIAN
REFUGEE COUNCIL



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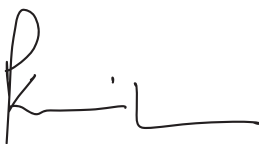
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INTRODUCTION FROM THE NRC MYANMAR COUNTRY DIRECTOR

Housing, land and property rights are fundamental human rights and a global advocacy priority for the Norwegian Refugee Council. The restitution of housing, land and property rights after conflicts and periods of non-democratic governance are fundamental aspects of transitional justice which are essential for the achievement of durable solutions to forced displacement, and to broader concerns of peace, reconciliation and economic prosperity. The NRC Country Office in Myanmar considers it necessary and positive to increase attention to raise public awareness on international standards on the matter as well as national laws and available legal remedies. For these reasons, in partnership with Displacement Solutions, the NRC has supported the publication by international restitution expert Scott Leckie of this **“An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar: Questions and Answers”**.

The guide gives an overview on how restitution has been addressed thus far in Myanmar, the position of international law on the question of restitution and some of the key existing obstacles and gaps. This guide is designed for use by refugees and IDPs and their representatives, providing a simple, easy-to-understand written tool on the basic principles of restitution, where these measures have taken place in other countries and various mechanisms that have been established to enable claims processes for HLP losses. Clearly, at present there are essentially no effective HLP remedies available for refugees and IDPs, hence their informed engagement in policy development on these matters will be crucial, particularly in the context of the ongoing peace process.

I wish to acknowledge the contribution to this project of the Information, Counselling and Legal Assistance (ICLA) core team (José Arraiza, Victoria Larroche, Sadia Rani, Yi Soe and Zaw Tun) as well as our ICLA field staff (Ei Ei Aung, Flora Ju, Naw Khin Thu, Saw Tar Lay Pwe, Saw Tun Naing, Khin Myat Thu and Paing Thu Soe), our programme team in Yangon (Laura Marshall and Kendra Hughbanks) and advisers in Oslo (Hege Mørk) for their support.



Prasant Naik
Country Director
March 2017

INTRODUCTION

Restitution means the process of returning to one's home after displacement and achieving the recovery of one's land. The process of housing, land and property restitution is truly profound, for these processes have as their key purpose, the aim of reversing past HLP losses and returning HLP rights back to those with legitimate restitution claims, and enabling refugees and IDPs to reclaim their former homes and lands. These processes may seem overly optimistic, but in fact, restitution processes have been carried out in numerous countries over the past three decades or more. Successful restitution programmes provide a pathway for residential justice, and create the conditions needed for all refugees and displaced persons to repossess control over their places of origin or to otherwise receive recognition of these losses through the provision of adequate compensation. These processes provide the means by which all returning refugees and IDPs can be assured of the full enjoyment of their human rights, in particular their housing, land and property rights.

Displacement Solutions and NRC have been involved in restitution efforts in a number of countries over the past two decades, and believe that increasing attention to the benefits of establishing specific post-conflict restitution mechanisms that would enable everyone with a restitution claim to have access to an appropriate remedial mechanism will facilitate voluntary repatriation and return of refugees and IDPs in Myanmar.

Some of the building blocks for a nationwide restitution process are in place. Article 1(k) of the 15 October 2015 Nationwide Ceasefire Agreement includes several references to HLP issues, while Chapter VI of the 2016 National Land Use Policy includes general guidance on how a restitution process could potentially take place. Moreover, bodies such as the Reinvestigation Committee for Confiscated Farmlands and Other Lands have been established to address some types of outstanding restitution claims. A number of international and local NGOs are currently advocating for the protection of the rights of refugees, internally displaced persons and other individuals affected by arbitrary takings of property in the past. These efforts should be encouraged.

In October and December 2016, NRC undertook a series of consultations in Yangon that confirmed the need to support the development of civil society-led advocacy strategies on restitution in Myanmar taking into account all available options. In February 2017, Displacement Solutions and NRC released another more detailed report on restitution issues in Myanmar entitled "The Next Steps on Myanmar's Restitution Journey: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme Accessible to All", that outlines a comprehensive overview of relevant restitution issues in Myanmar, as well as providing a series of proposed recommendations on how to move the restitution issue further in the country, culminating in a new law and procedure accessible to everyone with an unresolved HLP restitution claim.

This Guide builds on these efforts and uses a question and answer format to provide an introductory overview on some of the key issues of the restitution process, including the position of international law on the question of restitution, how restitution has been addressed thus far in Myanmar and the key gaps between domestic practice on restitution in the country and the most pertinent international legal standards. This Guide is designed for use by refugees and IDPs and their representatives, providing a simple, easy-to-understand guide for potential claimants on the basic principles of restitution, where these measures have taken place in other countries and various mechanisms that have been established to enable claims processes for HLP losses. The Guide makes clear that at present there are few effective HLP remedies available for refugees and IDPs, and that their engagement in these matters will be vital in generating support for such remedies, including restitution.

This Guide explores instances of displacement where those affected were forced to move from their homes and lands due to circumstances beyond their control, in particular cases of armed conflict, massive violence or gross violations of human rights such as arbitrary land confiscation, where legal procedures are not followed, where compensation was not provided and where those forced to flee from their homes assert their claim to repossess them once they feel it is safe and secure enough for them to return.

It is hoped that this Guide will facilitate greater understanding of the restitution concept by refugees and internally displaced persons from Myanmar, and lead to ever-improving restitution prospects for everyone with a currently unresolved claim to their former homes and lands. By providing legal advice to refugees and IDPs on the many complex aspects of the restitution question, this Quick Guide will assist people seeking to return home to be in far better position to assert their legitimate HLP restitution rights and increase the chances of enjoying residential justice.

“All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.”

