

# **PROPERTY RESTITUTION**

## **INTRODUCTION**

This chapter identifies the core elements of property restitution mechanisms. This chapter also outlines the provisions of the Darfur Peace Agreement related to property restitution and provides sample language parties may wish to consider when drafting provisions establishing a property restitution authority.

States generally recognize a right to own and possess property, but displaced persons who return home usually find that secondary occupants have occupied or destroyed their property. States often establish a land commission to adjudicate property claims. States also usually implement programs to communicate with displaced persons to inform them of the process for filing claims for property restitution. A land commission may have exclusive jurisdiction to adjudicate property disputes, or it may have an investigatory function and refer evidence of claims to a civil domestic court for adjudication. A land commission may include members from international organizations or it may consist only of members of the parties to the peace agreement.

States may provide two forms of property restitution including the physical return of property or financial compensation in situations where physical return is not a viable option. Peace agreements may include provisions that make the decisions of a land commission final and binding on all interested parties. Parties to peace agreements may consider creating a property rights ombudsman to ensure that domestic institutions do not violate the property rights of displaced persons and implement the enacted property restitution system.

The 2006 Darfur Peace Agreement (DPA) guarantees the right of displaced persons to recover their property or to receive compensation if return of property is not possible. The DPA also establishes the Darfur Relief and Rehabilitation Commission, which oversees the local Property Claims Committees that mediate property disputes in particular geographic areas. The Property Claims Committees must refer unresolved disputes to local authorities for adjudication, and the Property Claims Committees must rely on local authorities to implement its decisions. The DPA provides that the Human Rights Commission created by the Interim National Constitution shall ensure the protection of human rights, including property rights.

## CORE ELEMENTS

### Governing Principles

The United Nations formally endorsed the Principles on Housing and Property Restitution for Refugees and Displaced Persons, also known as the Pinheiro Principles, in August of 2005.<sup>1</sup> These principles enumerated several core elements of property restitution mechanisms consistent with state practice. The Pinheiro Principles, provide that property restitution mechanisms and institutions must be “equitable, timely, independent, transparent, and non-discriminatory.”<sup>2</sup> States must set aside adequate resources to support property restitution mechanisms.<sup>3</sup>

To ensure that potential claimants are aware of the availability of the procedures, the Pinheiro Principles require procedures for filing property restitution claims to be clear and easy to understand.<sup>4</sup> The Pinheiro Principles further require that all displaced persons, regardless of their location, have access to property restitution procedure, that the procedures permit claimants to obtain legal assistance in the submission and prosecution of their claims, and that claimants have adequate time to file claims.<sup>5</sup> In addition to enumerating international standards for property restitution mechanisms, the Pinheiro Principles outline the rights of refugees and internally displaced persons to property restitution.<sup>6</sup>

### Establishing Property Rights

The rights of refugees and internally displaced persons to property restitution commonly include: (1) property rights for all men, women and children;<sup>7</sup> (2) fair compensation for expropriated property;<sup>8</sup> (3) the right to

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<sup>1</sup> Commission on Human Rights, *Final Report of the Special Rapporteur, Paulo Sergio Pinheiro: Principles on Housing and Property Restitution for Refugees and Displaced Persons*, U.N. DOC. E/CN.4/Sub.2/2005/17 (June 28, 2005) [Pinheiro Principles].

<sup>2</sup> Pinheiro Principles, para. 12.1.

<sup>3</sup> Pinheiro Principles, para. 12.5.

<sup>4</sup> Pinheiro Principles, para. 13.7.

<sup>5</sup> Pinheiro Principles, paras. 13.4, 13.11, and 13.9.

<sup>6</sup> Pinheiro Principles, sec. III.

<sup>7</sup> Pinheiro Principles, para. 4.1.

<sup>8</sup> Pinheiro Principles, paras. 21.1 and 21.2.

collective forms of ownership;<sup>9</sup> (4) the rights of tenants to participate in the property restitution process;<sup>10</sup> and (5) the rights of secondary occupants or occupants of the property during the course of conflict other than the original owners.<sup>11</sup>

### *Right to Restitution or Compensation*

Many states provide a general right of voluntary return for displaced persons including a right to property restitution. States may include general property restitution provisions in a peace agreement, which do not detail eligibility provisions or rules of procedure. A peace agreement that does not provide mechanisms to enforce property restitution rights may give the parties more time to establish an agreeable and enforceable system for adjudicating and enforcing property restitution claims.

In June 1998, the Croatian parliament enacted the Programme of Return and Accommodation of Expellees, Displaced Persons and Refugees (Return Programme).<sup>12</sup> This legislation promoted the return of property to persons displaced during the conflicts in the 1990s by acknowledging the unconditional right of return of those who were former residents of Croatia, regardless of citizenship. The legislation also created procedures through which returnees could repossess property. Additionally, the Return Programme established local Housing Commissions to oversee the return of occupied private properties to their pre-war owners.<sup>13</sup>

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<sup>9</sup> Pinheiro Principles, paras. 13.6 and 15.3.

