Guiding Principle 29 and the right to restitution

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The emergence of a right to post-displacement property restitution represents a significant development in human rights law in the ten years since the Guiding Principles were submitted. While Guiding Principle 29 has contributed to the development of this right, significant obstacles remain to its consistent application in displacement settings.

At the time that the Guiding Principles were drawn up, the right of IDPs to reclaim abandoned property was not beyond dispute. Human rights law guaranteed a ‘right of return’ but it was limited to restoring people to the frontiers of their country of origin – a destination often far from their actual homes. Likewise, the right to legal remedies for violations such as property confiscation was defined as a procedural entitlement to a fair hearing, without pre-judging whether any specific substantive remedy such as restitution should result.

Accordingly, while the drafters of the Guiding Principles were aware that durable solutions for IDPs were inconceivable without the possibility of restitution and voluntary return, prevailing legal understandings necessitated a formulation focusing on state duties rather than individual rights. However, important progress on the ground came as a result of the 1995 Dayton Peace Accords, which ended the war in Bosnia and included rights for displaced persons “freely to return to their homes of origin” and to “have restored to them property of which they were deprived.”

The Bosnia experience helped shape such important developments as the 2006 adoption by the UN General Assembly of ‘Basic Principles and Guidelines’ affirming rights to substantive remedies such as restitution in addition to fair hearings. The most specific support for a post-displacement right to restitution came in 2005 with release of the Pinheiro Principles, which confirmed restitution “as the preferred remedy for displacement” and a “distinct right ... prejudiced neither by the return or non-return” of those entitled to it. Like the Guiding Principles, the Pinheiro Principles set out to reflect accepted principles of international law and have helped fill an important gap for countries serious about addressing displacement.

The UN General Assembly and Security Council have moved towards recognition of a right to restitution and the Secretary-General has called for a more effective response to post-conflict property issues. Restitution has also emerged as an increasingly standard component of conflict resolution, whether directly through peace agreements, as in Darfur and Nepal, or through ad hoc mechanisms in Afghanistan, Burundi, Kosovo and Turkey.

However, the acceptance of restitution in principle has raised new challenges in practice. The last decade has seen few examples of unambiguously successful restitution programmes, leaving Bosnia to represent as much an aberration as a precedent. This failure in implementation results in part from politics. Land and property are inherently valuable assets, and local and national authorities may resist their recovery by IDPs.

In frozen conflicts, restitution is usually impossible. Thus, while the Security Council has issued a strong statement in favour of restitution with regard to breakaway regions in Georgia, the recent incursion by Russia has greatly complicated the chances that it will be respected.

Where political will exists, restitution programmes may demand a level of resources and legal capacity that many countries do not enjoy. In countries such as Afghanistan, where landlessness was widespread prior to displacement, or Burundi, where the population has nearly outstripped the available supply of land, restitution proposals should accommodate the imperative of securing equitable access to land for the population as a whole.

A further significant challenge to restitution efforts is the need to integrate customary tenure systems. In many countries, indigenous or tribal groups hold land in accordance with unwritten rules. While traditional systems should be respected, lack of state recognition and formal documentation often complicate restitution claims. Customary systems are often non-transparent or even discriminatory, complicating efforts to ensure that respect for collectively held customary rights does not harm individuals. This tension is reflected in the Great Lakes Pact’s Protocol on the Property Rights of Returnees, which affirms the right of women to own property without discrimination as well as the rights of rural and...
Obstacles to realising Guiding Principle 29 in Afghanistan

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Restoring property to displaced Afghans is a formidable challenge. Given the prevalence of landlessness, overlapping claims and inequitable property distribution, focusing solely on restoring land to its ‘original owners’ is unlikely to meet the needs of IDPs, returnees and their neighbours.

Principle 29 asserts that: “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.”

Making a reality of this aspiration in Afghanistan is complicated by complex patterns of displacement. In addition to 130,000 IDPs in ‘protracted’ displacement in the south and southwest, unknown numbers have been displaced in recent years due to conflict, human rights violations, floods and droughts. The five million refugees who have returned from Pakistan and Iran face a heightened risk of internal displacement, as they often lack the resources and power necessary to reclaim property, or simply have nothing to claim and nowhere to go.

Competition for land is intense in a country with a high birth rate where only 12% of land is arable. Decades of conflict and displacement have...