PRINCIPLE 2.1 OF THE PINHEIRO PRINCIPLES

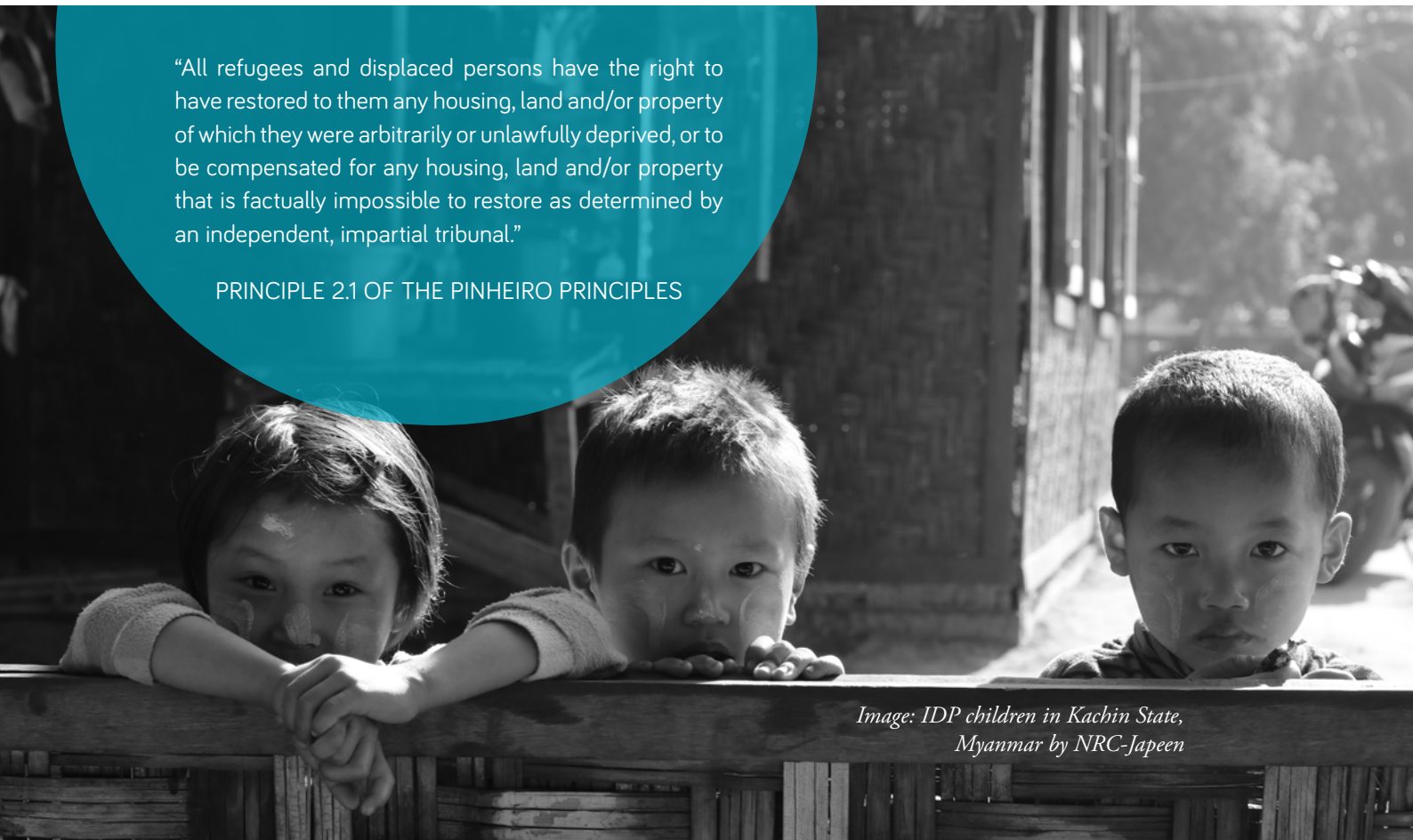


Image: IDP children in Kachin State, Myanmar by NRC-Japeen

QUESTIONS AND ANSWERS ON RESTITUTION

Q: WHAT ARE HOUSING, LAND AND PROPERTY RIGHTS?

A: Housing, land and property (HLP) rights are human rights recognised within international, regional and national legal frameworks. They are reflected in important human rights standards such as the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights and many others. The HLP norms upon which restitution rights for refugees and IDPs are based, are found widely throughout international, regional, national and local law, within the legal regimes of human rights law, humanitarian law, refugee law, criminal law, constitutional law and civil law. This extensive normative framework is useful in developing consistent and clear approaches to HLP restitution. Some of the specific rights that are clearly enshrined within these regimes include the right to voluntary return to one's country, the right to adequate housing, the right to be protected against forced eviction, the right not to be arbitrarily deprived of one's property, the right to privacy and respect for the home, the right to freedom of movement and others. Everyone, everywhere has HLP rights.

*Image: Palaw,
Tanintharyi Region
by José Arraiza
(NRC)*



Q: WHAT IS RESTITUTION?

A: Restitution refers to returning a situation to what it once was, through restoring rights over a certain piece of land or a home to those with recognized formal and/or customary rights over it. Restitution is now a common feature of the political fabric of countries emerging from conflict, undemocratic periods of governance and shifts in the political paradigm. As valued and central as the restitution process is, however, the path leading towards restitution can also be a highly complex, sensitive, and challenging process notwithstanding how such land dispossession originally took place and the circumstances in which this occurred.

Over the past several decades, inter-governmental agencies, government officials, international humanitarian and NGO field staff and others working in protection or support capacities with refugees and internally displaced persons (IDPs) have become increasingly involved in efforts to secure durable and rights-based solutions to all forms of displacement based on the principle of voluntary repatriation. In more recent years, the idea of voluntary repatriation and return have expanded into concepts involving not simply the return to one's country for refugees or one's city or region for IDPs, but the return to and re-assertion of control over one's original home, land or property; this is the process of housing, land and property restitution. This historic change in emphasis from what were essentially humanitarian-driven responses to voluntary repatriation to more rights-based approaches to return are increasingly grounded in the principle of restorative justice and of restitution as a legal remedy which can support refugees and internally displaced persons in their choice of a durable solution (whether return, resettlement, relocation or local integration).

The restitution process, thus, effectively provides a formal and legal basis for de-legitimizing the arbitrary acquisition of territory, assets, immovable (and sometimes movable) property and lands, and for putting these goods back into the possession of those holding rights over them at the time of the initial confiscation. Restitution allows losses incurred due to wrongful acts to be reversed, and the situation returned to what it once was and should be in terms of law. The recognition of restitution rights often provides the first official pronouncement that whatever may have taken place in the past which is responsible for people being forced to vacate their homes was wrong and should not be allowed to occur again in the future. It also re-affirms the basic proposition that refugees and internally displaced persons should never be penalized or suffer detriment due solely to the fact that they were forced to flee their homes and lands. These and other remedial norms, then, have evolved from general legal principles into increasingly specific areas of law and practice, now clearly pointing to the emergence of an explicit right of displaced persons to the restitution of housing, land or property. In other words, restitution itself has been recognized not just as a preferred general legal remedy, but also increasingly as an emergent distinct right, above and beyond the purely remedial and general international law contexts just noted.

Given the large number of people in Myanmar who are seeking or who will seek to exercise their restitution rights in the context of eventual return to their places of habitual residence and the highly complicated nature of many potential restitution claims, both refugees and IDPs, it will be vital to generate an improved understanding of the basic principles of restitution, what form a potential restitution law and procedure could take in Myanmar, precisely who may have valid restitution claims over which parcels of land, which entities will review such claims and how any such decisions will ultimately be enforced.

Q: DOES INTERNATIONAL LAW AFFIRM RESTITUTION RIGHTS?

A: Yes, in addition to international human rights law, humanitarian law, refugee law and international criminal law, many other international legal affirmations of restitution exist. Restitution norms form a key element of the 1998 Guiding Principles on Internal Displacement which explicitly address the question of restitution in Principles 28 and 29.¹ In turn, the Guiding Principles helped subsequently to inspire two vital standards on restitution, both of which were approved by the UN in 2005. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, is also useful. Paragraph 19 of this important text addresses restitution in the following terms: “Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”.²

These and similar HLP principles have been repeatedly reaffirmed, and are each in their own way fundamental in any quest for all-inclusive restitution. For any violation of international law – including the violation of a range of individual human rights norms such as those just outlined - redress that will undo the effect of the violation is required. These principles are evidence of the clear preference for restitution as a remedy for violations of international law, in particular those violations involving the illegal or arbitrary confiscation of housing, land or property.