<sup>10</sup> Pinheiro Principles, paras. 13.6 and 16.1.

<sup>11</sup> Pinheiro Principles, paras. 17.1.

<sup>12</sup> The United Nations High Commissioner for Refugees and the Organization for Security and Cooperation in Europe assisted the Croatian parliament in the drafting of the Programme of Return and Accommodation of Expellees, Displaced Persons and Refugees.

<sup>13</sup> INTERNAL DISPLACEMENT MONITORING CENTRE, RETURN POLICY OF THE CROATIAN GOVERNMENT: PERSISTENT DISCRIMINATION AGAINST SERB RETURNEES (1997-2001), *available at* [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/EFE12F95264DFEF3802570B8005A7019?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/EFE12F95264DFEF3802570B8005A7019?OpenDocument) (last accessed Sept. 22, 2007).

The Interim South African Constitution included a guarantee of property restitution for dispossessed persons.<sup>14</sup> The Constitution granted the South African parliament the authority to enact legislation to implement the property restitution system laid out in the Constitution.<sup>15</sup> The Constitution established a Commission on Restitution of Land Rights with authority to mediate and settle property disputes and to refer any unsettled disputes to a civil court.<sup>16</sup>

Mozambique's General Peace Agreement provides that "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it."<sup>17</sup> Additionally, a 1993 agreement between Mozambique, Zimbabwe, and the UN granted returnees access to land for resettlement and use, but the agreement subjected this use to established Mozambican laws.<sup>18</sup>

The Republic of Tajikistan, with the assistance of United Nations High Commissioner for Refugees and Organization for Security and Co-operation in Europe, adopted specific legislative measures to address the large-scale secondary occupation of returnee homes. The legislation required relevant authorities to take measures to return property to displaced persons that they had inhabited prior to their forced migration. If it was not possible to return the property to displaced persons the Council of Ministers of the Republic of Tajikistan would determine the manner and amount of compensation to be provided to those displaced persons.<sup>19</sup> The law also guaranteed displaced persons the freedom of movement, the right to choose one's residence, the right to rent-free accommodation in places of

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<sup>14</sup> SOUTH AFRICA INTERIM CONST. ch. 8, art. 121, para. 2 (1993), *available at* <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/index.html> (last accessed Sept. 22, 2007).

<sup>15</sup> SOUTH AFRICA INTERIM CONST. ch. 8, art. 121, para. 1 (1993).

<sup>16</sup> SOUTH AFRICA INTERIM CONST. ch. 8, art. 122 (1993).

<sup>17</sup> General Peace Agreement for Mozambique, Protocol III, sec. IV, para. e, April 10, 1992, *available at* [http://www.usip.org/library/pa/mozambique/mozambique\\_1991-92\\_toc.html](http://www.usip.org/library/pa/mozambique/mozambique_1991-92_toc.html) (last accessed Sept. 22, 2007).

<sup>18</sup> Bina Hanchinamani, *The Impact of Mozambique's Land Tenure Policy on Refugees and Internally Displaced Persons*, HUMAN RIGHTS BRIEF, Winter 2000, *available at* <http://www.wcl.american.edu/hrbrief/07/2mozambique.cfm> (last accessed Sept. 22, 2007).

<sup>19</sup> The Law of the Republic of Tajikistan on Forced Migrants (1994), art. 7, *available at* [http://www3.brookings.edu/fp/projects/idp/Tajikistan\\_LawonForcedMigrants.pdf](http://www3.brookings.edu/fp/projects/idp/Tajikistan_LawonForcedMigrants.pdf) (last accessed Sept. 23, 2007).

temporary residence, protection against forced return to the place of previous residence, and other such guarantees.<sup>20</sup>

### *Uniformity of Property Laws and Guarantees*

Property restitution provisions often include safeguards for private and communal property rights and a just compensation clause, which provide a framework for the protection of private and communal property and guarantee just and timely compensation.

Mozambique's Land Act of 1997 recognized customary rights in rural and local communities, and granted the rights to use this land to individuals, communities, and companies. The Land Act also recognized the rights of women to hold land titles and prohibited discriminatory treatment of women exercising this right. The Land Act further provided for 100-year land use rights; the use of verbal evidence from community members regarding land occupancy; new occupancy rights to prevent overlapping title issues; and individualized title acquisition if a claimant affirmatively removes himself from communal jurisdiction.<sup>21</sup>

### **Communicating with Claimants**

State practice illustrates that communicating with property restitution claimants is a significant challenge to the property restitution process. According to the Pinheiro Principles, claimants must be informed of either their right to make a property restitution claim or notified that a property in which they have an interest is the subject of such a claim.<sup>22</sup> Communication with claimants is often difficult, however, in part because interested parties are often refugees or displaced persons without a permanent address. Claimants also may be unwilling or unable to appear before a land commission or prepare the appropriate records to file a claim.

