



BUILDING AGREEMENT ON RESTITUTION RIGHTS WITHIN THE MYANMAR PEACE PROCESS AND NATIONAL LEGAL FRAMEWORK

A MANUAL FOR PRACTITIONERS

March 2019



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EXECUTIVE SUMMARY

This manual outlines proposals for the insertion of housing, land and property restitution rights simultaneously within the context of the ongoing peace process and within broader national legal reform efforts, including work towards a national land law. The paper begins by emphasising that many countries emerging from both conflict and political reform processes have successfully implemented restitution programmes, and that the current, largely piecemeal, efforts towards restitution in Myanmar under the Central Land Grab Reinvestigation Committee processes are simply inadequate in securing restitution rights for everyone in and from Myanmar with a legitimate restitution claim.

The manual proposes that a comprehensive agreement be reached between all relevant stakeholders to establish restitution rights under Myanmar law, and that an independent Myanmar National Restitution Commission be created to receive and decide upon all outstanding restitution claims concerning housing, land and property anywhere within the country.

The various sections of the manual provide detailed analysis of the types of provisions that would need to be included within such agreements, and suggest precise legal language as to how these provisions could be formulated within an eventual comprehensive agreement.

The manual takes the view that the people of Myanmar will be best served if courageous decisions by all involved in the peace and legislative processes lead to the development of a comprehensive restitution process and procedure whereby all outstanding restitution claims can finally be addressed, adjudicated and enforced. Only through such a process can enough justice and clarity be provided within the housing, land and property sectors for the foundations of democracy, economic prosperity and growing security and stability be reached.

“...having had justice delayed for so long, they are also entitled to expect that democratic governments will move as promptly as possible to bring closure during their lifetimes. This will not be easy, and we cannot do it alone. Restituting real property...will require the efforts of many honourable and courageous people...”¹

I. INTRODUCTION

1. Over the past several years, the question of housing, land and property (HLP) restitution for refugees and internally displaced persons (IDPs) from Myanmar has received extensive and growing attention within the context of the peace process and within broader governmental initiatives and legislative measures concerning land. These issues have also been the subject of new government programmes and increasingly mentioned within various agreements and policy statements. An array of detailed reports has been published on restitution themes², training sessions and workshops have been convened for hundreds of participants and ever-broadening societal discussions have emerged on this vital issue at all levels. As a result, while no definitive decisions have as of yet been made, there is clearly a growing awareness that in one form or another the question of restitution will need to be addressed within the peace process, and certainly be included within any eventual peace agreement that emerges between the government of Myanmar and the various ethnic armed groups.

2. The Norwegian Refugee Council (NRC) and Displacement Solutions (DS) have engaged with the restitution issue and related housing, land and property rights themes since 2009.³ NRC and DS have published a series of detailed and practical reports identifying the legal basis for restitution claims, the practice of other countries that have implemented restitution programmes and some of the main obstacles that will need to be addressed for restitution processes to succeed. These reports provide a wide overview of the information required to fully understand the nature of restitution processes by all relevant stakeholders, and readers of this manual are encouraged to consult the following reports:

¹ Stuart Eizenstat, Former United States Under Secretary for Economic, Business and Agricultural Affairs (1999).

² In addition to the various reports by NRC and Displacement Solutions outlined below, see also, Transnational Institute Re-Asserting Control: Voluntary Return, Restitution and the Right to Land for IDPs and Refugees in Myanmar (Myanmar Policy Briefing 20, May 2017); and University of Chicago Law School International Human Rights Clinic, Resolving Land Disputes Through Restitution Mechanisms: A Comparative Analysis of Country Case Studies, 2017. See also: Centre for Policy Research (CPR) and Namati, Midcourse Manoeuvres: Community strategies and remedies for natural resource conflicts in Myanmar, June 2018.

³ For a comprehensive overview of Displacement Solutions publications on these themes in Myanmar, see: Displacement Solutions, Housing, Land and Property Rights in Myanmar - Research, Analysis and Publications by Displacement Solutions, 2009-2018 - An Overview, May 2018.



Housing, Land and Property Rights in Peace Agreements: Guidance for the Myanmar Peace Process (February 2018)



Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme (March 2017)



A Framework for Resolving Displacement in Myanmar: The United Nations 'Pinheiro Principles' on Housing and Property Restitution for Refugees and Displaced Persons (March 2017)



An Introductory Guide to Understanding and Claiming Housing, Land and Property Restitution Rights in Myanmar: Questions and Answers (March 2017)

3. Building on these reports and other efforts relating to restitution in the country, the question now becomes how to best incorporate restitution concerns directly into the various aspects of the peace process and broader legislative reform efforts, both in terms of an eventual agreement and/or law addressing these matters, as well as possible restitution procedures and institutional frameworks needed to decide on and enforce restitution claims.

This manual, thus, focuses on the legal and procedural options that those involved in the peace process may wish to consider in terms of formally incorporating restitution issues within any eventual peace agreement and how these same norms can be included within a new National Land Law.

The manual presumes a basic understanding of the legal principles behind restitution as an *effective remedy* for displacement, the position of international and domestic law on restitution rights⁴ and the arguments in favour of including restitution measures within the peace process, just as so many other peace processes have done over the past several decades.

This manual will outline practical guidance on how best to incorporate restitution concerns formally into the peace process in a manner that ensures that everyone with a valid restitution claim has the right to have these claims considered by an independent body with the authority to determine the validity of these claims and with the powers needed to enforce these decisions.

⁴ For a comprehensive collection of legal documents recognising restitution rights for refugees and IDPs, current to 2007, see: Scott Leckie (ed) *Housing, Land and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases and Materials*, Cambridge University Press, 2007.

4. It should be pointed out at the outset, and in particular reiterated to people involved in peace negotiations in Myanmar, that many previous peace agreements – Colombia, Nepal, the Dayton Accords (Bosnia-Herzegovina), the Arusha Accords (Burundi), and agreements concerning Guatemala, El Salvador, Liberia, Mozambique, Tajikistan, and many others - explicitly address restitution. The clear global trend over time leans toward the *inclusion* of these issues within peace processes and eventual peace agreements.⁵ The housing, land and property situations in all of these countries were universally complex, widespread and difficult to resolve, just as is the case in Myanmar today. Nevertheless, because of both the law and the majority view that addressing restitution issues was the right thing to do, these and many other countries consciously decided to tackle these challenges head-on with often remarkable results. Indeed, if countries as racked by conflicts as those just listed can implement restitution programmes, surely Myanmar can do the same.

BOX 1

ADDRESSING LAND IN PEACE AGREEMENTS IS COMMON

- The 1995 **Guatemala** Agreement on Identity and Rights of Indigenous Peoples, for instance, elaborated rights relating to land of the indigenous peoples in the following terms: “The rights relating to land of the indigenous peoples include both the communal or collective and the individual tenure of land, rights of ownership and possession and other real rights, and the use of natural resources for the benefit of the communities without detriment to their habitat. Legislative and administrative measures must be developed to ensure recognition, the awarding of title, protection, recovery, restitution and compensation for those rights.”
- Section IV of Protocol III to the 1992 General Peace Agreement ending the lengthy civil war in **Mozambique**, included explicit restitution rights for returning refugees: “Mozambican refugees and displaced persons shall not forfeit any of the rights and freedoms of citizens for having left their original places of residence; Mozambican refugees and displaced persons shall be registered and included in the electoral rolls together with other citizens in their places of residence; and 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.”
- The General Agreement on the Establishment of Peace and National Accord in **Tajikistan** (1997) - Protocol on Refugee Issues stipulates that “The Government of the Republic of Tajikistan assumes the obligation to reintegrate returning refugees and displaced persons into the social and economic life of the country, which includes the provision to them of humanitarian and financial aid, assistance in finding employment and housing and the restoration of all their rights as citizens of the Republic of Tajikistan (including the return to them of dwellings and property and guaranteed uninterrupted service), and not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war, in accordance with the legislative acts in force in the Republic.”

⁵ For a comprehensive listing of all major peace agreements concluded since 1945, see: www.peacemaker.un.org.

II. SECURING RECOGNITION OF RESTITUTION PROVISIONS WITHIN THE PEACE PROCESS

5. Restitution - the restoration of something lost or stolen to the person or entity with legitimate ownership or other rights over it - is always difficult, and as clearly shown by recent efforts in the country, restitution processes in Myanmar will be no different. Determining who will have restitution rights to use, control and/or transfer housing, land and property resources, to which residential or rural land, on which evidentiary basis, determined by whom and the procedures associated with re-gaining access and control over the land in question, and what happens to those now claiming rights to the land in question are some of the most difficult issues facing countries emerging from conflict. The NLD-led government has indicated in their 2015 Election Manifesto the clear intention to address both the restitution demands of the people, as well as committing to preventing illegal land confiscation in the future. (See Box 2)

BOX 2

THE NLD WON THE 2015 ELECTION WITH PROMISES OF RESTITUTION

The 2015 Election Manifesto of the now governing National League for Democracy 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.”

Moreover, in the case of Myanmar, the scale of land dispossession has been constant for decades, involves literally millions of acres of land and millions of people set within in a complex legislative framework and not always supportive political environment.⁶ One estimate, for instance, points to more than 5.2 million acres of land being confiscated.⁷ Despite many positive statements favouring the idea of ‘restitution’ in principle, a great deal of work remains to be done clarifying precisely what this term will need to mean in the context of Myanmar. There is a need for a practical and accessible restitution solution that meets the needs and rights of both returning IDPs and refugees, as well as host communities and secondary occupants. (See Box 3)

⁶ See, for instance: A Promise Unfulfilled: A Critique of the Committees for Reinvestigation of Confiscated Land and other Lands, 2017. <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version>, 33. “Official figures from MOALI indicate that 3.8 million acres of allegedly vacant or fallow land were confiscated and granted to Ministries, companies, the Tatmadaw, or individuals, for agricultural development purposes between 1992 and 2016. This does not include land confiscation for other purposes, such as military encampments or infrastructure projects.”

⁷ Woods, K. “Commercial Agriculture Expansion in Myanmar: Links to Deforestation, Conversion Timber, and Land Conflicts”. Forest Trends Report Series. March 2015.

BOX 3

THE 2016 NATIONAL LAND USE POLICY AND RESTITUTION

The 2016 *National Land Use Policy* specifically highlights rights to return, restitution and compensation, and includes terminology such as the need to “develop and implement fair procedures relating to land acquisition, compensation, relocation, rehabilitation, restitution, and reclaiming land tenure and housing rights of internal displaced persons and returning refugees caused by civil war, land confiscation, natural disasters and other causes”, “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”, and commits to “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”. National Land Use Policy, Republic of the Republic of the Union of Myanmar (January 2016).

6. The issue of restitution is increasingly recognised as a fundamental issue both within the context of the peace process and more broadly in terms of restoring land arbitrarily, unlawfully or unfairly acquired during previous decades. The October 2015 *Nationwide Ceasefire Agreement Between the Government of the Republic of the Republic of the Union of Myanmar and the Ethnic Armed Organizations* (NCA) contains some important overtures to various restitution concerns, but does not address restitution directly, nor develop proposals in this regard. (See Box 4)

BOX 4

BUILDING ON THE NCA TO CREATE RESTITUTION RIGHTS

The NCA addresses a range of relevant themes: 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 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 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.

7. This recognition of the centrality of land issues within the peace process expanded within the context of the *Panglong 2* peace talks that resulted in the agreement of principles developing a people-centred, progressive land policy based on justice and fairness. Endorsed on 29 May 2017 by the government and various ethnic negotiating partners, the agreement outlines ten principles on land and the natural environment that will have a bearing on any eventual restitution programme. (See Box 5)

BOX 5

RELEVANT POINTS ON LAND IN PANGLONG 2

1. A countrywide land policy that is balanced and support people-centred long-term durable development; 2. Based on justice and appropriateness; 3. A policy that reduces central control; 4. Include human rights, international, democracy and federal system norms in drawing up land policy; 5. Policy on land matters should be transparent and clear. 6. In setting up policy for land development, the desire of the local people is a priority and the main requirements of the farmers must be facilitated. *Ownership Right* - 7. All nationals have a right to own and manage a land in accordance with the land law. Women and men have equal rights. *Management Right* - 8. Both women and men have equal rights to manage the land ownership matters in accordance with the land law; 9. If the land right granted for an original reason is not worked on in a specified period, the nation can withdraw the granted right and concede it to a person who will actually do the work; *Preventive Program* - 10. To aim toward protecting and maintaining the natural environment and preventing damage and destruction of lands that were social, cultural, historical heritages and treasured by ethnic nationals. Source: <http://www.statecounsellor.gov.mm/en/node/904>.