In general terms, if State organs or other governing authorities revoked any pre-existing rights to housing, land or property in an arbitrary manner or applied the law based upon racial, ethnic or national origin or other forms of discrimination, this would necessarily be classified as disproportionate, and thus a violation of international law. Similarly, the now widely accepted fair balance doctrine stipulates that in determining the compatibility of a certain act with regard to HLP issues, any interference in the exercise of these rights must strike a fair balance between the aim sought to be achieved and the nature of the act, particularly when a victim of land confiscation has suffered an individual and excessive burden because of the confiscation concerned.

¹ Principle 28 - 1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons; 2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration. Principle 29 - 1. Internally displaced persons who have returned to their homes or places of habitual residence, or who have resettled in another part of the country, shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally at public affairs at all levels and have equal access to public services; and 2. Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of, upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.

² *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>).

Q: WHEN DO RESTITUTION RIGHTS BEGIN TO APPLY?

A: Restitution rights begin to apply the moment you are displaced from your home due to circumstances beyond your control. The concept of restitution, of course, has a lengthy history in terms of international law and, has long been accepted as an important judicial remedy within a wide range of national and international legal codes. It is on these foundations that much of the subsequent progress specifically on housing, land and property restitution has been built. International law approaches restitution generally through the lens of infringements of law due to what are defined as wrongful acts or omissions attributable to States through the application of the law of State responsibility. One of the premier international law making bodies, the International Law Commission, in their 2001 *Articles on State Responsibility* outlines the legal meaning of the term ‘internationally wrongful acts’, as well as noting the following: Article 34: A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

*Image: Pa Pyin, Myeik Township, Tanintharyi Region
by José Arraiza (NRC)*



Q: ARE RESTITUTION AND RETURN THE SAME THING?

A: Sometimes yes, sometimes no. According to the Pinheiro Principles, which are explored below, the restoration of possession of one's original home is the preferred solution to displacement, and care is necessary when alternatives to physical repossession are considered or implemented, be these from States of origin, local governing authorities, UN agencies, NGOs or from refugees or the displaced themselves. The right to return – whether for refugees or displaced persons – is not an obligation to return; it cannot be restricted, and conversely it cannot be imposed.

The right to housing, land and property restitution should not be made conditional on the physical return of someone who has been displaced from their home or place of habitual residence, and that these rights remain valid notwithstanding whether return actually takes place. In some settings, return may be impossible, irresponsible or illegal due to the security situation or potential threats, but a person with a restitution right may wish to exercise rights over that property without physically returning there.

Particularly crucial in these contexts, of course, are the expressed wishes of those holding restitution rights; beneficiaries of these rights can neither be forced to return, nor forced to accept a resolution of their restitution claims unless this is fully consistent with the law.

Image: Pho O Kone, Palaw Township, Tanintharyi Region by José Arraiza (NRC)



Q: HOW LONG ARE RESTITUTION RIGHTS VALID?

A: Some refugee and internally displaced persons, including those from Myanmar, have been physically displaced from their original homes for many years, and in some cases, decades; do such persons retain restitution rights indefinitely? Housing, land and property restitution rights are not prejudiced by the non-return of those possessing these rights. Those seeking to exercise restitution rights must distinguish between remedies and durable solutions; restitution rights are not affected by the voluntary choice of resettlement or local integration, as opposed to return and do not lapse purely on the basis of a refugee or IDP not being able to physically exercise these rights. Restitution experiences around the world reveal a very wide range of cut-off dates for establishing the basis of restitution claims. In South Africa, restitution claims could be submitted for any discriminatory land dispossession carried out from 1913 to the end of *apartheid* in the early 1990s. A variety of UN resolutions dating back to 1948 confer restitution rights on displaced Palestinian refugees, which remain valid. Many of those who lost properties in Eastern Europe from 1945 onwards were accorded restitution rights following the collapse of the Communist governments in the region in the late 1980s and early 1990s. Ultimately, States cannot arbitrarily apply cut-off dates for outstanding restitution claims. Restitution rights and related claims to homes, lands and properties do not lapse if and when unreasonable, disproportionate or unfair date restrictions are imposed upon the restitution process, and as far as displacement in Myanmar is concerned, many valid restitution claims have yet to be resolved.

Q: WHAT ARE THE PINHEIRO PRINCIPLES?

A: The *Principles on Housing and Property Restitution for Refugees and Displaced Persons* ('Pinheiro Principles') were endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005 and have since been frequently cited as a major normative framework on restitution. They have been used to assist in the formulation of new national restitution programmes in a number of countries. The *Principles* are the result of a seven-year process that initially began with adoption of Sub-Commission resolution 1998/26 on Housing and property restitution in the context of the return of refugees and internally displaced persons in 1998. This was followed from 2002-2005 by a study and proposed principles by the Sub-Commission Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro. The *Pinheiro Principles* provide restitution claimants, as well as States and UN and others agencies, with a consolidated text relating to the legal, policy, procedural, institutional and technical implementation mechanisms for housing and property restitution. As such, the Principles provide specific policy guidance regarding how to ensure the right to housing, land and property restitution in practice and for the implementation of restitution laws, programmes and policies, based on existing international human rights, humanitarian, refugee and national standards. To this end the Principles reflect some of the most useful provisions from various national restitution policies, programmes and practices, including those developed for Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Colombia, Cyprus, Guatemala, Iraq, Kosovo, Rwanda, South Africa and Sudan.

The *Pinheiro Principles* expand and clarify the rights of all refugees and displaced persons 'to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived'.³ They begin by emphasising their broad scope and application in their key objective of assisting relevant national and international actors to adequately address the legal and technical issues linked to the restitution rights of refugees and displaced persons.

THE PRINCIPLES APPLY IN SITUATIONS WHERE DISPLACEMENT HAS RESULTED IN PEOPLE 'ARBITRARILY' OR 'UNLAWFULLY' BEING DEPRIVED OF THEIR FORMER HOMES, LANDS, PROPERTIES OR PLACES OF HABITUAL RESIDENCE. IN PRACTICAL TERMS IN MYANMAR, THEREFORE, THIS STANDARD APPLIES TO ALL REFUGEES AND DISPLACED PERSONS FORCIBLY REMOVED FROM OR OTHERWISE FORCED TO FLEE THEIR 'HOMES, LANDS, PROPERTIES OR PLACES OF HABITUAL RESIDENCE (...) REGARDLESS OF THE NATURE OR CIRCUMSTANCES BY WHICH DISPLACEMENT ORIGINALLY OCCURRED'.

³ See: Principle 2. The right to housing and property restitution: 2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal; 2.2 States shall demonstrably priorities the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution." The Pinheiro Principles recognise the principle that the right to HLP restitution should not be made conditional on the physical return of someone who has been displaced from their home or place of habitual residence, and that these rights remain valid notwithstanding whether return actually takes place. In some settings, return may be impossible, irresponsible or illegal due to the security situation or potential threats, but a person with a restitution right may wish to exercise rights over that property without physically returning there. Particularly crucial in these contexts, of course, are the expressed wishes of those holding restitution rights; beneficiaries of these rights can neither be forced to return, nor forced to accept a resolution of their restitution claims unless this is fully consistent with the terms of international law. In South Africa's restitution experience, for examples, the concept of equitable redress was one important form of restitution that allowed many beneficiaries to access restitution rights without necessarily reinhabiting their former homes and lands.