To improve communication with claimants, states may establish multiple land commission offices. Kosovo and Bosnia and Herzegovina established multiple land commission offices where many claimants owned property in rural

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<sup>20</sup> The Law of the Republic of Tajikistan on Forced Migrants (1994), art. 6.

<sup>21</sup> Bina Hanchinamani, *The Impact of Mozambique's Land Tenure Policy on Refugees and Internally Displaced Persons*, HUMAN RIGHTS BRIEF, Winter 2000.

<sup>22</sup> Pinheiro Principles, para. 13.7.

areas and feared returning to their homes. Moreover, many claimants had fled to Serbia and feared returning to Kosovo or Bosnia and Herzegovina. To ensure that claimants felt safe submitting their claims and to more efficiently address displaced persons' property restitution claims, the state established multiple land commission offices in areas where claimants temporarily resided.<sup>23</sup>

## **Gathering Records**

Property restitution mechanisms often include methods displaced persons can use to recover property records. Conflicts and natural disasters often lead to the destruction or loss of property records. Even where governments are able to preserve official records, few displaced persons have access to their individual property records. Displaced persons often are unable to travel to the capital or other central location to retrieve property records from government institutions.

States may create commissions or seek assistance from the international community to determine property rights of displaced persons where property records are otherwise inaccessible. In Bosnia and Herzegovina, most displaced persons did not have access to property records after the war. The Bosnian Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) verified most claims at the municipal level. Pre-war legal problems, such as poorly maintained records and rampant illegal construction, complicated the verification process. To maximize efficiency, the CRPC established an administrative determination process, which involved checking claims against electronic survey records and census data wherever possible.<sup>24</sup>

In Aceh, Indonesia, the World Bank sponsored a project to identify land ownership and issue land titles as part of its efforts to assist in tsunami recovery. The World Bank worked with non-governmental organizations, mobilized by the tsunami, to create a community land inventory, recover land records, and establish a land database. The World Bank checked their compiled property records against pre-tsunami satellite pictures, official government records and recovered land title documents. As of December 2006, the Aceh Land Administration Agency,

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<sup>23</sup> MARCUS COX & MADELINE GARLICK, *MUSICAL CHAIRS: PROPERTY REPOSSESSION AND RETURN STRATEGIES IN BOSNIA AND HERZEGOVINA*, IN *RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS* (2003), at 73.

<sup>24</sup> MARCUS COX & MADELINE GARLICK, *MUSICAL CHAIRS: PROPERTY REPOSSESSION AND RETURN STRATEGIES IN BOSNIA AND HERZEGOVINA*, IN *RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS* (2003), at 72-73.

through the support of the World Bank, had surveyed over 138,000 parcels of land and registered over 27,000 titles in the land records, securing property rights for the owners of those parcels.<sup>25</sup>

## **Land Commissions and Adjudication Authorities**

Property restitution commissions are a common element of any property restitution agreement.<sup>26</sup> Traditional judicial institutions are often incapable of adjudicating the quantity of property claims arising from the return of displaced persons.<sup>27</sup> Property restitution commissions provide a speedy mechanism for resolving disputes. Speedy resolution of property disputes may also reduce tension over land.

States have established commissions to hear and mediate the claims of individuals who have lost possession, ownership, or occupancy of land in the course of conflict. These commissions may address claims of those displaced during conflict or formalize informal property transactions that took place during conflict.

### *Jurisdiction and Authority*

States usually establish land commissions to resolve property disputes created by the return of displaced persons. Land commissions usually have the authority to assign title, mortgage, lease, and dispose of disputed or abandoned property.<sup>28</sup> Land commissions typically also have the ability to make legally binding decisions.<sup>29</sup> A land commission may function as an independent, quasi-judicial institution when parties to a property restitution agreement believe that the existing courts or administrative institutions are incapable of adjudicating property

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<sup>25</sup> MULTI DONOR FUND FOR ACEH AND NORTH SUMATRA, RECONSTRUCTION OF ACEH LAND ADMINISTRATION SYSTEM, *available at* <http://www.multidonorfund.org/p-land.html> (last accessed Sept. 17, 2007).

<sup>26</sup> Kosovo, Burundi, South Africa, Aceh, Georgia, and Bosnia and Herzegovina have established land commissions.

<sup>27</sup> State judicial institutions frequently do not have the resources to adjudicate tens of thousands of claims by displaced persons.

<sup>28</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, art. XII, paras. 1-8, Nov. 21, 1995, *available at* [http://www.usip.org/library/pa/bosnia/dayton\\_gfa.html](http://www.usip.org/library/pa/bosnia/dayton_gfa.html) (last accessed Sept. 17, 2007).