More recently, however, the 23 November 2017 *Agreement on Return of Displaced Persons from Rakhine State between the Governments of Bangladesh and Myanmar* does not address restitution per se. Instead, this agreement sets a series of stringent conditions on such return, not to mention the fact that virtually no refugee has as yet benefitted from this agreement because of ongoing security concerns. It should also be noted that the Rakhine Advisory Commission, on the other hand, specifically recommended to the government of Myanmar that it ensure return and relocation take place in accordance with international standards, including to facilitate returns to 'places of origin as a matter of priority'. (See Box 6)

BOX 6

RESTITUTION IS ADDRESSED BY THE RAKHINE ADVISORY COMMISSION

This recommendation reads as follows: Rec 25 - The Government should cooperate with international partners to ensure that return/relocation is carried out in accordance with international standards, including: All returns or relocations must be voluntary, safe and take place in a dignified manner; The aim should be to facilitate returns to places of origin as a matter of priority, or otherwise respect the choices of the displaced; Ensure that IDPs participate actively in the planning and management of their return, relocation, or local integration; Relocation/local integration should not confine IDPs to sub-standard areas without adequate access to basic services or livelihood – or to areas where the safety and security of the IDPs cannot be ensured; The choice to relocate must not be regarded as a renunciation of the right to return in safety and with dignity to the original place of residence, should that choice become feasible later; and IDPs and host communities must be consulted in a thorough and meaningful manner.

8. Several of the ethnic actors with whom the government is currently engaged in peace talks have also addressed restitution in detail, with others expected to do the same. The Karenni National Progressive Party (KNPP) has addressed land issues within an emerging land policy, while 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”.(See Box 7) Article 4.2 of the KNU Policy specifically mentions their intent to comply with the *Pinheiro Principles* and to work closely with government bodies including the Central Land Committee to address restitution demands. Discussions are currently underway in Shan State, Mon State and elsewhere by ethnic groups to develop their own policies in this regard.

Farmer in Hpa An, Karen State (José Arraiza/NRC)



BOX 7

KNU LAND POLICY ALREADY ADDRESSES RESTITUTION ISSUES

Article 4.2 Restitution: 4.2.1 It is recognized that many people in Kawthoolei have against their will been displaced by war and other factors and have become refugees and internally displaced persons (collectively, “IDPs”). In certain situations their homes and land have been occupied by migrants and other newcomers. 4.2.2 Occupation and use rights made or permitted under this policy will be administered in a manner that complies with the internationally recognized Pinheiro Principles, taking into account the primacy of the right of IDPs to have their lands be restored to them. The definitions in this policy shall be applied in a manner consistent with the Pinheiro Principles. 4.2.3 Where possible, the original parcels or holdings will be returned to those who suffered the loss, or their heirs. Where the original parcel or holding cannot be returned, the KAD, in close consultation with the Central Land Committee, will decide on an appropriate alternative with consensus from local authorities and village community of those impacted. 4.2.4 The KNU Authorities will set aside other land in townships to use for the purpose of providing alternative land plots for those that are not able to return to their original land plot, for whatever reason. This consensual process will be facilitated by the KAD and the Central Land Committee at the township level, in consultation with local customary authority and the returning IDPs and refugees being restituted. 4.2.5 The KNU Authorities has the authority to temporarily transfer use rights to currently unoccupied but previously used land while the original occupants are gone in order to maintain agricultural productivity and offer use rights to those that are in need in the area, in this case returning IDPs and refugees. If the original occupant returns before the temporary use rights holder’s use rights have expired (maximum 20 years), then KAD, in consultation with Central Land Committee and with consensus from customary authorities and the original occupants, will find a suitable alternative land plot for the original occupants until the use rights holders’ use rights have expired for the original occupants land plot. Meanwhile, the original occupant will qualify to receive the land taxes paid by the new use rights holder, instead of to the KAD as done before the original occupant returned. 4.2.6 KNU Authorities will develop gender-sensitive, clear, transparent processes for restitution. Information on restitution procedures will be widely disseminated in applicable languages. Claimants will be provided with adequate assistance, including through legal and paralegal aid, throughout the process. Progress of implementation should be widely publicized. 4.2.7 KNU Authorities will provide mechanisms for input by customary authorities and civil society organizations, in order to ensure the restitution process best reflects the will and needs of the people.

9. Although there are no comprehensive restitution laws yet in place in the country addressing the restitution claims of all potential claimants, nor remedial bodies with judicial capacities and enforcement powers in place entrusted with competencies to receive all potential unresolved restitution claims, Myanmar has, nonetheless, made an important and laudable start in addressing *some* of the outstanding restitution demands in the country. The work of the Reinvestigation Committee and the inclusion, for instance, of specific references to ‘land

dispute resolution' mechanisms within the 2016 *National Land Use Policy* are surely positive steps forward, however, as of 2019 neither specialized land courts nor independent monitoring bodies to assure compliance with restitution settlements have been established. Although only partial in scope thus far, these actions are nonetheless historical in significance and provide the beginnings of the foundations needed to ensure restitution rights are accessible for everyone, assurances that the conditions leading to these claims are not repeated, and that a demonstrable effort is made to streamline domestic law and policy with prevailing international norms and best practice. These principles provide a significant basis for building further agreement between participants in the peace process to thoroughly address restitution concerns. (See Box 8)

BOX 8

THE NATIONAL CEASEFIRE AGREEMENT AND RESTITUTION

Although the NCA does not address restitution *per se*, it is important in recognising a number of important prerequisites for restitution. Article 1(k), for instance, commits the parties to “Undertake efforts to protect lives and property and improve the livelihoods of all persons living within the Republic of the Republic of the Union of Myanmar.” Article 5 commits the national military (Tatmadaw) and the more than one dozen Ethnic Armed Organizations to cease ‘destruction of property’, while under Article 9 the parties agree to provide necessary support in coordination with each other to improve livelihoods, health, education, and regional development for the people, and avoid forcible displacement or relocation of local populations, forcible confiscation and transfer of land from local population, and the destruction of public property, looting, theft, or the taking of property without permission. Vtally, Article 10 aims to 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 and to promote collaboration on the resettlement process including verification of IDPs and refugees.

Peace mediators in Myanmar deserve commendation for finding common ground on these issues, and will continue to have an immensely important role to play in guiding deliberations on restitution issues and in assisting in the formulation of agreements that fairly, equitably and sustainably address the many diverse restitution themes that invariably require attention by the negotiating parties.

THE CENTRAL LAND GRAB REINVESTIGATION COMMITTEE

10. 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 body currently responsible for examining land confiscation and potential restitution cases is *The Central Land Grab Reinvestigation Committee*, which was formed by the Office of the Union President in May 2016. The *Reinvestigation 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 farmland 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 *Reinvestigation Committee* has also adopted a policy that dispossessed farmers should be compensated for their losses when the return of land is not possible. The *Reinvestigation Committee* is responsible for forming various levels of committees ranging from nationwide bodies down to the village level. It has powers to issue notice and orders relating to its authoritative rights, tenures and duties with approval of the government. Reinspection Committees at all levels are authorized to accept claims, either grievances or disputes, from citizens concerning requests for the return of confiscated lands. They are authorized to investigate them, deliberate, and, as appropriate, make decisions regarding how the dispute or claim should be settled.

11. The success of these bodies in restituting land to claimants, however, remains an open question⁸, with divergent views on the scale⁹ to which actual restitution and/or compensation has occurred under these various measures.¹⁰ What is clear is that many thousands of cases remain either not reviewed or without any form of adequate redress. One analyst notes in this regard that “The Reinvestigation Committee policies do not explicitly exclude nor include claims from conflict-displaced IDPs; however, anecdotal evidence suggests that even in post-conflict areas, the Reinvestigation Committees are not operating or have been instructed not to accept cases relating to armed conflict.”¹¹ While much remains to be done, and many restitution claims remain outstanding and unresolved, particularly those linked to conflict in ethnic areas, the land returns that have occurred are highly significant and need to be viewed against the recent historical past where land confiscation and land grabbing were extremely commonplace throughout the country. A variety of actors have voluntarily returned formerly confiscated land, including the

⁸ Caitlin Pierce and Stephen Huard, *Land Tenure Rapid Assessment - Pyapon and Maubin (Ayeyarwaddy), Pilot Sites for Land Distribution to the Landless*, Land Core Group, August 2016.

⁹ 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 Defense, 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.”

¹⁰ The Parliamentary Land Confiscation Commission received and reviewed 26,371 complaint letters from people and communities alleging to have been the victims of land confiscation, with the Executive Branch of the government given the responsibility of settling these claims and potential disputes. Of these some 19,836 complaints were scrutinized and sent to the Union government for resolution. According to one source, 12,978 cases were ‘solved’ involving almost 400,000 acres of land, although these figures are difficult to accurately verify. See: Caitlin Pierce, ‘Whose Land is it Anyway?’, in *The Irrawaddy*, 7 July 2016. See also, Namati, *Returns of Grabbed Land in Myanmar: Progress After 2 Years*, December 2015.

¹¹ *Gendered experiences of land confiscation in Myanmar: Insights from Eastern Bago Region and Kayin State*, (Saferworld: 2018).

military and local and regional governments.¹² These are important steps forward, and constitute a meaningful start on Myanmar's restitution journey. But much remains to be done to ensure that a system is in place that facilitates the submission of restitution claims by *everyone* with such a claim, within a given time-frame, and subject to clear legal rules, all assessed by an independent, fair, expert body with judicial powers of both determination and enforcement. At present, the vast majority of claims made (recalling that many claims may yet to have been made) have not been considered by judicial bodies, but rather through administrative or political mechanisms that may or may not necessarily be consistent with the rights possessed by those making such restitution claims.¹³ Beyond the difficulties in resolving such cases, determining how best to address the issue of inadequate past compensation vis-a-vis current market value of the land concerned is also proving a major challenge to the Committee. This is not to say that non-judicial remedies cannot provide acceptable avenues to restitution, and indeed, that in many cases such forms of redress may be preferable to judicial pathways.

12. However, for restitution to succeed in Myanmar, unilateral determinations on potential restitution claims without independent oversight and review falls short of what is expected in any restitution programme that is consistent with prevailing legal norms. For instance, views by the Ministry of Home Affairs in 2015 that some 336 restitution claims concerning 335,000 acres of land in its view 'cannot be transferred to the owners' (a sentiment which is not uncommon within ministries or others with current possession of land potentially subject to restitution), would need to be reviewed by an independent body specifically entrusted to examine restitution claims if the restitution process is to provide an effective restitution remedy for all who seek one.¹⁴ (See Box 9) A restitution process driven by the wishes of civil society and restitution claimants that is enshrined within whichever document is produced at the conclusion of the peace process and within a new National Land Law, constructed using the best practices of the international community and designed to resolve all outstanding restitution claims in the fairest and most expeditious manner possible will be of considerable benefit to the entire country as it continues in its quest for sustainable peace, reconciliation and development.

¹² 'Myanmar returns confiscated farmland to farmers in Mandalay', Xinhua, 10 July 2016 – "Myanmar's Mandalay regional government has returned over 200 acres of confiscated land to farmers in Madaya township...According to official, the returned land was originally seized by the former Ministry of Industry in 1977. In Mandalay, more than 35,000 acres of land were confiscated with some 32,000 acres having been returned." See also: Mylaff May 30th 2016, Issue 44 Volume 3.

¹³ Revealing the many challenges facing the existing mechanisms, the Reinvestigation Committee has received 2,056 cases submitted by hluttaws, states and regions, but thus far only 33 cases have been resolved by local committees. Source: Reinspection Committee Chair, VP Henry Van Thio, public statement made on 2 November 2016, published by the Myanmar News Agency on 2 November 2016.

¹⁴ Report of the Fifteenth day's meeting (20 Feb 2015) of the 7th regular session of the first Union Parliament. See also: Caitlin Pierce, 'Whose Land is it Anyway?', in *The Irrawaddy*, 7 July 2016: "Evidence suggests that the military was involved directly, or indirectly through family connections, in over 50 percent of land grab cases handled by paralegals working with Namati. The military's oversight of the GAD, via the Ministry of Home Affairs, creates a conflict of interest in the resolution of these cases."