The Principles apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as 'ethnic cleansing', development projects, acts of land confiscation resulting in displacement, forced evictions and natural and manmade disasters.

Whenever a person or community is arbitrarily displaced from their homes and lands the Principles can be used as guidance for how best to return the situation to what it once was. In recognising the restitution rights of all refugees and displaced persons with HLP losses in need of reversal, the Principles do not distinguish between categories of displaced persons in terms of defining their restitution rights, and this is particularly important in the case of Myanmar where displacement has taken a wide variety of forms. Ultimately, the Principles take the perspective that neither war, human rights abuses, development projects nor natural disaster are in and of themselves justifiable grounds upon which to legitimise the arbitrary or unlawful acquisition, expropriation or destruction of homes and lands over which refugees and displaced persons continue to retain rights. Grounded firmly in existing international law, policy and best practices, the Principles recognise the fundamental nature of housing, land and property restitution as a key concern of States and the international community, and ultimately as a fundamental feature of sustainable peace and development.

This important normative standard contains 23 Principles organised in the following manner:

- Principle 1 - Scope and application;
- Principle 2 - The right to housing and property restitution;
- Principle 3 - The right to non-discrimination;
- Principle 4 - The right to equality between men and women;
- Principle 5 - The right to be protected from displacement;
- Principle 6 - The right to privacy and respect for the home;
- Principle 7 - The right to peaceful enjoyment of possessions;
- Principle 8 - The right to adequate housing;
- Principle 9 - The right to freedom of movement;
- Principle 10 - The right to voluntary return in safety and dignity;
- Principle 11 - Compatibility with international human rights, refugee and humanitarian law and related standards;
- Principle 12 - National procedures, institutions and mechanisms;
- Principle 13 - Accessibility of restitution claims procedures;
- Principle 14 - Adequate consultation and participation in decision-making;
- Principle 15 - Housing, land and property records and documentation;
- Principle 16 - The rights of tenants and other non-owners;
- Principle 17 - Secondary occupants;
- Principle 18 - Legislative measures;
- Principle 19 - Prohibition of arbitrary and discriminatory laws;
- Principle 20 - Enforcement of restitution decisions and judgments;
- Principle 21 - Compensation;
- Principle 22 - Responsibility of the international community; and
- Principle 23 - Interpretation.

Q: ARE THE PINHEIRO PRINCIPLES RELEVANT TO MYANMAR?

A: Yes, they are. The question of housing, land and property restitution has received increased attention over the past several years throughout Myanmar as the country continues to consolidate recent democratic gains and political reforms. Paragraph 80 of the 2016 National Land Use Policy, for instance, asserts that: “The following priorities shall be carried out when implementing research initiatives, capacity building activities, educational programs and pilot projects: ...(n) Conduct research on best procedures for restitution of rights to land and housing of individuals, households and communities that had to abandon the area where they previously resided due to illegal land confiscation, civil war, natural disasters or other causes.” Paragraphs 38 and 39 continue by stating: “(38) When managing the relocation, compensation, rehabilitation and restitution related activities that result from land acquisition and allocation, unfair land confiscation or displacement due to the civil war, clear international best practices and human rights standards shall be applied, and participation by township, ward or village tract level stakeholders, civil society, representatives of ethnic nationalities and experts shall be ensured; (39) Relevant laws, rules and procedures shall be amended, repealed and newly enacted, if necessary to conform to the objectives, basic principles, practices and instructions in this policy.⁴ These provide a strong basis for more structural legislative and procedural attention to restitution in Myanmar. By simple virtue of the fact that the State of Myanmar is a formal member of various inter-governmental organisations, most notably the United Nations, it has committed to complying with international legal norms developed under the auspices of these organisations. As such, basic international law standards such as the *UN Charter*, the *UN Convention on the Law of Treaties*, the *Articles on State Responsibility*, the *UN Declaration on Human Rights* and countless others are as relevant to Myanmar as they are to all other sovereign States throughout the international community.

Moreover, the State of Myanmar has formally ratified several of the key international human rights treaties (though many more remain to be ratified) signalling their clear intent, in good faith, to comply with the rights and obligations these important standards generate.⁵ Consequently, vital international legal standards cannot be simply dismissed as irrelevant to the country, and in fact, such standards can provide useful guidance to the Government of Myanmar and its Ethnic Armed Group negotiating partners and assist in grappling with many of the fundamental challenges they face. Bearing all of this in mind, it is vital to point out that restitution as a legal principle and practice is far more common than is often realized. Many international standards address restitution issues, and dozens of peace agreements and voluntary repatriation agreements enshrine restitution rights for returning refugees and internally displaced persons.⁶

⁴ National Land Use Policy, Republic of the Union of Myanmar (January 2016).

⁵ Myanmar has ratified the following human rights treaties: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The Convention on the Rights of the Child (CRC) and the Convention on the Rights of People with Disabilities (CRPD). Importantly, in July 2015 Myanmar signed the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁶ Scott Leckie (2007) *Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials* (editor), Cambridge University Press.

Scores of resolutions adopted by the UN Security Council and UN General Assembly also address restitution concerns, as do numerous texts approved by various UN human rights bodies. All of these are pertinent to Myanmar to one degree or another. Regionally speaking, Myanmar is a signatory to the 2012 ASEAN Human Rights Declaration, which recognizes relevant principles such as the right to property and the right to an effective remedy.⁷ If the various governing authorities in Myanmar decide to undertake additional restitution measures to resolve the many outstanding HLP restitution claims in the country notwithstanding the nature of the land confiscation or displacement that occurred, important guidance can also be found in the experiences of other countries which have undertaken similar restitution programmes.

The list of such countries is far more diverse than often assumed, and includes Afghanistan, Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Colombia, Estonia, Georgia, Germany, Iraq, Kosovo, Romania, Rwanda, South Africa, South Sudan, Tajikistan and elsewhere. Political reform and peace processes in a range of countries led to the establishment of dedicated commissions and other bodies (including adjudicative bodies entrusted with making binding determinations) designed to facilitate the rights of returnees to return to, reclaim and re-possess their original homes. And there is nothing inherently unique about Myanmar that would preclude this as an option in the country as well.

⁷ ASEAN Human Rights Declaration and Phnom Penh Statement on its Adoption, available at: http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

Q: DOES MYANMAR LAW ADDRESS RESTITUTION RIGHTS?

A: Although the 2008 Myanmar Constitution does not explicitly single out recognition of restitution rights or contain a comprehensive right to adequate housing or concomitant rights to security of tenure or protection against forced eviction or displacement, as such, it does recognize a series of central HLP rights themes, and may, therefore, be useful as a foundational basis in pursuing an improved restitution environment in the country. Of central importance, it is useful to recall Article 37 of the Constitution, which notes that “The Union: 1. (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union; 2. (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces; and 3. (c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.” (emphasis added). While much can be said about Article 37, suffice it to say that the State has extensive powers over land in the country, and it will rest on the same State to ensure that these powers are exercised in a manner fully consistent with all of the rights relevant to those with restitution claims. Chapter VIII of the Constitution outlines fundamental rights and duties of citizens, and contains the following provisions which are relevant to the framework of housing, land and property rights and to eventual restitution guarantees: Article 347. The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection; 348. The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth....353. Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person....355. Every citizen shall have the right to settle and reside in any place within the Republic of the Union of Myanmar according to law. 356. The Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired. 357. The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution....372. The Union guarantees the right to ownership, the use of property and the

“All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin.”