<sup>29</sup> For more information about the binding decisions of land commissions, see the section on Enforcement later in this chapter.

restitution disputes. The conflict in Kosovo significantly reduced the capacity of judicial and administrative institutions. Kosovo established a Housing and Property Claims Commission with exclusive jurisdiction to hear and adjudicate property disputes.<sup>30</sup>

In Bosnia and Herzegovina, the land commission resolved disputes and relied on judicial and administrative institutions to enforce the land commission's decisions. The parties to the General Framework Agreement for Peace in Bosnia and Herzegovina designed the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) to investigate and mediate potentially hundreds of thousands of property disputes. To maximize efficiency, the CRPC established an administrative determination process, which involved checking claims against electronic survey records and census data wherever possible. The commission did not hold oral hearings or attempt to contact the current occupant of a disputed property. However, it established a flexible internal appeals process, which was open to any interested party who was able to present new evidence to challenge a decision. The CRPC settled 217,000 disputes by 2002, but did not have any enforcement mechanism. The CRPC relied on the courts and administrative agencies to uphold and enforce its decisions.<sup>31</sup>

### *Composition*

The appointment of international experts to a land commission is a common mechanism used to alleviate concerns about the impartiality of such a commission. Land commissions in Bosnia and Herzegovina, Georgia, and Kosovo have all had international experts serve on the commissions. While these international experts may increase the perceived impartiality of the commission, the appointment of international representatives typically requires that the state translate all claims and supporting documents.

The Bosnian Commission for Real Property Claims of Displaced Persons and Refugees was composed of nine members. Four members were appointed by the Federation of Bosnia-Herzegovina, two members were appointed by Republika

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<sup>30</sup> ALAN DODSON & VEIJO HEISKANEN, HOUSING AND PROPERTY RESTITUTION IN KOSOVO, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 230-231.

<sup>31</sup> MARCUS COX & MADELINE GARLICK, MUSICAL CHAIRS: PROPERTY REPOSSESSION AND RETURN STRATEGIES IN BOSNIA AND HERZEGOVINA, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 72-75.

Srpska, and three members were appointed by the President of the European Court of Human Rights. The President of the European Court of Human Rights was also responsible for designating the chairman of the commission from among one of the three members appointed the President.<sup>32</sup> Similarly, the Draft Law of Georgia on the Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict established a commission made up of twelve seats split equally among representatives of the Georgian government, representatives from the Ossetian party, and representatives from international organizations.<sup>33</sup>

Alternatively, the parties to a property restitution agreement may wish to negotiate the membership of the land commission as part of an overall peace agreement and forgo the use of international experts. In this way, the Arusha Peace and Reconciliation Agreement for Burundi established a land commission. The parties to the Arusha Agreement and the Government of Burundi selected members to represent them in the land commission.<sup>34</sup>

## **Procedural Standards**

Creating clear procedural standards that define the responsibilities of each administrative and adjudicative agency may prevent inconsistent implementation of property restitution mechanisms. Parties may choose to include provisions that set deadlines for filing claims, define claimants' eligibility, and establish fixed evidentiary burdens.

### *Initial Call for Property Claims*

The claims adjudication process generally begins with a public call for claims using widespread media to inform claimants. The call typically requires claimants to file available documentation of ownership, affidavits detailing removal from or seizure of property, past and current citizenship or residency of claimant, and claimant's private, commercial, civic, or public status.

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<sup>32</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, art. IX.

<sup>33</sup> Draft Law of Georgia on Rehabilitation and Restitution of Property of Victims of the Georgian-Ossetian Conflict (2006), art. 10, *available at* [http://www.venice.coe.int/docs/2006/CDL\(2006\)003-e.pdf](http://www.venice.coe.int/docs/2006/CDL(2006)003-e.pdf) (last accessed Sept. 24, 2007).

<sup>34</sup> Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, art. 3, para. a, Aug. 28, 2000, *available at* [http://www.usip.org/library/pa/burundi/pa\\_burundi\\_08282000\\_toc.html](http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html) (last accessed Sept. 17, 2007).

The Law on Abandoned Apartments in Bosnia required Bosnian authorities to draft claim forms and accompanying procedure manuals to inform municipal housing offices on how to implement the property claims legislation. The international community assumed these responsibilities due to inaction by Bosnian authorities and a fear that the Bosnian authorities may misinform or not inform Bosnians about the claims process. The international community launched a widespread campaign to inform potential claimants of the procedure for filing claims using billboards, roundtables, newspaper and radio advertisements, television spots, call-in shows, and websites. This campaign distributed information throughout Bosnia-Herzegovina, Western Europe, and North America.<sup>35</sup>

In South Africa, while the property restitution system settled some claims in the years after the implementation of the restitution program, the adjudication process was slow. Some commentators noted problems in South Africa's property restitution system, including the centralized and bureaucratic nature of the property restitution system, the lack of harmony among the property restitution institutions, and the limited resources and powers of the Commission on Restitution of Land Claims.<sup>36</sup>

#### *Dates of Eligibility and Filing Deadlines*

To establish a clear timetable for property restitution claims, parties generally consider the start and end dates for which claims are eligible and the deadline for filing claims.