BOX 9

WHY THE REINVESTIGATION COMMITTEE IS NOT THE SAME AS A NATIONAL RESTITUTION PROGRAMME

While the *Reinvestigation Committee* and its various tiers constitute remarkable steps forward in a country where so much land confiscation has taken place in past decades, in its present form and with its present mandate, this body falls short of what is needed in the following fundamental ways:

- The Committee only has powers of persuasion; it has no judicial powers, and can neither issue formal decisions nor enforce its recommendations concerning the complaints it receives and assesses;
- There is little indication that all potential restitution claims have been submitted to this and former bodies, particularly those linked to conflict areas;
- The Committee was intended to complete its work within six months (eg. by the end of 2016), which was always a wholly unrealistic time-frame given the nature of the problems at hand, and at time-frame which if strictly enforced, would have left large numbers of restitution claims unaddressed (as indeed occurred);
- The Committee is under-staffed, under-financed and lacks expertise in terms of international law and best practice on restitution;
- There appears to be no comprehensive searchable digital public record of the Committee's work, nor a website or database accessible to the public, including persons living under the control of ethnic armed groups.
- The Committee has not responded to many of the claims put to it, particularly if the case concerns land that was confiscated by the military.

13. Generally, if it can be definitively shown that the *Reinvestigation Committee* provides an effective remedy for everyone with a restitution claim, then it could be appropriate to consider giving the mandate to this body to determine all remaining restitution claims under the peace process. However, if this is not the case, - even if politically difficult and 'sensitive' - a new body will need to be established to ensure such effective remedies. 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. None of this is to dismiss the achievements of this body and other efforts to provide restitution, which have been considerable, but rather to state that this body and the overall procedural possibilities realistically accessible to everyone with a legitimate restitution claim are *not yet in place*, and can probably only find a place within the country through a new, consolidated restitution programme and law as a core element of the peace process and legislative land reform efforts.

NEGOTIATORS ON ALL SIDES CAN OVERCOME ALL OBSTACLES TO RESTITUTION

14. Restitution is never an uncomplicated endeavour, and the circumstances surrounding a potential restitution process in Myanmar are no exception. Identifying barriers to restitution, analysing the particular manner by which each manifests itself and developing effective measures to overcome these obstructions are crucial elements in any strategy to promote housing, land and property restitution. Such human-made impediments (most of which are *intentionally* placed in the way of effective return by those opposed to return or restitution) require early detection and pre-emptive attention by policy makers involved in negotiating peace agreements and other instruments involving return and eventual restitution. In this regard, it is particularly vital to ensure the inclusion within such texts of both the recognition of the right to housing, land and property restitution, as well as the establishment of the legal, procedural and institutional mechanisms required to ensure the implementation of this right. Ultimately, restitution is possible if the political will to make it possible is apparent, and this will depend on the courage of peace negotiators from both the Myanmar military and their negotiating partners to insist on peace agreements that fully recognise restitution rights and identify the precise means of overcoming these. A brief summary of some of the most prominent generic obstacles to restitution and how these occur within the Myanmar context follows:

15. **Inconsistent Legal and Regulatory Frameworks** have hindered restitution programmes in a variety of countries. Effective restitution can only occur when the national legislative structures are internally consistent, as well as fully compatible with whatever additional agreements (such as peace agreements, voluntary repatriation agreements and other standards) may exist. All countries that have undertaken to confer restitution rights to refugees and displaced persons have had to adopt new laws governing the restitution process, and frequently have had to repeal or amend earlier laws that were subsequently seen to be incompatible with more current efforts at restitution.

Refugee camp in Myanmar.



16. *Myanmar Context*: At the level of national law, 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 rights which could potentially bolster restitution claims, and may, therefore, be useful as at least a partial foundational basis in pursuing an improved restitution environment in the country. Of central importance, we need first 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.” Article 37 gives the State 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. Co-existing with the terms of Article 37, are additional constitutional human rights norms that address vital aspects of what the term ‘restitution’ means in both law and practice. In these provisions 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 restitution themes and both relevant and supportive to implementing corresponding 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.

17. At the level of statutory law, three laws are particularly relevant to an eventual restitution programme, namely the 1894 *Land Acquisition Act*, the 2012 *Farmland Law* and the 2012 *Vacant, Fallow and Virgin Land Law*. 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 even after recent amendments took place.¹⁵ 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.¹⁶ A new comprehensive restitution agreement promulgated *both* within the context of the peace process and within the eventual National Land Law now under discussions by the National Land Use Council could change all this for the better.

¹⁵ 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.

¹⁶ 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.

18. Arbitrary Applications of Law can act as a contributing factor in preventing successful measures of restitution and even future instability and conflict.¹⁷ Effective restitution programmes need to identify any legislation that has been applied unjustly or arbitrarily to the detriment of returning refugees, displaced persons and others subjected to the unlawful confiscation of their property, how such applications took place and were sanctioned, and which precise remedial measures will be required to reverse any illegitimate gains based on such arbitrary applications of law.

19. Myanmar Context: The question of arbitrariness - the unjustifiably differential treatment accorded to persons in the same situation on the basis of subjective decisions - and discrimination (differential treatment of a person based on his/her belonging to a certain group and without an objective justification) is fundamental in deciding restitution claims. If it can be shown, for instance, that members of certain ethnic groups have suffered acts of land confiscation/acquisition because of their membership of that ethnic group, then this would signify an arbitrary application of the law concerned. Likewise, if displacement is generated purely on the basis of one's religion and those displaced faced HLP losses during their displacement, then this, too, would constitute an arbitrary application of the law. If land was taken without regard to legal procedures and without access to proper judicial remedies, or if land was ostensibly acquired under the *1894 Land Acquisition Act* but not in the public interest, these acts would also be treated as arbitrary. The establishment of the *Reinvestigation Committee*, while not focused on refugee or IDP restitution claims, is premised on the fact that large-scale land acquisition has historically taken place in Myanmar on the basis of arbitrary applications of law, in particular the *1894 Land Acquisition Act* or the *1953 Land Nationalization Act*, and thus forms a solid piece of evidence as to the social viability of addressing outstanding restitution claims in the country, despite the fact that it has only considered a very small number of all possible restitution claims. A new restitution programme emerging from the peace process could complete the restitution quest in the country.

20. Secondary Occupation and Prolonged Possession of refugee homes, lands and properties is another common obstacle to the right of returnees to return to their original homes. Few practices spark tensions and provide more fertile ground for sustained conflict or renewed disputes than the takeover of one's property by persons unauthorised by the legitimate owner or tenant to do so. Indeed, reversing this particular obstacle to restitution has proven difficult unless adequate measures are taken to ensure that current occupants will be protected against homelessness, unreasonable relocation or any other human rights violations.

21. Myanmar Context: In Myanmar, the secondary occupation of refugee and IDP housing, land and property resources is commonplace throughout the country. The nature of this secondary occupation spans the full spectrum of political and military actors in the country, leading to circumstances where a substantial portion of disputed land is now occupied or otherwise being used and exploited by business/company interests, public officials, military facilities and local opportunists. As is clear from the procedures of the *Reinvestigation Committee*, there is a

¹⁷ In the Republic of Georgia, the legacy of discriminatory applications of the 1983 Housing Code by the judiciary against Ossetians who fled their homes during the 1990-1992 has prevented large-scale return for several years. Georgian courts have routinely argued that the abandonment of an apartment by a refugee did not constitute a "valid reason" for departure, and thus many flats belonging to Ossetians were subsequently allocated to ethnic Georgians. Similarly, in Kosovo as a result of the application of the Law on Changes and Supplements on the Limitations of Real-Estate Transactions (Official Gazette of RS 22/91 of 18 April 1991), the housing and occupancy rights of the ethnic Albanian population were arbitrarily annulled and housing and property transactions were severely restricted. When housing was bought or sold between 1989-1999, this was generally carried out on an irregular basis, and never officially registered thus complicating an already difficult restitution process.

realisation that even if the land in question was acquired unlawfully or unfairly that it is vital to take the interests of all parties into account in managing such claims. If a country-wide mass claims restitution process is approved under the auspices of the peace process, it will be vital to ensure that secondary occupants - even if their occupation of the land was done unlawfully - are accorded protection under law and that assurances are given to prevent homelessness or landlessness if the secondary occupants are required to vacate the land concerned. This is particularly true, of course, when the occupant is an individual or family as distinct from a large institution or well-connected business.

22. The Destruction and/or Non-Existence of Claimed Housing, Land and Property is a reality in many countries dealing with restitution, but such situations cannot be used as a rationale for the payment of compensation *in lieu* of restitution unless this is expressly requested by a successful restitution claimant. Indeed, the destruction of or damage to a home claimed by a refugee or IDP does not exempt it from restitution claims, nor does it exempt claimants from seeking and obtaining restitution. Rather, care must be taken to ensure that restitution remedies are interpreted in a broad and flexible manner (which may involve compensation), such that the factual status of a home or community as damaged or destroyed does not preclude claims on that home or community by refugees and displaced persons who were previous residents there. Restitution can be both claimed and awarded, even to buildings and villages or towns that physically no longer exist. Obviously, the remedy in such cases will differ from more traditional cases of restitution. But the right to have restored to them, the lands on which structures may have once stood or to be provided with other forms of restitution could constitute effective remedies, as could prompt and adequate financial compensation.

23. Myanmar Context: While national figures on the scale of housing, land and property losses are not available, it is clear that large numbers of homes have been destroyed as a result of conflict, and sometimes intentionally demolished or cleared following the end of open conflict or flight of refugees and IDPs. When such destruction has occurred, this *does not* in any manner extinguish restitution claims or rights to return to the land in question, nor does it mean that only compensation arrangements can be sought by claimants in lieu of return. Rather, under an eventual restitution programme in Myanmar it will be important to not penalise restitution claimants because of the destruction of their homes, but rather to ensure that both return *and* compensation are available to successful claimants.

24. The Absence of Effective Judicial Remedies makes the restitution of housing, land and property impossible, and for this and other reasons many countries have established specialised restitution bodies to overcome these deficits. While mediation, alternative dispute resolution and other approaches to restitution may be workable, an independent judicial body is a pre-requisite for actual restitution to occur in full.

25. Myanmar Context: It is widely known that the judicial system in Myanmar is in practical terms out of reach for significant portions of society due to cost, difficulties accessing lawyers, and because the judicial system is widely seen to need of structural reform and enhancement. This is particularly true when concerning land matters and disputes. Effective and impartial judicial remedies, therefore, for persons with housing, land and property restitution claims are generally unavailable to the vast majority of potential claimants, and even for those that do choose judicial pathways to pursue restitution claims are unlikely to secure recognition of their claims due to the state of law which rarely favours weaker segments of society who are by far the

most likely to have suffered HLP losses. Though persons claiming land losses can approach the *Reinvestigation Committee* for a potential remedy, practice has shown that the vast majority of people with potential claims have not presented such claims to this body, nor have a significant portion of those who have submitted claims achieved a reasonable degree of redress. Moreover, it has been widely acknowledged that the universal presence of representatives of the General Administration Department (GAD) on all levels of the *Reinvestigation Committee* (local, state and national) has had the very real effect of discouraging large numbers of potential restitution claimants from invoking this procedure because the procedure is seen as biased and not wholly impartial. Arguably, thus, while alternative dispute resolution measures may have some effect at very local levels of restitution disputes, in general terms there exists no effective remedy available today for everyone who believes themselves to have a valid restitution claim. To rectify this, the establishment of a new national restitution agreement and procedure emerging from the peace process, therefore, would provide effective judicial remedies to *everyone* seeking the restitution of their HLP losses.

26. Loss or Destruction of HLP Records and Other Evidence of Ownership and Residence can also undermine restitution guarantees. Protecting the physical integrity of housing, land and property records combined with ensuring rights to access them by claimants and whatever adjudicative body may be deciding restitution claims, the possibilities of successful restitution are measurably enhanced.

CDR Training in Mon State.



27. *Myanmar Context:* Research has shown that even in the comparatively rare instances where land claims were officially registered that large segments of the refugee and IDP population from Myanmar do not physically possess housing, land and property records proving their ownership of HLP resources that could be subject of a restitution claim. Part of this reality is simply a result of HLP registration systems in Myanmar lacking the capacity or legal powers to ensure registration for everyone seeking to do so, not to mention the important fact that the majority of land in ethnic areas remains under customary land laws which are not recognised under national Myanmar law, and which thus never result in titles or other forms of legal recognition being issued. Every effort needs to be given, therefore, to ensure that when housing, land or property was officially registered and it has been lost or destroyed, that measures need to be developed under a new restitution system to find alternative means for recognising the rights established under the registration systems in place. (See Box 10)

28. **Unclear Issues of Title and Residential Evidence** often results in several (or even many) people placing claims on the same piece of land. Resolving such contentious claims is often one of more difficult challenges facing restitution mechanisms, and are responsible for the often lengthy judicial proceedings that can accompany restitution claims.