PRINCIPLE 10.1 OF THE PINHEIRO PRINCIPLES

*Image: Rice fields in Palaw,
Tanintharyi, Myanmar
by NRC-Japeen*



right to private invention and patent in the conducting of business if it is not contrary to the provisions of this Constitution and the existing laws. Thus, understanding these constitutional norms in terms of how they address vital aspects of what the terms 'restitution' and 'HLP rights' mean in both law and practice, we can see that citizens of Myanmar have rights to equal protection of law, without discrimination, to settle and reside where they wish, to have their immovable properties, privacy, security of the home protected, and the right of ownership and use of property. These are all central HLP themes and both relevant and supportive to implementing restitution rights, even while they fall short of ensuring a comprehensive right to restitution, nor the full spectrum of HLP rights presumed with recognition of restitution rights.

Three national laws are particularly relevant to an eventual restitution programme, namely the *1894 Land Acquisition Act*, the *2012 Farmland Act* and the *2012 Vacant, Fallow and Virgin Land Act*.⁸ Without examining these Acts in detail, let it simply be noted that none of them recognise restitution rights as they are articulated under international frameworks, nor do they afford the full spectrum of HLP rights to all citizens of Myanmar.⁹ It is important to point out that all three of these laws are currently under review and are expected to be amended in 2017. Consequently, while Myanmar law and policy affecting the housing, land and property sectors has evolved in recent years, from the perspective of restitution the current legal framework will require enhancements if it is to play a positive role in assisting in building the legal foundations for successful restitution. Myanmar law relevant to the question of land and the ultimate restitution of land acquired arbitrarily and over which potential restitution claims may exist is multi-layered, often contradictory and comprised of legal principles which have never, in their entirety, been developed within the framework of democratic structures associated with representative democracy.¹⁰ A new comprehensive restitution law and claims process could change all this for the better.

⁸ For an overview of some of the structural flaws in both of the 2012 land laws, see: Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar, Food Security Working Group's Land Core Group, Yangon, November 2012, 13-14.

⁹ See, for instance: A detailed overview of the new HLP legislative framework in Displacement Solutions, Myanmar at the HLP Crossroads: Proposals for Building an Improved Housing, Land and Property Rights Framework that Protects the People and Supports Sustainable Economic Development, 2012.

¹⁰ See also: International Commission of Jurists Report - 3 May 2016 - Re: Implementable Action Plans from the ICJ to the new Parliament & Government - "The current land law does not protect human rights. New laws enacted in 2012 such as the Foreign Investment Law, the Vacant, Fallow and Virgin Land Law and the Farmland Law were designed to increase investment, encourage large-scale land use and promote agricultural income. Under this system fewer than half of Myanmar's people have land title. The protection of human rights in national law through national courts will improve the rule of law and thereby foster sustainable, rights-based development", 12.

Q: DOES MYANMAR POLICY ADDRESS RESTITUTION ISSUES?

A: Yes, however, much remains to be done. In contrast to prevailing law in the country, direct restitution references are now in place within various policy documents guiding action and decision-making on land questions. Most notably, and of great significance, is the 2016 *National Land Use Policy* (NLUP) noted above. A lengthy series of public consultations prior to the adoption of the NLUP enabled citizens from across the country to express their views on fundamental issues affecting them, including restitution. Although only technically a policy document providing guidance to government on how to approach relevant concerns such as restitution, because the NLUP is intended to be a precursor to a consolidated national land law, the inclusion of specific restitution norms is of vital importance. That the NLUP expressly indicates that restitution measures will be applied in line with international best practices and human rights standards and that relevant laws, rules and procedures will be created to make restitution a reality in the country, is an important stepping stone in the broader quest for restitution processes to take place.

Similar sentiments are also found in the 2015 Election Manifesto of the now governing National League for Democracy which states, inter alia, that: “We will strive, in accordance with the law, to ensure the return to farmers of illegally-lost land, and payment of compensation and restitution. We will defend against illegal land confiscation practices. We will amend the existing land laws that are not appropriate for the present era.” This again demonstrates the clear intention of the present government to address both the restitution demands of the people, as well as committing to preventing illegal land confiscation in the future.

At least one of the ethnic actors with whom the government is currently engaged in peace talks has also addressed restitution in detail, with others expected to do the same. The December 2015 *Land Policy of the Karen National Union* (KNU) notes that “internally displaced persons have the right to reoccupy their land, which they owned previously, and to receive compensation” (1.1.7); “1.2.5 – To recognize, prioritize and promote the rights of restitution of refugees and displaced persons who have been forced from their lands, livelihoods and homes”; and “1.2.9 – To establish an appropriate, accessible and effective system for addressing and remedying tenure-related grievances and disputes”. Article 4.2 of the KNU Policy specifically mentions their intent to comply with the Pinheiro Principles and to work closely with government bodies.

Q: ARE THERE EFFECTIVE JUDICIAL REMEDIES AVAILABLE FOR PEOPLE WITH RESTITUTION CLAIMS IN MYANMAR?

A: Unfortunately, not. Since the onset of the political reform process in 2011, the two governments in place have each established non-judicial government committees to address various land-related themes. In 2012 a *Parliamentary Land Confiscation Commission* (also sometimes referred to as the 'Farmland Investigation Commission') was created to investigate abuses in confiscation of land and make recommendations on cases where the government should take back land from concession holders, or pay households for uncompensated past expropriations. In the following year, a *Land Utilization Management Central Committee* was established and entrusted with implementing the recommendations of the *Parliamentary Land Confiscation Commission* and facilitating the return of seized land. The success of these bodies in restituting land to claimants remains an open question, with wildly divergent views on the scale to which actual restitution and/or compensation has occurred under these various measures.¹¹ Indicative of the seriousness of these restitution processes, the General Administration Department (GAD) of the Ministry of Home Affairs has developed a set of procedures for redistributing confiscated land that the current occupants/rights-holders wished to relinquish and return to their original owners, and which also specifically note that any compensation or restitution for annual or perennial crops would be subject to the rules outlined in the 1894 Land Acquisition Act and the 2012 Farmland Act.

The body currently responsible for examining land confiscation and potential restitution cases is the *Reinspection Committee of Farm Land and Other Land Acquisition*, which was formed by the Office of the Union President in May 2016. The *Reinspection Committee* is entrusted with resolving 'conflicts from farmland and other land acquisition', as well as to 'supervise solution procedures of the relevant Ministries, the Nay Pyi Taw Council or Division and State Governments in Connection with land acquisition expressed in the report of the Enquiry Commission submitted to the Union Parliament about farm land and other land acquisition', and to 'give back systematically the former affected persons the farmlands forsaken by the relevant ministries, companies and private enterprises'. The *Reinspection Committee* has also adopted a policy that dispossessed farmers should be compensated for their losses when the return of land is not possible. All of these are positive steps forward, but they fall well short of constituting a nationwide restitution process accessible to everyone with an as of yet unresolved HLP restitution claim.