South Africa's property restitution system establishes elements that potential claimants must satisfy to be eligible to apply for property restitution. These elements include requiring applicants to show that they have been (1) dispossessed (2) of a right of land (3) after June 19, 1913 (4) because of past racially discriminatory laws or practices. South Africa chose the 1913 date because the former government enacted the discriminatory Land Act in that year. The Government of South Africa created redistribution and tenure reform programs to

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<sup>35</sup> Lynn Hastings, *Implementation of the Property Legislation in Bosnia and Herzegovina*, 37 STANFORD J. OF INTL. L. L. 221, 231 (2001).

<sup>36</sup> MONTY J. ROODT, LAND RESTITUTION IN SOUTH AFRICA, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 243-271.

assist people who lost their land prior to 1913.<sup>37</sup> Establishing an end date for property restitution claims may ease management of an overwhelming load of claims in an administrative effort with limited resources.

The second crucial date is the deadline for filing claims. Bosnia set multiple deadlines, with commercial claims filed by a set date and residential claims by a later date. Claimants were required to file supporting documentation after filing their claim with the Bosnian Commission for Real Property Claims of Displaced Persons. The Office of High Representative in Bosnia and Herzegovina extended the deadline for filing claims after it concluded that Bosnian authorities had obstructed the filing process.<sup>38</sup> Parties to any property restitution agreement also may wish to consider extending the filing deadline, depending on the success of the initial call for claims.

### *Eligibility and Claimant Classification*

Setting standards for eligibility and creating classes of claimants may increase the manageability of property restitution claims. Property restitution systems routinely divide claimants into different categories. Different categories of claimants may have different rights. States may also divide property into different categories such as private property, communal, and commercial property. If states divide property into different categories, each category of property may have a different procedure for the adjudication of claims.

The South African Interim Constitution of 1994 granted the land commission the authority to resolve disputes over property claimed individually or collectively by the tribe or village who previously held the land. Eligibility for property restitution claims was contingent upon the claimants' status as victims of a racially discriminatory law. The South African Constitution of 1996 widened the eligibility requirements by allowing victims of racially discriminatory practice as well as racially discriminatory laws to file property restitution claims.<sup>39</sup>

### *Evidentiary Burdens*

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<sup>37</sup> MONTY J. ROODT, LAND RESTITUTION IN SOUTH AFRICA, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 247-248.; Lynn Hastings, *Implementation of the Property Legislation in Bosnia and Herzegovina*, 37 STANFORD J. OF INTL. L. 221, 234 (2001).

<sup>39</sup> MONTY J. ROODT, LAND RESTITUTION IN SOUTH AFRICA, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 250.

A successful property restitution system requires parties to establish evidentiary burdens that claimants must satisfy to receive property restitution. The lack of property records may present obstacles to claimants seeking to prove ownership of a property. If documentation and property records are accessible, the land commissions may require claimants to present the necessary documentation to substantiate their claims. In states where claimants do not have access to property records and other documentation, the land commissions may relax the requirements for evidence of ownership.

Property restitution procedures may require oral and/or written testimony of claimants and witnesses to meet the established evidentiary burden. Displaced persons who allege that they were forced to sign sale or rental contracts under duress or coercion at the time of flight may benefit from the testimony of neighbors or other witnesses where documentation of ownership is unavailable. States may require claimants to provide other evidence, including testimony, to corroborate their claims of property ownership.<sup>40</sup>

The amount of evidence required likely will affect the speed of the resolution of property restitution claims. In South Africa, prior to the adjudication of property restitution claims, the land commission required investigations and substantial evidentiary documentation. These requirements inhibited speedy resolution of property restitution claims and consumed much of the commission's available resources.<sup>41</sup>

## **Remedies**

States often provide two remedies for property claims. Claimants may receive restitution or, where restitution of the property is not a viable option, claimants may receive compensation. Claimants may obtain two types of restitution: (1) natural restitution whereby the property claimed by the displaced person is returned, also known as repatriation; and (2) substitutional restitution whereby claimants receive a replacement property of equivalent value to their

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<sup>40</sup> SCOTT LECKIE, *NEW DIRECTIONS IN HOUSING AND PROPERTY RESTITUTION, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS* (2003), at 52.

<sup>41</sup> The Restitution of Land Rights Act of 1994 establishes the authority of the Commission on Restitution of Land Rights to demand documentation from individuals as well as from communities making claims to property. The Restitution of Land Rights Act of 1994, sec. 12.

claimed property. Compensation usually results in cash payments or government securities equivalent in value to the disputed property.