BOX 10

SOURCES OF HLP RIGHTS EVIDENCE ARE EXTENSIVE

While clear and irrefutable evidence of ownership or residency form an important component of any successful restitution programme, such records are not necessarily indispensable to ultimately successful restitution claims. A variety of types of evidence, in addition to formal property records, are admissible in many of the existing restitution procedures, including: verified sale contracts, verified gift contract, inheritance decision with legal validity, court decision on ownership, valid decision made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, utility bills, construction license or building permits, usage permits, contract on use of apartment, excerpt from official records, decision on allocation of apartment, decision on apartment rent or rent levels, apartment rent slip, decision by which the apartment is declared abandoned, certificate of place of residence at claimed apartment, utility, phone, gas, bills, eyewitnesses, personal identity cards, car registration, census records, personal contracts, dismissal records and others.

29. *Myanmar Context:* In ethnic nationality areas the vast majority of land is held under customary law rules where shifting cultivation (*taungya* agriculture) is highly common. Most rights in this land, however, with the exception of some recent amendments to the VFV Law, are not adequately recognised under Myanmar law, and this must be addressed in any peace agreement and restitution process. Moreover, to the extent there is any land rights documentation in ethnic nationality areas, it has often been documented by armed opposition groups and not by the central government. The implications of these factors are twofold: first, it is important that HLP rights be negotiated as part of peace agreements; and second, any determination as to HLP rights must take into consideration both customary land rights and land rights that have been established under EAG documentation.

30. **Inequitable Inheritance Laws** can undermine the restitution rights of women-headed and single-parent households in many countries face particularly severe obstacles to return because of the application of discriminatory inheritance laws affecting both housing and property.¹⁸

31. *Myanmar Context:* When a new restitution procedure is developed, it must ensure that inheritance and succession rights to claimed housing, land and property are equitable and that women's rights in this regard are treated on the basis of full equality. At present, the laws treat women and men equally, however, practices often privilege male members of the family.

32. **Unresolved Citizenship and Nationality Issues** can also affect the ability of refugees and IDPs to equitably enjoy restitution rights. When national legal structures base restitution rights on citizenship status, these too, can create insurmountable obstacles to restitution.

33. *Myanmar Context:* Unresolved citizenship and nationality issues remain major political issues in Myanmar and will need to be addressed in the context of any new restitution agreement concluded as part of the peace process. The denial of access to citizenship rights, for instance, to persons belonging to minorities is at the core of tensions fuelling violence. The lack of a fair legal framework on citizenship and other unresolved issues need to be addressed and reformed in a manner fully consistent with relevant international legal principles.

34. **Abandonment/Absentee Laws** can obstruct restitution where selectively applied abandonment or absentee laws are employed against refugees and IDPs, in effect penalising them for fleeing.¹⁹ Such laws are responsible for much of the lack of confidence of refugees and IDPs to return to their original homes on a sustained basis.

35. *Myanmar Context:* Any new restitution procedures developed in Myanmar will need to ensure that any application of laws that treat claimed refugee/IDP homes, lands or housing as legally abandoned are declared null and void, and never to be used as the legal basis for rejecting an otherwise valid restitution claim. This will be challenging under the current legal regime as land

¹⁸ Two instruments are of particular note in recognising the rights of women to inherit property. The Beijing Platform for Action from the Fourth World Conference on Women, held in Beijing in 1995, provides that "men and women shall have full and equal access to economic resources including the right to inheritance and ownership of and property" (para. 61(b)). These principles were further elaborated in the Habitat Agenda, which emerged from the Habitat II Conference in 1996 where States were urged to commit to: "providing legal security and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technologies" (para. 40(b)).

¹⁹ It is also worth reiterating the important principle established in the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) that "refugees who voluntarily return to their country shall in no way be penalized for having left it for any of reasons giving rise to refugee situations..."(Art. 5(4)).

that is left fallow by refugees and IDPs simply because they had to flee their land can result in these groups legally losing this land under the *2012 Farmland Law*, even if the refugee or IDP in question holds a land use certificate (LUC). Similarly, under present law it is also possible that a refugee or IDP could lose land rights due to abandonment because of the non-payment of taxes or due to the reclassification of land because of non-use of the land in question under the *2012 Vacant, Fallow or Virgin Land Management Law*. Amendments to the VFV law in 2018 worsened the situation by establishing a tight deadline for registration and severe penalties in case of non-compliance with legal requirements (see Box 11). If security concerns persist and conditions on the ground remain non-conducive to refugee or IDP return leading to the inability of rights-holders to return to their land, this could also result in the land being declared abandoned, as could be the case if Department of Agricultural Land Management and Statistics (DALMS) refuses to survey the land in question for similar reasons or because a company which currently possesses the land may have declared it vacant. Clearly, none of these justifications for removing rights to claimed land by refugees or IDPs are reasonable or proportionate nor are they consistent with the numerous legal norms recognising restitution rights outlined above. Consequently, these issues will need to be explicitly addressed in any eventual restitution agreement for the agreement to be consistent with law and capable of securing restitution for everyone with a valid claim.

BOX 11

A SETBACK TO RESTITUTION EFFORTS: THE 2018 VACANT, FALLOW AND VIRGIN LAND MANAGEMENT LAW AMENDMENT

An announcement by the government concerning the implementation of the September 2018 amendment of the *Vacant, Fallow and Virgin Land Management Law* raised significant concerns amongst civil society engaged with land rights in Myanmar. The amendment is seen as a potential risk for small farmers, ethnic customary land users and IDPs.

WHAT IS VACANT, FALLOW AND VIRGIN LAND?

- Vacant and Fallow Land - According to Myanmar law, “vacant and fallow land” is land that used to be cultivated but has been abandoned. This can include both State designated land and land formerly used for agriculture, livestock or breeding purposes.²⁰
- Virgin Land - “virgin land”, according to Myanmar law, is land that has never been cultivated. This includes forests that are not legally reserved or declared protected.²¹ This also includes formerly reserved forests, grazing lands and fisheries that have been legally nullified for government-approved business purposes.²²

²⁰ 2012 Vacant, Fallow and Virgin Land Management Law (Pyidaungsu Hluttaw Law No. 10/2012), Article 2(e),

²¹ *Id.*, Article 2(f).

²² This includes “agriculture, livestock, breeding, mineral production and other businesses permitted by the Government”, *Id.* Article 2(f).

In practice, these are wide categories by default, as the definition incorporates areas of land that are not covered under other, specific Myanmar land laws. Based on Myanmar Government statistics, the most recent estimate classifies over 27% of the land in Myanmar as vacant, fallow or virgin.²³ Millions of farmers are currently using land that could potentially be considered VFV land. Often, farmers and communities are using such lands as part of their customary land tenure systems.

WHAT IS THE VACANT, FALLOW AND VIRGIN LAND MANAGEMENT LAW?

The 2012 Vacant, Fallow and Virgin (VFV) Land Management Law specifies the definition, governance, use rights, along with offenses and penalties associated with vacant, fallow and virgin land in Myanmar. The VFV Land Management Law places the management of vacant, fallow and virgin land under the Central Committee for the Management of Vacant, Fallow and Virgin Land (Central Committee). This is a national-level, inter-ministerial committee chaired by the Ministry of Agriculture, Livestock and Irrigation (MoALI).²⁴ The Central Committee oversees the granting and monitoring of users' rights over VFV lands for all government-permitted business purposes, in coordination with relevant ministries and Region or State Governments.²⁵ Myanmar citizens, private sector investors, government entities and NGOs can submit applications to the Central Committee for use permits of VFV land.²⁶ The role of the Central Committee is particularly important, as VFV land may be granted to companies for development.²⁷

WHAT ARE THE IMMEDIATE CHALLENGES AND CONCERNS?

Following the Vacant, Virgin and Fallow (VFV) Land Law Amendment, public announcements were made on 2 November 2018 in newspapers, along with MoALI's website and Facebook page, calling for those currently using VFV land without permission to apply for use permits by March 2019. This raises concern regarding widespread and strict implementation of the Amendment's provisions. Specific concerns include:²⁸

- While the Amendment provides a new provision (Article 30a) for the protection of customary land rights, there was no reference to such provisions included in the public announcements, potentially creating confusion regarding who needs to apply for use permits.
- The boundaries of VFV lands are not clear. VFV land is a category by default, and there are no accessible or verified maps of such land category. Most farmers do not know whether the land they are using is formally considered VFV land.

²³ Data source: Department of Agricultural Land Management and Statistics, 2017. VFV land estimate computation by Land Core Group.

²⁴ 2012 Vacant, Fallow and Virgin Land Management Law, Article 3(a).

²⁵ *Id.* Articles 6 - 9.

²⁶ *Id.* Article 5 (a - e).

²⁷ Mekong Regional Land Governance, *Large-Scale Land Acquisitions for Agricultural Development in Myanmar: A Review of Past and Current Processes* (2018), pg. 26.

²⁸ Concerns developed with input from multiple organizations, including Land Core Group, Oxfam, Landesa, GRET, and others.

- Many farmers do not have good access to information or administration services to submit a use permit application. This is particularly true in upland areas where farmers often live under customary tenure.
- If implemented as planned, the appropriate land administration bodies will likely be unable to manage an increased volume of applications on a nation-wide basis.
- In practice, this means that only a very small portion of farmers already using VFV land will be able to apply for use permits within six months.
- At the same time, this Amendment provides an opportunity for companies and influential individuals, with much better access to information and land administration services, to apply for VFV land use permit concessions.
- The VFV law implementation, without safeguards, can potentially counter existing agreements concerning land and natural resources within the peace process as well as the National Land Use policy.

HOW CAN THIS IMPACT DISPLACED PERSONS?

Cultivated land, grazing land, fisheries or forest land left behind by displaced persons may fall under the 2012 Vacant, Fallow and Virgin (VFV) Land Management Law. There is no specification for how much time must pass before abandoned land is considered vacant or fallow, and persons who have experienced forced displacement are not protected under the VFV Management Law. This creates a risk for both IDPs losing use rights to these lands in their locations of origin, along with facing penalties for using formerly abandoned land in their current locations. If displaced populations' lands are classified as vacant, fallow or virgin, IDPs will face enormous difficulties adhering to the six-month timeline for use permit application required by the VFV Management Law Amendment. IDPs are likely not able to receive timely information regarding the VFV Management Law Amendment, return to their location of origin, nor submit the proper application paperwork to the Township Vacant, Fallow and Virgin Land Committee by March 2019. This could facilitate *de facto* eviction for IDPs who have left cultivated land, grazing land, fisheries or forest land. IDPs who are using abandoned land in their current location must also apply for a use permit by March 2019 or else potentially face penalties associated with the VFV Management Law Amendment, which includes up to two years in jail, a fine of 500,000 Kyats or both.

WHAT ARE THE POSSIBLE WAYS FORWARD?

The government should halt the implementation of the 2018 amendment of the law and any related sanctions to farmers. It should also discontinue the allocation of VFV lands to private sector entities. Moreover, the government should enter into a constructive dialogue with farmers, ethnic communities and civil society organisations with the goal of establishing a fair land governance framework, as foreseen by both the National Land Use policy and the peace process.

36. Discrimination in any form - racial, sex, nationality, ethnic, age or otherwise - can seriously undermine restitution rights. The exercise of housing, land and property restitution rights can be seriously restricted by any intentional or factual manifestation of all forms of discrimination negatively affecting those individuals and groups seeking to claim these rights. Over the past decade, inter-governmental agencies, government officials, United Nations 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, rights-based solutions to all forms of displacement based on the restoration of possession of one's original home is the *preferred remedy* to displacement, and this often takes place within the context of resisting discrimination. For instance, the UN Committee on the Elimination of Racial Discrimination (CERD) in *General Recommendation No. 22 (1997) (Article 5 on refugees and displaced persons)*, recognizes that refugees and displaced persons have the "right freely to return to their homes of origin under conditions of safety; States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-defilement and non-expulsion of refugees; All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void; (d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance".

37. Myanmar Context: If any of the current measures proposed by the Myanmar government were applied differently to distinct ethnic, religious or other groups without a reasonable justification, such measures would clearly be discriminatory and thus violate both international and domestic laws. Protections against such acts will need to be included in any eventual restitution law and programme.

Village in Mon State (José Arraiza/NRC)



38. Inequitable Treatment of Owners and Tenants can also impede restitution when restitution rules focus only on conferring such rights on the basis of outright ownership and thus exclude former tenants or holders of others forms of occupancy rights from full restitution rights.

39. Myanmar Context: In any eventual restitution process it will be vital to ensure that tenants or other non-owners in any eventual Myanmar restitution programme are treated equal in terms of restitution rights to owners, and that they are as ensured full restitution rights in the process. This would mean, for instance, that those in possession of LUCs which provide rights of *use* but not outright ownership, would be treated equitable with all of types of rights-holders.