¹¹ See, for instance, *Myanmar Centre for Responsible Business, Land – Briefing Paper* (March 2015), Yangon, (Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights): "This Committee has agreed to return land or provide compensation for 474,000 acres (699 cases) but in July 2014 reports suggested that less than 150,000 acres may be returned. In September 2014 the Parliamentary Commission presented a report to Parliament, citing many layers of bureaucracy as the main cause of extreme delays in returning land to farmers which had been taken by the government. Indeed, the official newspaper *The New Light of Myanmar* reported in September 2014 that the Commission said only 583 out of 2,689 complaints which they had forwarded to the Ministry of Defence, and only 299 out of 6,559 complaints forwarded to the State/Region Governments, had been addressed. Such delays indicate the lack of capacity in the government to deal with the large number and the complexity of land disputes, as well as a cumbersome legal and administrative regime."

Q: ARE THERE GAPS BETWEEN INTERNATIONAL NORMS ON RESTITUTION AND RELEVANT NATIONAL LAW IN MYANMAR?

A: Yes. A partial restitution journey has commenced in Myanmar, but as far as this process has traversed, there remain many issues that require clarity and resolution, improvements that need to be made in existing mechanisms, and a strong need for new legislative and procedural tools to be put in place to ensure that everyone in Myanmar with an outstanding restitution claim will have the free, unimpeded and guaranteed right to have such claims considered and resolved. Whatever restitution decisions are ultimately made by the people and authorities in Myanmar, it will be vital that a single, consolidated and legally consistent approach to restitution is taken that applies as much to those that were past victims of land acquisition as it does to those displaced because of conflict, the presence of land mines, ill-conceived development projects and other causes. To be consistent with international standards, the best practice of other States that have engaged in restitution and in the best interests of Myanmar, any restitution process must ensure, at a minimum, that everyone deserves, in accordance with the basic legal principle, an effective remedy for any acts of land confiscation determined by an independent, impartial and fair remedial body and commitments that such confiscation will not be repeated in the future.

Q: HAS RESTITUTION EVER TAKEN PLACE IN MYANMAR?

A: Yes, however in a very limited way. Displacement in Myanmar, of course, has a variety of causes and distinguishing between these various types – particularly for the purposes of potential restitution – will not always be easy or straightforward. Moreover, where government has thus far acted in support of the principle of restitution, e.g. through the establishment of new government committees such as the current *Reinspection Committee of Farm Land and Other Land Acquisition* this has generally been done in non-conflict contexts, however, the mandates of these bodies do not necessarily formally differentiate between types of displacement. If the ultimate goal in Myanmar is to ensure that everyone who suffered HLP losses as a result of displacement and land confiscation has the ability to have their losses restored to them in the form of an eventual restitution process, as we believe it must be, then arguably all forms of loss (non-conflict and conflict-induced displacement) should be able to be determined under a new restitution procedure.

Q: HOW DO I KNOW IF I HAVE A VALID RESTITUTION CLAIM?

A: HLP Restitution rights are based on a range of pre-existing international human rights norms. If you feel that any of these rights are not in place, you may have a valid restitution claim. Four of these are particularly relevant: (1) *The Right to Voluntary Return* - The right of refugees and IDPs to voluntarily return to their homes is one of the primary HLP restitution rights. Widely reaffirmed in numerous human rights standards, the right to voluntary return forms a cornerstone of the *Pinheiro Principles*. These provisions reflect the transformation of the right to voluntary return (or repatriation) into a concept involving not simply the return to one's country or region of origin, but to one's original home, land or property. Increasingly, therefore, return rights and HLP restitution rights need to be treated in tandem with one another. At the same time, the right to voluntary return – whether for refugees or displaced persons – is indeed not an obligation to return; it must be a free choice by those concerned, and procedures and mechanisms need to be developed to ensure that this right can be secured for all who wish to assert it. Practice clearly indicates that the presence of a viable and all-inclusive restitution programme will facilitate voluntary repatriation; (2) *The Right to Adequate Housing and Security of Tenure*: The right to adequate housing is found throughout international human rights law, most notably in Article 25(1) of the Universal Declaration on Human Rights in 1948, and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹² Those entitled to the right to adequate housing are legally entitled to housing that is adequate. Under *General Comment No. 4*, adequacy has been specifically defined to include: security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy, and this would apply to returning refugees and IDPs as much as it would to any other persons.¹³

Governmental obligations derived from this right include duties to take measures to confer security of tenure (and consequent protection against arbitrary or forced eviction and/or arbitrary confiscation or expropriation of housing); to prevent discrimination in the housing sphere; to ensure equality of treatment and access vis-à-vis housing; to protect against racial discrimination; to guarantee housing affordability; and many others. Returnees and displaced persons generally, as well as all other rights-holders, need to be assured that these rights will be protected and secured; (3) *The Right to be Protected Against Forced Evictions*: Building on the legal foundations of the rights to adequate housing and secure tenure, international standards increasingly assert that forced evictions constitute 'a gross violation of human rights, in particular the right to adequate housing'.

¹² Beyond the Universal Declaration and the Covenant, rights to housing are found in the Convention on the Elimination of All Forms of Racial Discrimination (art. 5(e)(iii)), the Convention on the Rights of the Child (art. 27(3)); the Convention on the Elimination of All Forms of Discrimination Against Women (art. 14(2)), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43(1)(d)), ILO Recommendation No. 115 on Workers' Housing and many other standards.

¹³ General Comment No. 4 on the Right to Adequate Housing (1991), Para. 8.

The 1998 *UN Guiding Principles on Internal Displacement* adopt a similar perspective and state clearly in Principle 6 that ‘Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence’. UN *General Comment No. 7 on Forced Evictions* (1997)¹⁴ issued by the UN Committee on Economic, Social and Cultural Rights, is perhaps the most detailed statement interpreting the view of international law on this practice, re-affirming the sentiments of the 1991 *General Comment No. 4* that: ‘[t]he Committee considers that instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law (para. 18)’. *General Comment No. 7* goes one step further in demanding that ‘the State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions’. The *Comment* requires countries to ‘ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards by private persons or bodies’. The 2015 signature by Myanmar of the ICESCR is particularly noteworthy in indicating the clear intent to ratify and bind itself in good faith to all of the norms found in this important treaty, as well as norms such as *General Comment No. 7*; and (4) *The Right Not to be Arbitrarily Deprived of One’s Property*: Closely related to the security of tenure question, and rights to privacy and respect for the home, the right not to be arbitrarily deprived of one’s property is widely addressed throughout human rights law. It is in determining the scope of both the rights of individuals and those of the State that we can determine which measures resulting in land confiscation and subsequent displacement are truly justifiable and which are not. While land acquisition/confiscation is not in and of itself a prohibited act, under human rights law it is subject to increasingly strict criteria against which all such measures must be judged to determine whether or not they are lawful. The power of States to expropriate carries with it five fundamental pre-conditions, namely when housing, land or property rights are limited, this can only be carried out when the expropriation concerned is: 1) subject to law and due process; 2) subject to the general principles of international law; 3) in the interest of society and not for the benefit of another private party; 4) proportionate, reasonable and subject to a fair balance test between the cost and the aim sought; and 5) subject to the provision of just and satisfactory compensation. Every act of land confiscation, acquisition, grabbing and expropriation, in Myanmar can be assessed against these five pre-conditions.