### *Restitution*

States that provide for restitution may either return property to its original owners or provide claimants with other property to replace the property they lost. Prior to settlement of a property restitution claim, displaced persons usually require temporary housing. In Tajikistan, the government was required to provide displaced persons with free temporary housing pending the settlement of property restitution claims. The Tajikistan government also allowed displaced persons who were in the process of selecting a new permanent residence to receive government administered accommodations<sup>42</sup>

Secondary occupants who inhabit property subject to a restitution claim may be displaced when the original owners of the occupied property return and successfully obtain restitution. States may provide restitution to these secondary occupants. During the conflict in Bosnia and Herzegovina, the government enacted laws allowing reallocation of properties that displaced persons abandoned when they fled their homes because of the violence. When the conflict ended, secondary occupants were not required to leave the occupied properties until they were able to return to their prewar homes. The law also provided an appeals process to delay implementation of an order for eviction of secondary occupants.<sup>43</sup>

### *Compensation Mechanisms*

States often provide compensation for displaced persons who successfully claim ownership of occupied properties. The provision of compensation raises valuation questions such as whether the value of property should reflect the value at the time of the taking or account for the subsequent depreciation/appreciation in value of property and lost profits. The UN Charter of Economic Rights and Duties of States provides that compensation shall be “appropriate” as determined by the laws of the taking state.

States may wish to provide cash compensation to property restitution claimants in the value of the property they lost or for the cost of acquiring another

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<sup>42</sup> The Law of the Republic of Tajikistan on Forced Migrants (1994), arts. 6 and 12.

<sup>43</sup> Rhodri C. Williams, *The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina*, INTERNATIONAL MIGRATION, August 2006, at 44.

home. States frequently do not have the monetary resources to provide cash compensation to large numbers of returnees and may seek contributions from the international community. Burundi sought funding from the World Bank, the United Nations Development Program, the Office of the United Nations High Commissioner for Refugees, and the European Commission to fund its repatriation program.<sup>44</sup>

An alternative to cash compensation may be in-kind compensation in the form of construction of adequate, affordable, and accessible housing, for use by displaced secondary occupants. Governments may directly fund or subsidize in-kind compensation. Alternatively, states may provide vouchers or individual subsidies that displaced persons may redeem for the construction of residences. States may also establish a housing fund that issues government-housing bonds. Other compensation mechanisms include allocating state land plots to those forcibly displaced or providing government assistance to returnees looking for new housing.<sup>45</sup>

## **Enforcement**

Land commissions may have independent enforcement mechanisms; however, they often rely on courts and administrative agencies to ensure implementation of commission decisions. The founding documents of land commissions may ensure that the commission's decisions are final and enforceable as law.

### *Final and Binding Judgments*

An effective property restitution mechanism requires that the adjudicating commission have authority make its decision final and binding upon all interested parties to that claim. The General Framework Agreement for Bosnia and Herzegovina provided that decisions of the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) would be "final, and any title deed, mortgage or other legal instrument created or awarded by the Commission shall be

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<sup>44</sup> Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, ch. 3, art. 17.

<sup>45</sup> SIMON BAGSHAW, PROPERTY RESTITUTION FOR INTERNALLY DISPLACED PERSONS: DEVELOPMENTS IN THE NORMATIVE FRAMEWORK, IN RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 381.

recognized as lawful throughout Bosnia-Herzegovina.”<sup>46</sup> The General Framework Agreement, did not provide a means for the CRPC to enforce its decisions or require that other government institutions enforce the CRPC’s decisions.<sup>47</sup> In practice, the lack of an enforcement mechanism inhibited successful implementation of the property restitution system established by the General Framework Agreement.<sup>48</sup>

To ensure the effective implementation of a property restitution system, states may wish to include provisions for enforcement mechanisms in any property restitution agreement. These provisions may help ensure that other government authorities comply with and enforce the decisions of the land commission. The parties also may consider allowing international organizations to monitor the implementation of the property restitution system to ensure compliance by domestic government authorities.<sup>49</sup>

### *Property Rights Ombudsman*

States may create a property rights ombudsman to prevent the adoption of legislation that infringes upon these rights and to report progress on property claims. In Bosnia and Herzegovina, the General Framework Agreement established a Human Rights Commission, which consisted of a Human Rights Ombudsman and a Human Rights Chamber. The Human Rights Ombudsman determined the admissibility of claims of violations of human rights, including property rights, and tried to settle the dispute between the parties. The Ombudsman usually issued non-binding recommendations to which the parties to the dispute were required to respond. If a party failed to respond, the Ombudsperson could refer the claim to the Human Rights Chamber. The Human

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<sup>46</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, art. XII, para. 7.