40. Compensation Bias can undermine restitution efforts when an over-emphasis on financial compensation is used to effectively thwart claims demanding the actual restitution in kind of the housing, land or property concerned. Compensation is a vital component of all restitution programmes, but it must never be used as a rationale for preventing actual return.

41. Myanmar Context: Although no nationwide, comprehensive restitution law or claims process is currently in place in Myanmar, the principles and concepts of both compensation and restitution arrangements are widely recognised within domestic law and policy, and are familiar in the country and can, thus, easily find recognition within peace agreements. The *Procedures on Redistribution for Confiscated Land (2013)*, for instance, address compensation and restitution arrangements for land and crops lost due to land acquisition as does the *2012 Farmland Law*. It will also be important to ensure that appropriate forms and amounts of compensation are provided to returning refugees who lost movable property and assets as a result of their flight to safety. In addition to people losing their legal rights to reside in certain homes, many also have lost - through military actions, outright confiscation, theft and vandalism - personal affects including household possessions, furniture and other personal goods, agricultural machinery, farm animals and so forth. Returnees should be availed the opportunity to claim such losses before an independent claims body. If it is decided that the returnee has a right to compensation for lost movable property, this should be made at replacement cost or through the substitution of the lost asset with another of comparable productive capacity. Any compensation provided under this rubric must specify regulations for the standard valuation of lost movable assets.²⁹(See Box 12)

²⁹ Land Acquisition Act 1894, Sections 23(1), 34. This Act is currently under review and expected to result in a revised law at some point in 2018.

BOX 12

GETTING COMPENSATION RULES RIGHT

Whatever regulations are developed must ensure that the level of compensation is just and that it provides the affected person(s) with a real substitute for the asset lost. Answers will need to be found to the following key questions in this regard:

- Who will receive compensation and under which criteria and conditions?
- What is the likely scale of possible compensation claims, e.g. how much will this cost the State?
- Will claimants be entitled to submit specific compensation claims or will the programme pursue a one-size-fits-all approach notwithstanding what could be significantly different scales of loss?
- How much compensation will be provided to recipients?
- Who will pay for compensation and from which source will the full amount be accessed?
- What form will compensation take? Will it be entirely financial in nature, or will non-financial sources of compensation be envisaged?
- Will recipients be able to appeal any compensation decision?
- Will compensation be provided on the basis outlined in the *Land Acquisition Act* that allows for with compensation to be set at market value plus 15% and the possibility of interest at 6% per annum for any delay in payment?

CORE PRINCIPLES TO GUIDE RESTITUTION DECISION-MAKING

42. The existence of so many obstacles to effective restitution - which as we have seen, all exist to one degree or another in Myanmar - raises the obvious question as to why countries even bother with restitution when such measures present such challenges? And to that, the simple reply is that ever growing numbers of governments, political movements and institutions recognise that unresolved restitution claims undermine the prospects of sustainable peace, reward unlawful and often corrupt actions involving the theft of disputed housing, land and property and that ignoring such claims generate a sense of injustice for everyone who believes their restitution claims to be legitimate, but who also feel they have nowhere to turn to achieve justice.

43. Given the now widespread application of restitution laws, programmes and procedures for refugees and others who seek to recover lost property, homes and lands, a variety of important lessons can be identified for those involved with the establishment of future restitution mechanisms. These include:

- ✓ **Implement interim measures of protection for IDP and refugee land** - While restitution-oriented measures are developed, it is imperative that the government establishes interim measures to protect land left behind by IDPs and refugees to prevent occupation, unlawful land acquisition and sales under duress.
- ✓ **Include restitution rights directly within peace agreements, voluntary repatriation agreements and other policy documents** - Directly addressing these rights and highlighting them will assist in peace-building and protect the rights of victims of conflict.
- ✓ **Address restitution issues within the context of governance issues in peace agreements, not only in terms of human rights or refugee/IDPs** - Restitution issues are invariably rule of law issues and directly impinge on political understandings, as well as legislative and judicial sectors. Using the peace process as a vehicle for addressing outstanding restitution grievances can be highly beneficial to building the foundations needed for peace.
- ✓ **Ignoring restitution issues will not make the problems go away** - Restitution claims are not rendered void due to the passage of time, even sometimes considerable periods. Indeed, all of the eastern and central European restitution programmes that commenced in the early 1990s concerned property that was confiscated up to five decades earlier, while in South Africa restitution claims could be submitted for confiscation cases stretching back almost 90 years. Moreover, unless restitution rights are given the attention they require, they will invariably re-surface, with often violent results.
- ✓ **A gender perspective should pervade any restitution process** - Every effort should be made to ensure that restitution issues particularly relevant to women pervade any restitution process. This would include, for instance, equality and inheritance and succession rights form core parts of all peace agreements.
- ✓ **Prepare for a long-term process** - Once a restitution agreement is reached and the mechanisms required are established, the process will take time. The full enjoyment of HLP rights by everyone will invariably be a long-term process, but one which will stand a far larger likelihood of success if addressed properly within peace agreements.
- ✓ **Minimize residential disruption to the maximum possible extent** - Every effort should be made by those involved in the restitution process to prevent as much residential disruption as possible. A first step in this regard would involve rules that do not allow the ordering, carrying out or toleration of forced evictions of people from their present homes (unless truly extraordinary circumstances so warrant) and/or a moratorium on transfers/sales of any homes, lands or properties subject to claims by claimants under a restitution procedure.
- ✓ **Identify and allocate affordable land for low-income housing settlements as part of broader restitution objectives** - Set benchmarks for the identification of land for eventual use and/or allocation to low-income groups; and develop longer-term plans for land allocation and distribution (particularly of State land) with a view to accurately addressing future housing needs.

- Ensure the registration of all restitution claims** - The housing, land and property registration system, and/or the national land cadastre will require establishment, (or re-establishment and updating) and will invariably form a core element of any restitution process. As appropriate, alternative titling and deeds systems should be proposed to expedite the conferral of security of tenure and official registration of housing rights.
- Ensure flexible and effective remedies based on refugee and IDP choice** - Any successful restitution programme must recognise the dual needs of the restitution institutions concerned to be able to have at their disposal an array of flexible remedies that can be deployed in adjudicating restitution claims, and the equally important need for refugees to have the right to choose the restitution remedy that is best suited for them and consistent with their rights. Because the restitution process is often complex and comprised of layers of laws, history and conflict, restitution mechanisms must also be given the necessary flexibility to deal effectively with the claims submitted to them. Overall, the more flexibility built into restitution systems, the greater the likelihood that they will succeed in their objectives.
- Rely on compensation remedies subject to strict conditions** - It is often argued that the payment of financial compensation can act as an acceptable substitute for full return-based restitution. Many restitution programmes, however, have not successfully used the remedy of compensation unless special circumstances were apparent. The UN Claims Commission on Iraq, for instance, was only able to provide compensation due to the Oil for Food Programme, which brought in billions of dollars for use towards compensation claims. Likewise, the German restitution programme, which also involved compensation payments, could not have been carried out without the massive infusion of funds to eastern Germany by the central German government.³⁰ While compensation may or may not provide an adequate alternative to restitution in kind within a given context, compensation in lieu of restitution should be considered only on several specific grounds. Firstly, if restitution is materially impossible due to the destruction of a former home or a degree of alternation to a former home that restitution was not considered feasible, then clearly compensation may provide equitable redress. This will only be the case, however, if the payment is made at the full market value of the property confiscated, and if these funds are paid in a prompt, fair and equitable manner. Secondly, compensation in lieu of restitution (excluding compensation for damages) should only be considered if this is the preferred remedy expressed by a claimant. Thirdly, compensation should only be considered if the funds to be paid already exist within a trust fund or other guaranteed source, administered by independent parties, which ensures that the compensation award will actually be paid.
- Legal principles guiding restitution must take both international and national law into account** - Restitution procedures that are based solely on the contents of domestic laws are often unfair and inequitable. Many restitution mechanisms have had to grapple with such considerations, and particularly in the immediate aftermath of the war, the domestic legal framework in Bosnia-Herzegovina, for instance, was seriously incompatible with international law, and obviously could not act as the basis for decisions of the restitution commission there.
- Restitution rights must extend to heirs of property** - In principle, all living refugees and the heirs of refugees who have died since their flight from their original homes and lands must have a right to submit restitution claims.

³⁰ On the other hand, even where compensation has been explicitly envisaged, such as under the Dayton Agreement, this element of the broader restitution programme was never implemented.

- Protect the rights of secondary occupants** - Effective restitution procedures, that are consistent with human rights law, should ensure that the rights of secondary occupants of housing and property subject to restitution claims are protected. The enforcement of restitution claims will obviously mean that the current occupants of the homes or lands in question may be required to vacate the premises in order to allow the recovery of property to take place. To the maximum possible extent, such relocation should take place on a voluntary basis, with enforceable legal guarantees in place stipulating that under no circumstances will any secondary occupant become homeless or be forced to reside in intolerable living conditions.³¹
- Effective institutional co-ordination is vital for restitution mechanisms to succeed** - Restitution programmes tend to involve the efforts of numerous institutions. In Bosnia and Herzegovina, for instance, over 100 separate institutions were involved with restitution and refugee return issues. To ensure the successful restitution of the original homes and lands returnees, institutional efforts should be well co-ordinated through the conclusion of agreements or memorandums of understanding aimed at promoting co-operative actions prior to, during and subsequent to the work of restitution institutions. The appointment of one agency to oversee the co-ordination of restitution may facilitate these processes.
- Ensure refugee and IDP participation in developing restitution plans** - Refugees and IDPs should be directly involved in developing programmes and institutions designed to protect restitution rights. There is a need to incorporate the interpretations of what it means for refugees and IDPs to call a place 'home' and an implicit understanding that not all returnees will want to return to their original homes. Restitution will be more likely to succeed when refugees and IDPs are involved as equal partners in a consultative process.
- Citizenship, nationality and residential status should not preclude restitution** - Restitution rights should not be subject to a person's citizenship, nationality or place of residence. Claims should be allowed by any person with a legitimate claim, notwithstanding any other criteria. The positive obligations of the State under international standards require that steps are taken to confer legal security of tenure to persons lacking it. Moreover, States are obliged to prevent and address statelessness within their jurisdiction.

44. Viewed from any angle or perspective, it is clear that the Myanmar peace process will never succeed without the restitution question being formally addressed within whatever eventual agreement emerges. Similarly, any National Land Law must also address restitution concerns. The sheer scale of unresolved cases of displacement throughout all corners of the country, the economic and social deprivation and losses associated with this displacement, the growing clamour by refugees and IDPs to be able to return to and have restored to them their former homes, lands and properties, and the good practices of many other states emerging from conflict(s) all point to the need for comprehensive action on restitution as a *key ingredient* in building the foundations for sustainable peace.

³¹ General Comment No 7 on 'Forced evictions', adopted on 16 May 1997 by the UN Committee on Economic, Social and Cultural Rights stipulates clearly that: "States parties shall also see to it that all individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected" (para. 14).



Farmer in Hpa An, Karen State (José Arraiza, NRC)

III. KEY ELEMENTS IN A SUCCESSFUL MYANMAR RESTITUTION PROCESS - ISSUES ON WHICH PEACE NEGOTIATORS MUST FIND AGREEMENT

45. It is difficult to imagine from a dispassionate and objective point of view that the foundations for a sustained national peace will ever come about in Myanmar unless and until all outstanding restitution claims - of which there are literally millions - are effectively dealt with in a way that fully respects the rights of those concerned. These outstanding cases need resolution and it will only be through a new restitution process and mechanism, grounded in an eventual peace agreement(s) and a National Land Law that fully enshrine restitution rights that such obstacles can be overcome. Such a process and the mandate given to an eventual restitution mechanism will, at the most basic level, need to be based on the following ten points:

1. 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) retains legal 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 and within 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.



46. There appears to be a 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 within the country. Myanmar will be a better country and all of its people will be better off if restitution demands are met in the near term. It will depend on courageous negotiating by all parties - government, ethnic armed groups and the military - to build mutual agreement around a restitution process that is built on the best global practices over the past several decades, and one which accords equitable access and justice for every single person with a valid restitution claim. To construct such a restitution process in Myanmar decision makers will need to bear in mind the basic parameters of what a solid restitution process would look like and the various foundations on which it can be built.

47. As such, the remainder of this section focuses on fifteen specific elements of a successful restitution process and how each element can be addressed by those responsible for building peace across Myanmar. Each of the following sections (A - O) indicate a key feature of a successful restitution programme followed at the end of the section with 'Suggested Agreement Text' where draft language of a potential restitution agreement are proposed.