Influenced by and building upon these many clear restitution principles under international human rights law, the particular remedy of restitution stems ultimately from the broader right to an effective remedy for violations of human rights; a core right pervading this entire body of law.¹⁵ This means, of course, that victims of wrongful acts and/or human rights violations – including the arbitrary loss of residential resources and assets – must have an enforceable right to have the act or violation remedied, repaired and reversed.

If you have experienced abuses or violations of any of these or other relevant rights then you probably have a legitimate restitution claim.

¹⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997) - The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions (UN doc. E/C.12/1997/4), adopted 16 May 1997 by the UN Committee on Economic, Social and Cultural Rights at its 16th session, held in Geneva).

¹⁵ A right to an effective remedy for victims of violations of international human rights law is found in the Universal Declaration of Human Rights (UDHR) (Art. 8), the International Covenant on Civil and Political Rights (ICCPR)(Art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)(Art. 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)(Art. 11), the Convention on the Rights of the Child (CRC)(Art. 39), the African Charter on Human and Peoples’ Rights (Art. 7), the American Convention on Human Rights (Art. 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)(Art. 13).

Q: HAVE OTHER COUNTRIES DEVELOPED RESTITUTION PROGRAMMES?

A: Numerous other countries throughout the world that have undertaken formal restitution programmes over the past 25 years. Examples range from Bosnia-Herzegovina to Colombia, Germany to Estonia, Kosovo to El Salvador, Iraq to Georgia, Poland to Hungary, the Czech Republic and many others decided that redressing past acts relating to land confiscation was not only the right thing to do, but also the smart thing to do to build peace, reconciliation and to create better conditions for economic development.¹⁶ Many major peace agreements concluded over recent decades have also made explicit reference to HLP issues, including restitution, as areas vital for sustainable peace.¹⁷ Where these programmes have been successfully implemented they have formed fundamental steps in the larger quest for political stability and building the foundations of democracy. Indeed, the attributes of a modern, vibrant and prosperous society are all well served by courageous decisions to secure restitution rights to those with claims to this path to justice. Mass claims mechanisms, in particular, offer important advantages for the resolution of large groups of claims. These bodies define types of claims, according to the needs of a particular situation involving large-scale dispossession and thus involving the systematic disrespect of basic principles of justice. Mass claims mechanisms assume that such systematic pattern of abuses was the rule rather than the exception and reverses the burden of proof.¹⁸ Hence, defining the scope of the claim allows their grouping and a speedy decision making process on claims that present similar merits. Moreover, the processing of claims, including the provision of information to claimants, is computerized, increasing effectiveness and accessibility. Claimants often benefit from a free of charge process in which the investigation is carried out by the administrative body. The claimant does not need to hire a private lawyer for his or her claim. Moreover, the establishment of offices and mobile units allows the mechanism to reach displaced persons.¹⁹

Specialized bodies created to achieve restitution objectives have been created in Bosnia and Herzegovina (Commission on Real Property Claims), Burundi (National Commission for the Rehabilitation of Sinistrés), Colombia (The Land Restitution Unit), Georgia (Commission on Restitution and Compensation), Iraq (Iraq Property Claims Commission), Kosovo (Housing and Property Directorate and Housing and Property Claims Commission)²⁰, (South) Sudan (Land Commissions), Tajikistan (Local Courts), among many others.

¹⁶ See, for instance, Scott Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, Transnational Publishers, 2003, which provides detailed overviews of the restitution experiences of Bosnia-Herzegovina, East Timor, Guatemala, Rwanda, Kosovo, and South Africa, as well as analyses of as of yet unresolved restitution demands in Palestine, the Republic of Georgia, and Turkey.

¹⁷ These include El Salvador (1992), Mozambique (1992), Liberia (1993), Rwanda (1993), Bosnia-Herzegovina (1995), Guatemala (1995), Croatia (1995), Tajikistan (1997), Sierra Leone (1999), Burundi (2000), Liberia (2003), Sudan (2004), Great Lakes Protocol (2007 - Burundi, Central African Republic, Democratic Republic of the Congo, Kenya, Republic of Congo, Rwanda, Uganda and United Republic of Tanzania), Colombia (2016) and others. See, for instance, Scott Leckie, *Housing, Land and Property Rights and the Quest for Peace: Guidance for Peace Mediators*, Displacement Solutions, 2011.

¹⁸ R. Williams, 'The Contemporary Right to Property Restitution in the Context of International Justice' (2007), International Center for Transitional Justice Occasional Paper Series, 51.

¹⁹ Arraiza, Jose-Maria and Moratti, Massimo, 'Getting the Property Questions Right: Legal Policy Dilemmas in Property Restitution in Kosovo (1999-2009)', 21 (3) International Journal on Refugee Law, 421-452, 429.

²⁰ In Kosovo, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), modelled loosely on the CRPC, were established several months following the creation of the United Nations Mission in Kosovo (UNMIK) in 1999. See: UNMIK Regulation No. 1999/23 On the Establishing of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1999). See also: UNCHS (Habitat) Kosovo Program (22 Sept. 1999) Establishing the UNMIK Housing and Property Directorate (HPD).

There are other such institutions, human rights standards and pronouncements supporting housing, land and property restitution²¹, but suffice it to say that in 2017 there is nothing to prevent, either in Myanmar or globally, the recognition of restitution rights in law, policy and practice. A situation has arisen where specific norms, bodies and procedures have been created, while simultaneously large numbers of people have returned to and reclaimed their former places of residence or received just and satisfactory compensation in countries ranging from Bosnia and Herzegovina to Tajikistan and from South Africa to Kosovo. Under the restitution processes in Germany (concerning former East Germany) claims were made for 2.7 million pieces of property. In the Czech Republic property collectively valued at US\$ 10.7 billion has been successfully restored to its former owners, and Estonia where more than 200,000 applications for the restitution of 160,000 properties were received by the bodies responsible for managing the nationwide restitution programme. In Colombia, up to 360,000 households or 1.5m people may be eligible for restitution under the restitution programme there. Norms and facts, thus, have increasingly intersected, and laws on restitution have actually been taken seriously and enforced.

The point here, therefore, is that during the last three decades an historic shift took place where – at least as far as restitution is concerned – some of the world’s politically least organized and economically weakest groups, were enabled to assert claims and recover HLP rights that in earlier eras would have been virtually impossible to even contemplate. From the age-old tendency of ‘once displaced, always displaced’, we have been transported to a period more aptly captured by ‘once displaced, increasingly entitled to return home’. And, yet, it would be foolhardy to pretend that the restitution process has always gone smoothly, been entirely equitable or universally enjoyed by all of those with rights to return to their original homes. Indeed, we cannot overstate this point enough; the struggle for restitution remains. Nevertheless, this should not detract from the significance of the new embrace of restitution as a right for ever-increasing proportions of the displaced. This physical reversal of former acts of injustice – in this case the arbitrary theft, occupation or expropriation of one’s home and lands, without justification or compensation - represents nothing less than a human rights milestone in terms of actually undoing infringements of human rights law.

²¹ *Id.*

Q: WHAT ARE THE TEN MAIN ASPECTS OF A SUCCESSFUL RESTITUTION PROGRAMME?