<sup>47</sup> MARCUS COX & MADELINE GARLICK, MUSICAL CHAIRS: PROPERTY REPOSSESSION AND RETURN STRATEGIES IN BOSNIA AND HERZEGOVINA, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 73.

<sup>48</sup> Lynn Hastings, *Implementation of the Property Legislation in Bosnia and Herzegovina*, 37 STANFORD J. OF INTL. L. 221, 231-232 (2001).

<sup>49</sup> The United Nations Office of the High Representative for Refugees (UNHCR) frequently monitors state repatriation and restitution programs for IDPs and refugees. For more information, see the UNHCR website at <http://www.unhcr.org> (last accessed Sept. 24, 2007).

Rights Chamber would then adjudicate the claims and issue a final and binding decision.<sup>50</sup>

### DARFUR PEACE AGREEMENT

The 2006 Darfur Peace Agreement (DPA) provides that “[e]very person shall have the right to acquire or own property as regulated by law.”<sup>51</sup> Further, the DPA provides that displaced persons have the right to restitution of their property or to compensation if return of their property is not possible.<sup>52</sup> The DPA establishes a land commission, the Darfur Rehabilitation and Resettlement Commission. The Commission has the authority to determine restitution and appeals procedures and must ensure the full participation of women in making property claims.<sup>53</sup>

The Darfur Peace Agreement establishes local Property Claims Committees under the Darfur Rehabilitation and Resettlement Commission to mediate property disputes.<sup>54</sup> The DPA required that Property Claims Committees be present in both rural and urban areas, and provided each committee with jurisdiction over property claims within its delineated geographic area.<sup>55</sup> The Property Claims Committees shall consist of “members representative of the geographical area in respect of which the commission exercises jurisdiction” and shall have access to all land records needed to reach its decisions.<sup>56</sup> The Darfur Peace Agreement does not outline the composition or specific procedures for appointment of members but

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<sup>50</sup> WALPURGA ENGBRECHT, PROPERTY RIGHTS IN BOSNIA AND HERZEGOVINA: THE CONTRIBUTIONS OF THE HUMAN RIGHTS OMBUDSPERSON AND THE HUMAN RIGHTS CHAMBER TOWARDS THEIR PROTECTION, in RETURNING HOME: HOUSING AND RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (2003), at 83-142. The most common claims that these institutions received were claims of displaced persons who had been unable to recover their lost property through the property restitution system.

<sup>51</sup> Darfur Peace Agreement of, May 5, 2006, art. 3, para. 33, *available at* [http://www.unmis.org/english/2006Docs/DPA\\_ABUJA-5-05-06-withSignatures.pdf](http://www.unmis.org/english/2006Docs/DPA_ABUJA-5-05-06-withSignatures.pdf) (last accessed Sept. 17 18, 2007).

<sup>52</sup> Darfur Peace Agreement, art. 21, para. 194. Paragraph 196 provides that a Property Claims Committee may only award compensation where it has factually established that restitution is impossible.

<sup>53</sup> Darfur Peace Agreement, art. 21, para. 195.

<sup>54</sup> Darfur Peace Agreement, art. 21, para. 197.

<sup>55</sup> Darfur Peace Agreement, art. 21, para. 197.

<sup>56</sup> Darfur Peace Agreement, art. 21, para. 197, secs. c, e.

rather provides, “Membership, appointment, terms and conditions of service of the Property Claims Committees (PCCs) shall be regulated by law.”<sup>57</sup>

The Property Claims Committees shall “make recommendations to the relevant authorities for the implementation of its decisions.”<sup>58</sup> If the Property Claims Committee cannot resolve a dispute through mediation or traditional dispute resolution mechanisms, the committee must refer the dispute to the relevant domestic authorities.<sup>59</sup> The Parties to the DPA call on the international community to assist in funding and creating the Darfur Relief and Rehabilitation Commission (DRRC).<sup>60</sup> The DPA does not provide for the creation of a property rights Ombudsperson to ensure the protection of displaced persons’ property rights, but the Human Rights Commission, which the Interim National Constitution established, is responsible for ensuring the protection of human rights, including property rights.<sup>61</sup>

## **SAMPLE LANGUAGE**

### **Article XXX**

#### **Right to Restitution**

Refugees and displaced persons shall be guaranteed restitution of property owned by them that is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it.<sup>62</sup>

### **Article XXX**

#### **Commission for Displaced Persons and Refugees**

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<sup>57</sup> Darfur Peace Agreement, art. 21, para. 198.

<sup>58</sup> Darfur Peace Agreement, art. 21, para. 197, sec. 1.

<sup>59</sup> Darfur Peace Agreement, art. 21, para. 197, sec. a.

<sup>60</sup> Darfur Peace Agreement, art. 32, para. 505.

<sup>61</sup> Darfur Peace Agreement, art. 3, para. 41.