A. THE LEGAL BASIS FOR RESTITUTION

48. The concept of restitution 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 for refugees and IDPs has been built. International law approaches restitution generally through the lens of infringements of law/rights due to what are defined as wrongful acts or omissions attributable to States through the application of the law of State responsibility. In addition to these norms, international humanitarian law also addresses grave breaches of residential rights that can give rise to measures of restitution. Restitution is also a key element of the remedial measures envisaged under international criminal law. Article 75 (Reparations to victims) of the *Rome Statute of the International Criminal Court* specifically addresses restitution in terms of eventual Court decisions. The *International Criminal Tribunal for the Former Yugoslavia* has also explicitly included restitution of property amongst a range of possible remedies. These and many other international legal affirmations of restitution, in part, also formed the basis for the 1998 *UN Guiding Principles on Internal Displacement* which explicitly address the question of restitution in Principles 28 and 29. (See Box 13)

BOX 13

THE IDP GUIDING PRINCIPLES ENSHRINE RESTITUTION RIGHTS

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.

49. 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 UN General Assembly adopted and proclaimed 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*, which in para. 19, 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*.” (emphasis added) These points were further refined in the United Nations Principles on Housing and Property Restitution (*Pinheiro Principles*), also approved by the UN in 2005. 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’. The *Pinheiro Principles* 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. 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.(See Box 14)

BOX 14

THE UN PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS, 2005 - 'THE PINHEIRO PRINCIPLES'³² AND ITS RELEVANCE TO MYANMAR

WHAT ARE THE PINHEIRO PRINCIPLES?

The *Pinheiro Principles*, expand and clarify further 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'.

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.

WHAT DO THEY SAY?

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. 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.

³² See: Final Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1). This document contains the official UN text of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, as approved by UN Sub-Commission on the Protection and Promotion of Human Rights in Resolution 2005/21 of 11 August 2005.

WHY ARE THEY RELEVANT IN MYANMAR?

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'. 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.

50. If the various governing authorities in Myanmar and their ethnic negotiating partners 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



caption goes here

inherently unique about Myanmar that would preclude this as an option in the country as well. Myanmar is a formal member of various inter-governmental organisations, most notably the United Nations and ASEAN, and has officially 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 *Universal Declaration on Human Rights*, as well as other sources of international law (*jus cogens*, State practice, customary international law, *et al*) are as relevant to Myanmar as anywhere else. Moreover, the State of Myanmar has formally ratified several of the key international human rights treaties signalling their clear intent, in good faith, to comply with the rights and obligations these important standards generate.³³

MANAGING PARALLEL LEGAL SYSTEMS

51. One fundamental legal issue sure to face peace negotiators will be how best to manage situations involving parallel legal systems where Myanmar Law and EAGs law co-exist in the same location. As noted, several of the main EAGs have begun land registration programs. The Karen National Union (KNU), for instance, has begun registering land claims and issuing KNU land titles to people living within areas under its control. Over the past few years, the KNU has issued more than 35,000 Land Use Certificates which clearly indicates the importance this group places on land and its administration, and further evidence of how vital it will be to fully recognise and protect ethnic land rights within the peace process. While the relevant ceasefire agreement indicates that such titles will be respected by the government, it is unclear how these KNU titles (and others eventually bestowed by other EAGs) will be harmonised with land use certificates (Form 7, Form 105 or other land documents) issued by the Myanmar Government under its legislation as well as any new registration measures that occur as a result of a new restitution procedure. While it appears that many with official documentation issued by the KNU also possess government-issued land use certificates, the potential for HLP disputes based on this parallel-titling system and the threat of non-recognition of the KNU documents by the government could form an obstacle to sustained peace.

52. Moreover, while there have been some important advancements in terms of the recognition, for instance, of customary land use tenure systems by ethnic groups within the National Land Use Policy and the VFV Law, which includes a commitment to formally recognise these systems (formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms) within any new National Land Law, the gap between government and ethnic groups on these fundamental issues remains. At the same time, several of the ethnic actors have issued their own distinct land policies, including

³³ 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) and ratified it in October 2017. More specifically, many international standards address housing, land and property rights issues and dozens of voluntary repatriation agreements enshrine restitution rights for returning refugees and internally displaced persons which recognise the right to repossess original homes and lands. 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. The concept of the restitution of property, of course, 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 the general remedy of restitution 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.

the KNU's new land policy launched on 25 May 2016, which commits it to administer land in a manner that is consistent with the *Pinheiro Principles*. The KNU policy notes that original lands will be returned to displaced persons or their heirs, and if this is materially impossible, appropriate alternatives will be ensured. The revised policy also commits the KNU to allocate land to displaced persons that are unable to return to their original lands.

53. The legal basis for restitution, thus, is widespread and clearly established at the international level, as well as within Myanmar national law (albeit partially), and being increasingly considered by various EAGs. Many other countries have successfully implemented restitution programmes based on such principles, and **there are no legal grounds upon which to justify inaction on restitution**. If there is inaction over the short-term, this will be for political reasons and not legal ones. How a new restitution agreement could start and what preambular language could be included within such a text follows:

SUGGESTED AGREEMENT TEXT - DRAFT TITLE OF AGREEMENT

Housing, Land and Property Restitution for Refugees and Displaced Persons and the Establishment of the Myanmar National Restitution Commission

DRAFT PREAMBLE

Recognising that national reconciliation and peace, as well as national economic development, the broadening enjoyment of human rights and the foundations of a peaceful, stable and democratic nation are best served by ending displacement and securing housing, land and/or property restitution rights for everyone with a legitimate restitution claim;

Aware that resolving all outstanding housing, land and/or property restitution claims and ending displacement will strengthen the foundations of peace and provide a solid basis for ending the arbitrary acquisition of land throughout Myanmar;

Reaffirming Article 34 of the 2001 Articles on State Responsibility that asserts: "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.";

Also reaffirming 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 (2005), which notes in para. 19: "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.";

Further Reaffirming the principles contained within the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005) as well as internationally

recognised fundamental human rights which are indispensable for the enjoyment of restitution rights, including but not limited to the right to voluntary return and repatriation; the right to pursue options other than return; the right to just and satisfactory compensation; the right to citizenship, and the right to adequate housing and secure tenure;

Recalling provisions within the 2008 Constitution recognising relevant rights to the right to land restitution;

Taking note of the important work of the Central Land Grab Reinvestigation Committee and other actions designed to address the loss of housing, land and/or property rights;

Convinced that all refugees and displaced persons who fled their homes, lands and properties do not at present have sufficient recourse to judicial or other procedures to enable them to return to, reclaim and have restored to them housing, land and property over which they have legitimate and valid claims;

Therefore, the Signatories agree to the following Articles:

B. THE RIGHT TO RETURN TO HOMES, LANDS AND PROPERTIES OF ORIGIN

54. Some of the specific housing, land and property restitution rights that are clearly linked to any eventual voluntary repatriation by refugees and IDPs and which are clearly enshrined within the international legal regimes include the right to voluntary return, the right to HLP restitution, the right to adequate housing and security of tenure, 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. These rights can be seen as the core rights that need to be considered in developing restitution policies and agreements in Myanmar. These provisions reflect the evolution and transformation of the right to voluntary return/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*; principles now widely recognised throughout international law. Increasingly, therefore, return rights and HLP restitution rights need to be treated in tandem with one another. Arbitrarily failing to recognise such rights would not, therefore, be fully consistent with international legal norms. At the same time, the right to return – whether for refugees or displaced persons – is indeed *not* an obligation to return. Return cannot be restricted, and conversely it cannot be imposed. It must be a free and informed 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.

55. 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. In sum total, thus, international laws read in their entirety, recognise the following HLP rights in the context of eventual voluntary return:

- (a) All refugees and IDPs have the right to voluntarily return or to voluntarily choose not to return;
- (b) Repatriation should always be voluntary;
- (c) All refugees and IDPs have a right to return to their place of origin and HLP restitution where return to their place of origin or destruction of property has led to a deprivation;
- (d) When restitution is materially impossible or not the wish of the refugee or IDP concerned, refugees and IDPs have a right to just and satisfactory compensation;
- (e) Fair and impartial legal and/or judicial mechanisms need to be in place to ensure the protection and enforcement of restitution and compensation rights;
- (f) The particular, gender-specific rights of women require attention in these contexts;
- (g) Housing, land and property records and documentation should be secured and publicly available to all returning refugees and IDPs; and
- (h) All refugees have the right to resettle where they wish within their country and to move freely within their country.



SUGGESTED AGREEMENT TEXT

ARTICLE I - RIGHT TO RETURN TO HOMES, LANDS AND PROPERTIES OF ORIGIN

1. All refugees and internally displaced persons, or anyone else with a valid restitution claim, has the right to return to and have restored to them any and all housing, land and/or property of origin that was unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution between 1 January 1988 - 31 December 2018.

2. The Signatories shall ensure that all refugees and displaced persons are permitted to voluntarily return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.

3. The Signatories shall take all necessary steps to prevent activities within their territories that would hinder or impede the safe and voluntary return of refugees and displaced persons.

4. The Signatories agree that choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Signatories shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. The Signatories shall facilitate the flow of information necessary for refugees and displaced persons to make informed judgments about local conditions for return.

C. THE RIGHT TO PRESENT A RESTITUTION CLAIM

56. Read in their entirety, relevant legal norms clearly posit that everyone arbitrarily displaced from their places of habitual residence must have the right to present a restitution claim as a process through which lost housing, land and property can be properly returned to the legitimate owner or rights-holder. Principle 13 of the *Pinheiro Principles* discusses the need for accessible claims procedures in considerable detail. This Principle follows on from the norms found in Principle 12 and point to the need for everyone who 'has been arbitrarily or unlawfully deprived of housing, land and/or property' to be able to submit a claim for restitution and/or compensation to an independent and impartial body and to have a determination made on their claim and to receive notice of such determination. While there do not appear to be any specific restrictions on who may submit their cases to the *Reinspection Committee* or previous bodies which received such complaints, it is clear that a considerable portion of people who have outstanding and unresolved restitutions may not have yet submitted such claims, particularly those in current or former conflict areas not subject to ceasefires or peace agreements. Restitution can only succeed if the procedures associated with this objective are free, simple and equitable. Any acceptable restitution procedure must be entirely free of charge to any potential claimant. Moreover, the claims process must be easy to understand and with as little legal language as possible. Claims forms must be available in languages understood by those likely to submit claims. Claims processing centres and offices should be established throughout the areas where claimants currently reside, such that it is easy to reach the nearest office. Restitution mechanisms must have the capacity to assist potential claimants to fill in their claim forms in the proper manner and to provide answers to any questions claimants may have. These mechanisms should also be able to provide legal counsel or direct representation to claimants requiring this assistance.

57. Principle 2 of the *Pinheiro Principles* addresses the right to housing and property restitution.³⁴ Though the term 'restitution' is increasingly common in Myanmar, as noted, there is no distinct

³⁴ It reads as follows: 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 prioritize 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.



'right to housing and property restitution' as yet within Myanmar law. One could argue that an emergent restitution right may be inferred by a comprehensive reading of the constitution, the *National Land Use Policy* and the growing practices of State bodies such as the *Reinspection Committee*, it is clear that no stand-alone restitution right exists. Pinheiro Principle 2.1 speaks of the necessity of having in place an 'independent and impartial tribunal' that is capable of making determinations, in every case, as to whether the restoration of housing, land and/or property of which they were arbitrarily or unlawfully deprived' is an appropriate remedy, or whether compensation should be paid in instances where it is factually impossible to restore the housing, land or property in question. Similarly, it would be difficult to argue that such an independent and impartial tribunal is currently in place in the country, or that a consistent and equitable system is now in place to determine whether restitution or compensation would be the most appropriate remedy in each given case.

58. Principle 2.2 articulates the responsibility of States to 'demonstrably prioritize the right to restitution as the preferred remedy for displacement'. While significant and laudable steps have been taken over the past several years in Myanmar to place restitution concerns ever higher on the political agenda in the country, once again it would be difficult to argue that restitution is the *preferred remedy* for displacement when just a small portion of those with outstanding restitution claims have actually been either able to recover their original homes and lands or receive just and satisfactory compensation at levels consistent with generally accepted norms.

Farmers in Hpa An, Karen State (José Arraiza/NRC)



59. Some refugees 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.

LEGAL AID AND ASSISTANCE

60. The right to present a valid restitution claim should be accompanied by concurrent rights to legal aid and assistance for claimants to ensure they are able to present the highest quality restitution claims in their best interests. An effective restitution agreement should include explicit reference to ensuring legal aid and assistance to all potential restitution claimants by, for example, placing trained lawyers at each office of a restitution body who can assist claimants, as well as roving teams of lawyers who are entrusted with visiting claimants who cannot travel to the central or state offices. Explicit funding for such legal teams should be included within any eventual agreement.