A: Broadly defined, ten key aspects of any successful restitution programme would include: 1. Governing authorities (including the State and, where the effective control of the State is absent, other groups exercising jurisdiction over territories and people, whether under dispute or not) retain legal and political responsibility for securing restitution rights for all who assert such rights notwithstanding when the acts and omissions, generating restitution claims occurred; 2. Notwithstanding the cause of forced displacement everyone must have equal access to a restitution remedy; 3. Everyone with a restitution claim must have access to an effective remedy for reviewing such claims; 4. Securing the independence, impartiality and fairness of any restitution process is vital for its eventual success; 5. Everyone deserves a commitment to the non-repetition of acts and omissions that generated restitution claims; 6. Restitution can take various forms, all of which are fair, equitable and just; 7. Restitution processes should be quick, fair, effective and affordable, and set within an agreed time-frame, both in terms of how far back in time claims can go and how long citizens will have to submit restitution claims; 8. Restitution is an essential element of the peace process. Including restitution rights within relevant national legislation, peace agreements and voluntary repatriation/return agreements will be vital to provide a basis for an eventual restitution programme; 9. Restitution is a tool for conflict prevention. Ignoring the restitution demands of returnees will tend to aggravate rather than reduce tensions or violence; and 10. Restitution is beneficial for the economy. The growing awareness that the resolution of housing, land and property restitution claims and disputes can be a vital contributor to economic and social stability, as well as broader reconciliation efforts within post-conflict peace building efforts. Myanmar will be a better country if restitution demands are met in the near term.



Image: Loikaw, Kayah State, Myanmar by José Arraiza

Q: HOW CAN THE PEACE PROCESS CONTRIBUTE TO THE RESTITUTION IDEAL?

A: No conflict, notwithstanding its nature, or how small or short in duration it may be, is without some degree of crisis within the housing, land and property spheres, and Myanmar is no exception. International experience has consistently shown that restitution is a valuable path to pursue to overcome such challenges, and consequently these concerns must find a central place within the ongoing peace process, and within the eventual peace agreement(s). The October 2015 *Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations* contains some important overtures to various HLP concerns²², but does not address restitution directly, nor develop proposals in this regard, but the central nature of land issues is clearly well-known on all sides.

As the peace process continues to evolve, it will be vital to promote a unified approach to restitution by all of the ethnic actors involved in the negotiations to ensure the strongest possible recognition of restitution rights within any eventual peace agreements, and to ensure a consolidated approach to restitution that is fully consistent with restitution initiatives in the country outside the context of the peace process.²³ Finding mutually acceptable answers to these and numerous other HLP challenges - that are fully in compliance with international law - will be an important aspect of the ongoing peace processes between the Government and ethnic groups. All sides to the various conflicts will be best served by a robust, open and clear discussion of HLP restitution issues and the development of proposals and agreements that address these issues in all of their complex manifestations.

²² See, for instance: Protection of Civilians - 9. The Tatmadaw and the Ethnic Armed Organizations shall abide by the following provisions regarding the protection of civilians: a. Provide necessary support in coordination with each other to improve livelihoods, health, education, and regional development for the people... c. Avoid forcible displacement or relocation of local populations. d. Avoid forcibly taking money, property, food, labor or services from civilians... f. Avoid forcible confiscation and transfer of land from local populations... g. Avoid the destruction of public property, looting, theft, or the taking of property without permission. Provision of humanitarian assistance - 10. The Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations shall abide by the following provisions regarding the provision of humanitarian assistance: a. Relevant Government ministries, the Ethnic Armed Organizations and local organizations shall coordinate with each other when implementing delivery of humanitarian assistance by the NGOs and INGOs to Internally Displaced Persons (IDPs) and conflict victims with the approval of the Government of the Republic of the Union of Myanmar. b. Ensure the safety and dignity of the IDPs when undertaking a prioritized voluntary return of IDPs to their places of origin or resettlement of IDPs into new villages in suitable areas. c. Collaborate on the resettlement process including verification of IDPs and refugees.

²³ See: International Crisis Group, Myanmar's Peace Process: Getting to a Political Dialogue. Crisis Group Asia Briefing No. 149, Yangon/Brussels, 19 October 2016.

Q: HOW CAN REFUGEES AND DISPLACED PERSONS ADVOCATE FOR GREATER PROTECTION OF RESTITUTION RIGHTS?

A: Despite important progress in the restitution quest at so many levels, a distinct minority of those with valid HLP restitution claims in Myanmar have received true redress for their various land grievances, and thus much remains to be done to achieve restitution for all, an objective that can only be reached through the establishment of a new nationwide restitution law and programme. Establishing a comprehensive restitution programme in Myanmar will be a considerable challenge, but by no means an insurmountable one. A growing number of people and organisations in Myanmar are beginning to focus on the need for greater attention to restitution, and the imperative of redressing past land grievances as a fundamental prerequisite of longer-term peace, reconciliation and the entrenchment of the rule of law.²⁴ Several organisations are already engaged with communities seeking to restore their rights over land they consider to be theirs, while other groups are directly engaged with government, assisting it in their land reform and others efforts.

As interest and work in support of restitution grows in the country, a shared vision of what restitution means in today's Myanmar needs to emerge, and this can perhaps best be achieved with the establishment of a well-coordinated Myanmar Restitution Organisation, perhaps at least partially modelled on the successful restitution movements formed following World War II, as well as similar movements for restitution in countries such as South Africa and Colombia. Once established, a Myanmar Restitution Organisation could act as a national clearinghouse of information, advocacy and advancement of the restitution cause in the country. Such a platform would enable consistent and consolidated strategies in support of restitution to emerge, and would constitute a key actor entrusted with building a national movement in support for further action on restitution comprised of non-conflict and conflict-based land grievances and restitution claims. The first public action of the Myanmar Restitution Organisation could be the hosting of a national restitution conference to bring together all relevant actors and to develop a common framework for pushing the restitution boundaries ever further, actions which could also include the development of a public database on resolved and outstanding restitution claims, combined with a national assessment map revealing the precise locations and current uses of land parcels subject to restitution claims.

²⁴ See, for instance, Tin Htet Paing, Civil Society Groups Demand National Land Restitution Policy for Displaced Communities, *The Irrawaddy*, June 9, 2016, which notes the aim of establishing "a national platform for displaced communities to be able to claim land and property rights, review international standards and increase joint advocacy".

CONCLUSION

Millions of people from Myanmar, both refugees and internally displaced persons, have been displaced over the past several decades and retain valid claims for HLP restitution that have yet to be considered by an official restitution body. In accordance with international standards and best practice, these people, as people everywhere, have clear housing, land and property restitution rights to return to and reclaim their original homes and lands.

This Guide has outlined a series of questions and answers seeking to explain the concept and practical aspects of the restitution process and how this applies to the situation in Myanmar. It has shown that while some aspects of a comprehensive restitution programme are in place, much work remains to be done by all parties, particularly in the context of the peace processes currently underway, to recognise the centrality of restitution concerns to the quest for a sustained peace and reconciliation between all the peoples of Myanmar.

Restitution offers a clear pathway through which peace and reconciliation can be facilitated, and whereby past abuses of HLP rights can at last be remedied.

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