<sup>62</sup> This language is drawn from the General Peace Agreement for Mozambique, Protocol III, art. IV, sec. e. The General Framework Agreement for Peace in Bosnia and Herzegovina also provides displaced persons with the right to restitution or compensation, but the agreement explicitly defines the time period for which displaced persons may be eligible to bring claims. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, art. 1, para. 1. The Arusha Peace and Reconciliation Agreement for Burundi also provides the right to restitution or compensation for property loss. Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, art. 8, paras. a, b.

- (1) The Parties hereby establish an independent Commission for Displaced Persons and Refugees (the “Commission”).
- (2) The Commission shall receive and decide any claims for real property, where the property has not voluntarily been sold or otherwise transferred, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.
- (3) Upon receipt of a claim, the Commission shall determine the lawful owner of the property with respect to which the claim is made and the value of that property. The Commission, through its staff or a duly designated international or nongovernmental organization, shall be entitled to have access to any and all property records, and to any and all real property for purposes of inspection, evaluation and assessment related to consideration of a claim.<sup>63</sup>

**OR**

- (3) The Commission shall investigate the merits of claims for the restitution of rights in land, mediate and settle disputes arising from such claims, and refer any unsettled disputes to the Land Claims Court for final decision.<sup>64</sup>

### **Article XXX**

#### **Composition of the Commission**

The Commission shall be composed of [X] members. The Government of Sudan shall appoint [X] members, and the region of Darfur shall appoint [X] members. The United Nations [or other international organization] shall appoint the remaining members and shall designate one such member as the Chairman. The members of the Commission may be reappointed.<sup>65</sup>

**OR**

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<sup>63</sup> This language is drawn from the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, arts. VII, XI, and XII. Article 8 of the Arusha Peace and Reconciliation Agreement for Burundi establishes a similar commission.

<sup>64</sup> This language is drawn from the South African Restitution of Land Rights Act, art. 6 (1994).

<sup>65</sup> This language is drawn from the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, art. IX.

The members of the Commission shall be drawn from the participating parties and the Government of Sudan, and shall elect the Commission's chairperson.<sup>66</sup>

### **Article XXX** **Remedies**

- (1) Any person requesting the return of property who is found by the Commission to be the lawful owner of that property shall be awarded its return. Any person requesting compensation in lieu of return who is found by the Commission to be the lawful owner of that property shall be awarded just compensation as determined by the Commission.
- (2) In cases in which the claimant is awarded compensation in lieu of return of the property, the Commission may award a monetary grant or a compensation bond for the future purchase of real property. The Parties welcome the willingness of the international community assisting in the construction and financing of housing to accept compensation bonds awarded by the Commission as payment, and to award persons holding such compensation bonds priority in obtaining that housing.<sup>67</sup>

### **OR**

- (2) If recovery proves impossible, everyone with an entitlement must receive fair compensation and/or indemnification. Refugees who do not return may receive a just and equitable indemnification if their land had been expropriated without prior indemnification. The policy with respect to

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<sup>66</sup> This language is drawn from the Arusha Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000, Protocol IV, art. 3. *See also* Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, May 5, 1999, arts. 24, 42, *available at* [http://www.usip.org/library/pa/et/east\\_timor\\_05051999\\_toc.html](http://www.usip.org/library/pa/et/east_timor_05051999_toc.html) (last accessed Sept. 17, 2007). The Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor establishes a Land Claims Commission and provides that the Judicial Commission shall choose its members.

<sup>67</sup> This language is drawn from the General Framework Agreement for Peace in Bosnia and Herzegovina. Protocol III, art. IV, sec. e. The General Peace Agreement for Mozambique, Protocol III, art. IV, sec. e, provides displaced persons with the right to sue to recover their lost property.

distribution of State-owned land shall be reviewed so that priority can be given to the resettlement of displaced persons.<sup>68</sup>

### **Article XXX**

#### **Final and Binding Judgments**

Commission decisions shall be final, and any title, deed, mortgage, or other legal instrument created or awarded by the Commission shall be recognized as lawful throughout Sudan.<sup>69</sup>

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<sup>68</sup> This language is drawn from the Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, art. 8. Like the General Framework Agreement for Peace in Bosnia and Herzegovina, the Arusha Peace and Reconciliation Agreement for Burundi provides for restitution and compensation to settle property disputes. However, the Arusha Peace and Reconciliation Agreement for Burundi also provides for distribution of State-owned property to displaced persons in lieu of restitution or compensation for lost property.

<sup>69</sup> This language is drawn from the General Framework Agreement for Peace in Bosnia and Herzegovina. Protocol IV, article 8 of the, Annex 7, art. XII. The Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, art. 8, also establishes a land commission to adjudicate property disputes, but the Arusha agreement does not provide that the commission's decisions are final and binding on all persons in Burundi.