EVIDENCE OF VALIDITY OF CLAIMS

61. Problems associated with HLP registration and the prevailing lack of full land titles in many areas of the country are well-known throughout the land sector in Myanmar and stem from decades of imperfect record-keeping, internally contradictory laws, the non-recognition of land rights for those living in areas governed by customary land rules, and the lack of meaningful legal recourse. This reality can have the net effect of proving the validity of restitution claims difficult, and restitution procedures will need to apply flexible evidentiary means for claimants to rely on in making their claims. As such, any restitution body established should be able to review claims based on a wide range of potential evidence including: formal property records, verified sale contracts, verified gift contract, inheritance decision with legal validity, court decision on ownership, valid decision made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, utility bills, construction license or building permits, usage permits, contract on use of apartment, excerpt from official records, decision on allocation of apartment, decision on apartment rent or rent levels, apartment rent slip, decision by which the apartment is declared abandoned, certificate of place of residence at claimed apartment, utility, phone, gas, bills, eyewitnesses, personal identity cards, car registration, census records, personal contracts, dismissal records and others.

SUGGESTED AGREEMENT TEXT

ARTICLE II - RIGHT TO PRESENT A RESTITUTION CLAIM

1. *All refugees and internally displaced persons, or anyone else with a valid restitution claim has the right to present a claim for the restitution of housing, land and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution between 1 January 1988 - 31 December 2018 to the National Land Restitution Commission [hereinafter 'The Commission'].*

2. *Restitution claims may be presented individually and collectively.*

3. *Restitution claims may be presented by claimants concerning housing, land and/or property that they cannot currently access or otherwise exercise control over due to, inter alia, earlier confiscation and/or acquisition of the said housing, land and/or property, the secondary occupation of the said housing, land and/or property or any other reason, with or without reference to legal justification.*

4. *Restitution claims must be presented on the basis of objective evidence supporting the claim in question, including but not limited to: formal property records, verified sale contracts, verified gift contract, inheritance decision with legal validity, court decision on ownership, valid decision made in administrative procedures, building permits, mortgages or credit agreements, property taxes or income taxes, utility bills, construction license or building permits, usage permits, contract on use of apartment, excerpt from official records, decision on allocation of apartment, decision on apartment rent or rent levels, apartment rent slip, decision by which the apartment is declared abandoned, certificate of place of residence at claimed apartment, utility, phone, gas, bills, eyewitnesses, personal identity cards, car registration, census records, personal contracts, dismissal records and others.*

D. DETERMINING A CLAIM CUT-OFF DATE

62. As a means of expediting a rapid resolution of all outstanding restitution claims, peace negotiators may find it useful to consider including a specific cut-off date for the submission of claims, as well as a target end-date by which all claims are considered and decided upon by a new restitution body. Were a peace agreement to be concluded in 2019 and include relevant restitution claims provisions one option could be to open the claims process immediately with a view to completing the collection of claims by 31 December 2021 and to set a target end date of 31 December 2031, thus giving a new restitution body ten years to complete their review of all restitution claims under the new procedure.

ARTICLE III - CLAIM CUT-OFF DATE

1. *Everyone with a legitimate restitution claim shall submit such claims by 31 December 2021.*
2. *The Myanmar National Restitution Commission will consider and provide decisions on all claims received and determined on or before 31 December 2031, and preferably sooner.*

E. RESTITUTION MECHANISMS

63. Countries engaged in restitution efforts have developed a variety of mechanisms for implementing and enforcing restitution rights. While restitution can take place in a spontaneous manner due to changing circumstances such as a peace agreement or a formal end to hostilities, without special legal procedures or bodies to facilitate it, particularly when the homes of restitution claimants are either vacant or occupied by reasonable secondary occupants who are willing to vacate the land or homes in question, many successful instances of individuals or families exercising restitution rights have been linked to formal laws, mechanisms, claims procedures and institutions established for precisely this purpose. Specialized bodies created to achieve these 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), (South) Sudan (Land Commissions), Tajikistan (Local Courts), among many others. Similar bodies have been proposed in during peace talks and during phases of transition in Cyprus, Sri Lanka, Timor Leste and elsewhere. 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. (See Box 15)

BOX 15

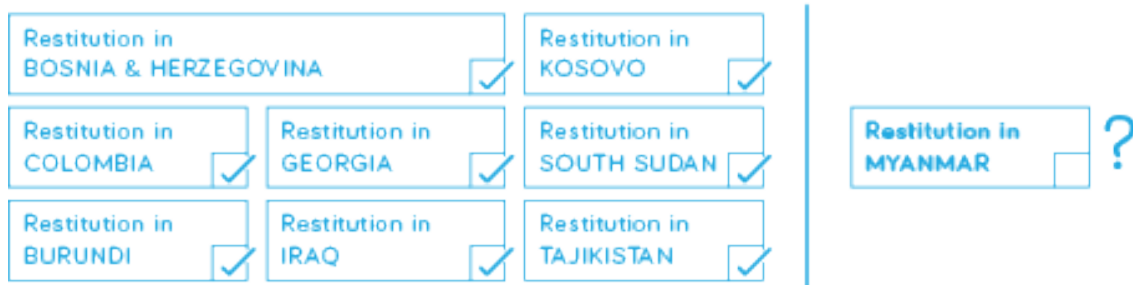
RESTITUTION BODIES: EXAMPLES FROM SOUTH AFRICA, BOSNIA AND HERZEGOVINA AND KOSOVO

South Africa - The restitution process under the *Land Restitution Act* in South Africa allowed claims to be made up to 3 years following the adoption of the law. Claims were lodged with the Land Claims Commission and was then published in the Government gazette and forwarded to Registrar of Title Deeds. The Commission then investigated the claim, dismissing frivolous or vexatious claims. If a claim is deemed valid, the Commission attempted to resolve the claim by agreement between the parties. If there is no agreement or resolution, the claim is then submitted to the Land Claims Court. Following a hearing, the Court considers the history of the dispossession, the hardship caused thereby, the circumstances of the acquisition of the land by its owner, the use to which the property has been put, the interests of both the owner and the persons dispossessed, the requirements of equity and justice and the desirability of avoiding major social disruptions. If the land claimed is owned privately, the Court may order the State to purchase or expropriate the land and restore it to the claimant. The landowner will then be entitled to be paid just and equitable compensation by the State. If it is not feasible to restore the land claimed to the claimant, it may instead grant the claimant a right in alternative State-owned land or order the State to pay the claimant just and equitable compensation. Appeals on the decisions of the Land Claims Court can be submitted to the Constitutional Court or to the Appellate Division of the Supreme Court.

Bosnia and Herzegovina - The Commission on Real Property Claims (CRPC) in Bosnia and Herzegovina was established under the Dayton Agreement ending the 1991-1995 war. The CRPC developed a sophisticated series of criteria and eligibility procedures such that it now has the capacity to make binding legal decisions on the rights of individual refugees to return to their homes of origin within 6 weeks after taking the claims. The housing and property claims are computerised and checked against property records held at various levels of government using the expertise of an ethnically balanced group of local lawyers. Under Dayton, the decisions of the CRPC are final and binding on all local authorities. The CRPC works on a case-by-case, individual claim basis, which is seen as essential to an orderly return programme. During its' busiest period, the CRPC rendered approximately 5,000 decisions a month, each of which are investigated by lawyers at the regional level and approved by a central legal department.

Kosovo - The Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) were established several months following the creation of the United Nations Mission in Kosovo (UNMIK) in June 1999. The HPCC collected and decided on some

40,000 housing and property claims and seeking to protect restitution rights and to resolve outstanding housing and property disputes. The HPCC was a wholly 'independent' organ, entrusted with exclusive jurisdiction, carrying out binding and enforceable judicial functions, entirely separate from the local judicial system. As such, the jurisdiction of the HPCC supersedes that of local courts, although the HPCC can forward cases to the local judiciary as they see fit. In order to ensure both effective remedies and an independent and impartial tribunal for any persons seeking to enforce restitution rights, it was universally agreed that bodies entirely distinct from the local judiciary would be required. Importantly, no appeals are allowed by claimants once a decision has been issued.



64. Principle 12 of the *Pinheiro Principles* outlines the central importance of establishing national procedures, institutions and mechanisms to address restitution claims, and is a vital element of the document. It recognises that effective and competent judicial and administrative procedures for considering restitution claims - sometimes in conjunction or with the support of international institutions - can be critical cornerstones in efforts supporting the implementation of housing and property restitution rights. The absence of effective, impartial and accessible judicial or other effective remedies can severely compromise the restitution process. Judicial bodies play a special role in upholding the credibility and fairness of the entire restitution process. This is particularly the case in post-conflict situations where internal political divisions can render domestic institutions incapable of effectively administering restitution programmes, either due to institutional bias, or due to a lack of capacity and resources. Even where local judicial institutions function normally, however, the particular circumstances and caseloads involved in restitution efforts following large-scale displacement will often be such that resolving housing, land and property disputes through the courts is not a viable option. Creating new mechanisms - both judicial and quasi-judicial in nature - to find ways of resolving such disputes is increasingly commonplace as the experiences in many countries attest. These mechanisms can be purely local, as is the case for example in Iraq, international, as for example in Bosnia and Herzegovina, or a mixture of both. What is most suited in any given case will depend on the particular national and international context. But in many settings, competing claims on a dwelling or land parcel have no formal means of resolution or of being officially recognised and eventually registered by the governing authorities unless a special body is established to address these concerns.

65. Decisions will need to be made by the Signatories as to the cut-off date of any valid restitution claims. South Africa's restitution process which commenced in 1994 allowed claims dating back to 1913 if land thefts were carried out on discriminatory grounds. Bosnia and Herzegovina's restitution procedure allowed claims from 1991-1995, which were the years of the armed conflict there. In the case of Myanmar, any decision on the cut-off date must be agreed by the negotiating parties, but dates such as 1948 (independence), 1962 (the commencement of the Ne Win regime) and 1988 (the commencement of the SLORC regime) have been suggested as possibilities. While this decision will need to be left to the negotiating parties, here we suggest 1988 as a reasonable cut-off date.

SUGGESTED AGREEMENT TEXT

ARTICLE IV - ESTABLISHMENT OF A MYANMAR NATIONAL RESTITUTION COMMISSION

1. *The Signatories to the present agreement hereby establish the Myanmar National Restitution Commission [hereinafter 'The Commission'].*
2. *The Commission shall have exclusive jurisdiction to receive, consider and determine restitution claims concerning any and all housing, lands and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution linked to any armed conflicts or otherwise in the territory of the Republic of the Union of Myanmar between 1 January 1988 - 31 December 2018.*
3. *The Commission shall have Nay Pyi Daw as its headquarters and shall establish at least one office in each state to facilitate the receipt and processing of restitution claims.*
4. *The Commission shall be supported by a Secretariat that will be responsible for, inter alia: (a) Receiving, processing and managing all claims; (b) Issuing prompt decisions on claims for which there is clear and compelling evidence and no counter claims by any other party; (c) Considering and deciding upon other claims where there are more than one claimant.*
5. *The Signatories agree to fully cooperate with the work of the Commission, and shall respect and implement its decisions expeditiously and in good faith, in cooperation with relevant international and nongovernmental organizations having responsibility for the return and reintegration of refugees and displaced persons.*
6. *The Tatmadaw agrees to fully cooperate with the Commission and to implement and honour all decisions emerging from the Commission which may involve its activities or its members.*

F. THE COMPOSITION OF A RESTITUTION MECHANISM

66. Determining how many members should constitute a restitution mechanism and determining who these should be are vital aspects of the restitution process. The unclear membership criteria for members of the *Reinvestigation Committee* and the often duplicative nature of membership on government bodies, particularly in rural areas, has raised a range of doubts about the effectiveness of this body, and such realities need to be taken into account in determining the best possible composition of a new restitution body to complete what has thus far been a very incomplete restitution process. The issues of independence, expertise and impartiality

will be indispensable for restitution to work in Myanmar. Because restitution issues are often controversial and sensitive, restitution bodies that have been established have often used interesting criteria in determining the composition of such bodies. In Kosovo, for instance, the Housing and Property Claims Commission (HPCC) was comprised of a three-person body, two of whom were required to be international and one of whom who was required to be a national. This international majority was developed as a means to ensuring that all claimants were able to receive a fair and impartial consideration of their claims in the highly charged and highly politicised reality in Kosovo. Given the extreme ethnic divides in Kosovo, it was decided that only an international majority body could feasibly carry out its functions in a manner which ensured access to all potential claimants to an effective remedy.



67. In terms of determining the best possible composition of a Myanmar restitution body, it will be important to determine the number of members, from which sectors these members must stem, gender issues, the oath of members to ensure independence and impartiality, the length of terms and working methods and regulations. In terms of membership, it is proposed that the following sectors are represented: The government should be able to appoint three members, ethnic actors should be able to appoint three members, the military should be able to appoint two members, civil society should be able to appoint two members, and the ASEAN should be able to appoint one member. Such an arrangement would result in an eleven-person body, with a six-person majority in cases requiring votes. Of this eleven, there should be at least five members who are women to ensure gender parity in this regard. Members should be required to be fully independent, take a legally binding oath upon assuming membership and serve five-year terms.

SUGGESTED AGREEMENT TEXT

ARTICLE V - COMPOSITION OF A MYANMAR NATIONAL RESTITUTION COMMISSION

1. The Commission shall be comprised of eleven (11) members. Three (3) members shall be appointed by the Government of Myanmar, three (3) shall be appointed from ethnic actors, two (2) shall be appointed by the Tatmadaw, two (2) shall be appointed from civil society, and one (1) shall be appointed by ASEAN.

2. *Every effort shall be made by the parties to ensure gender parity in the membership of the Commission, and at no time shall the Commission have less than five members who are women.*
3. *Members of the Commission must be of recognized high moral standing, capable of making judicial decisions and act impartially and independently.*
4. *Upon accepting membership within the Commission, Commissioners shall take the following official oath: "I, [name of commissioner], hereby agree to act wholly impartially and independently in deciding on all claims presented to the Commission. I will never accept instructions, bribes or other gifts or favours from anyone during the full period of my term as a commissioner".*
5. *Commissioners shall serve terms of five years, and may be reappointed.*
6. *The Commission shall elect a new Chairperson on 1 January of each year.*
7. *The Commission may sit in panels, as provided in its rules and regulations.*
8. *The Commission shall have the power to promulgate working rules and regulations consistent with this Agreement, as may be necessary to carry out its functions. This power is vested solely in the Commission as a whole. In developing these rules and regulations, the Commission shall consider domestic and international laws on governing housing, land and property rights.*

G. FACILITIES, STAFF AND EXPENSES OF A RESTITUTION MECHANISM

68. Restitution mechanisms and institutions need to be assured of their own existence for restitution procedures to succeed. As such, sustained financial support for restitution institutions is a vital prerequisite for restitution processes to be successfully implemented. The lack of financial stability experienced by various restitution bodies has clearly had an impact on their effectiveness and on the enjoyment of rights by those refugees entitled to restitution.

SUGGESTED AGREEMENT TEXT

ARTICLE VI - FACILITIES, STAFF AND EXPENSES

1. *The Government of Myanmar shall be responsible for the full implementation of the present law including the establishment of the Myanmar National Restitution Commission, and providing all necessary budgetary resources for the effective functioning of the Commission including all necessary office space in all states.*
2. *The Commission shall have appropriate facilities and a professionally competent staff, experienced in administrative, financial, banking and legal matters, to assist it in carrying out its functions. The staff shall be headed by an Executive Officer, who shall be appointed by the Commission.*
3. *The salaries and expenses of the Commission and its staff shall be determined jointly by the Signatories and shall be borne equally by the Parties.*

4. *Members of the Commission shall not be held criminally or civilly liable for any acts carried out within the scope of their duties. Members of the Commission, and their families, who are not citizens of the Republic of the Union of Myanmar shall be accorded the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.*

5. *The Commission may receive assistance from international and nongovernmental organizations, in their areas of special expertise falling within the mandate of the Commission, on terms to be agreed.*

H. MANDATE OF A RESTITUTION MECHANISM

69. In developing the mandate of an eventual restitution mechanism, claims types will need to be defined, the issue of secondary occupation will need to be addressed, and the types of remedies will need to be clarified. In terms of the mandate of a new restitution mechanism it will be important to ensure that as many potential restitution claimants are able to avail themselves to collaborative dispute resolution options and if available, these could be seen as prerequisites prior to requesting decisions by a new restitution body.

DEFINING CLAIM TYPES

70. As is well known, the body of law in Myanmar comprising housing, land and property law is comprised of dozens of laws, many of which are from the colonial, pre-independence era. These and subsequent laws (including those adopted after 2011) often conflict with one another and at their constitutional core continue to assert the primacy of the state as the ultimate owner of virtually all lands, with most HLP rights more like use or possession rights than based on private property and land ownership titles as such. Consequently, in determining claim types under a prospective restitution mechanism care must be exercised to ensure that claims are not restricted only to those claiming ‘ownership’ of the housing, land or property in question, but rather to those claiming ‘rights’ over such HLP resources. Under the Kosovo restitution process, restitution claims could be made by three types of claimants who held either ‘ownership’, ‘possession’ or ‘occupancy rights’. In Bosnia & Herzegovina, the Commission on Real Property Claims established under the Dayton Peace Agreement entrusted the Commission with receiving claims and determining the ‘lawful owner of the property’, however this was interpreted to include claimants with lawful ‘occupancy rights’ to the properties concerned, as most property in Bosnia & Herzegovina was ultimately owned by the State.

TYPES OF REMEDIES

71. *Return* - Most peace agreements that address restitution concerns, place return at the top of restitution options that should be available to refugees and IDPs wishing to return home. When the Dayton Agreement on Bosnia and Herzegovina was drafted in 1995, a clear preference for return was given the highest priority as a means of resolving housing, land and property claims. However, claimants were also given the choice of choosing compensation in lieu of return. The claim form under this restitution procedure invited claimants to nominate whether they would

like to (a) return into possession; (b) receive a binding declaration of property rights, for utilization in various ways; or (c) receive compensation in the form of money or property, as and when the means were available. Under the Kosovo restitution procedure, the Housing and Property Claims Commission could find that claimants were entitled to restitution, and then award restitution in kind unless the ownership of the property has been acquired by a natural person through a valid voluntary transaction for value before the date this regulation entered into force.



72. Restoration of Rights and Control - In the South Africa restitution process determining how to deal with cases involving successive acts of dispossession, the Land Court was empowered to decide what it considered to be a “just and equitable” remedy when return-based restitution was either materially impossible to excessively difficult (reflecting an equitable balance between the public interest and the interests of those affected). The current use of the property, the history of the acquisition and use of the property and the extent of direct state investment and subsidy in acquisition and beneficial capital improvement are all taken into account in this respect. Firstly, it shows that administrative remedies can speed up the restitution process and provide a considerable degree of flexibility to the bodies involved. Secondly, by allowing claims to date back to any acts of dispossession since 1913 clearly shows that time alone does not prevent restitution from being a practical, effective right. Thirdly, the South African restitution model developed the concept that restitution should be ‘just and equitable’. This flexibility device is also worth considering. Finally, South Africa’s experience with restitution shows that if the rights of secondary occupants are protected and treated seriously, that people who are living in refugee homes are often perfectly willing to move if independent bodies decide that they must do so.

73. Compensation - States have sometimes sought to avoid the difficulties often associated with restitution by proposing the provision of compensation to persons for whom restitution is considered to be ‘materially impossible’. Although rights to compensation are of great importance, promises and expectations surrounding the provision of compensation in lieu of restitution rarely come to fruition. For instance, to cite one of many cases, the compensation fund envisaged in Annex 7 of the Dayton Agreement in Bosnia was never established. The financial costs associated with compensation almost invariably reach amounts considerably higher than initially envisaged at the time compensation was agreed. In fact, in purely financial terms, restitution in kind can actually prove far cheaper than large-scale and sufficient compensation. The payment of compensation, instead of allowing return-based restitution, can also result in the legitimisation of human rights violations by failing to reverse illegal acts, and it can place overwhelming burdens on the economy of States. When these limitations are taken into account, the result is often simply that the amounts

awarded to recipients of compensation is based on an arbitrarily developed limit, which itself may be wholly insufficient as a means of securing justice based on the market value of HLP losses. The consensus regarding the remedies of restitution and compensation is that compensation should not be seen as an alternative to restitution, and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution. For example, an injured party should receive compensation to remedy the wrongful dispossession of housing only if that particular housing no longer exists or if the injured party knowingly and voluntarily decides it is in her or his interest not to return to her or his original home. Only when this is for *factual reasons* not possible, the right to restitution should be substituted by the rights to just, fair and prompt compensation.”

74. Compensation, of course, can be provided for any number of losses, including individual material losses (plunder, looting, wanton destruction of property, damages and loss of revenue from property), public material assets (railways, airports, ports, quarries, mines, fisheries, coasts, water, oil and other public services and natural resources), individual non-material losses, such as psychological suffering, dispersion, torture, ill treatment, imprisonment and forced labour), and public non-material assets (loss of records, loss of nationality, ethnic cleansing, oppression, massacres, transfer of population and the loss of human capital). When compensation is provided it must be given in a manner which is *reasonable* in terms of its relationship with the value of the damage suffered by the victim. The European Court on Human Rights has stated clearly that compensation for the deprivation of property (as distinct from interference alone) must be given in a *prompt, appropriate and effective manner* and in “an amount reasonably related to [the value of the property]”.

75. While cash compensation is often viewed as a simple means of settling housing, land and property restitution claims, cash compensation should be reserved only for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: physical and mental harm, lost opportunities (including education), material damages or loss of earnings, harm to reputation or dignity, costs required for legal or expert assistance, medicines and medical services, and psychological and social services, and lost or destroyed immovable and/or movable assets. There are many alternative means, other than monetary alone, which can satisfy the obligations associated with the provision of compensation. The obvious first alternative to cash compensation would be the construction - by the State or subsidised by the State - of adequate, affordable and accessible housing which could be made available to returnees or displaced secondary occupants. Other housing-based or fair alternative solutions might be made accessible through a range of creative measures, including: the establishment of State housing fund which issues government housing bonds, vouchers or individual subsidies which can only be redeemed in relation to the construction of residences; Government assistance for returnees in finding an empty existing flat or in accessing new housing; tax reductions could be given returnees for a given period; returnees could be placed at the head of the official housing waiting list; state land plots could be allocated to the returnees; government bonds in a substantial sum could be provided to returnees or; returnees could be given favourable housing credits for building materials should they choose to build new housing themselves.

76. Finally, it is important to note that Principle 21 of the *Pinheiro Principles* elaborates the issue of compensation when actual restitution is ‘factually impossible’. Although return-based restitution is the preferred (but not only) remedy following displacement, in some cases a

combination of compensation and restitution may be the most appropriate remedy. Care must be taken to ensure that compensation is not be seen as a simple alternative to restitution when States are hesitant to accept the return of refugees and displaced persons. Consequently, (and this is particularly true when displacement was clearly arbitrary or unlawful) the provision of compensation should not automatically be seen as an acceptable alternative to restitution when actual return-based restitution is made infeasible due to resistance by a certain State or political grouping or because of the unwillingness of the international community to strongly support restitution rights. Rather, given the primacy of restitution rights within the *Principles*, unless displaced persons wish explicitly to receive compensation in lieu of return, compensation is only viewed as an acceptable substitute for the physical recovery of original homes and lands when three key conditions are met:

1. When the restoration of housing, land or property rights is *factually impossible*;
2. When those possessing restitution rights voluntarily prefer compensation-based solutions; and even then, and;
3. Only following a determination to this effect by an independent and impartial tribunal or some legitimate and competent body without vested interests in the matters concerned.

In some instances, it may be advantageous to consider compensation *in lieu* of restitution when this is clearly the expressed wish of the refugee or displaced communities concerned and when return-based restitution would, in the words of the International Law Commission's draft Articles on State Responsibility, "create a burden out of all proportion to the benefit deriving therefrom".

SUGGESTED AGREEMENT TEXT

ARTICLE VII - MANDATE

1. *The Commission shall receive and decide any claims for housing, land and/or property anywhere in the territory of the Republic of the Union of Myanmar where the property has not voluntarily been sold or otherwise transferred since 1 January 1988, and where the claimant does not now enjoy possession of or control over that property.*
2. *Claims may be for return of the property or for just compensation in lieu of return.*
3. *In determining compensation claims, the Commission shall apply rules governing compensation arrangements, including but not limited to the principles that:*
 - (a) *compensation must be both just and satisfactory, and be provided in a prompt, appropriate and effective manner;*
 - (b) *reasonableness and proportionality will guide any determination of compensation arrangements;*
 - (c) *compensation can take many forms, not limited to monetary grant (cash), bond, in-kind arrangements, or the provision of alternative housing, land and/or property of an equitable quality and location;*

(d) in determining the adequacy of cash payments, current market value is the acceptable rate of consideration; and

(e) any determination of material impossibility in terms of claims for return and restitution will only be applied in circumstances where this can be objectively determined to be true.

4. A Restitution Fund shall be established in the Central Bank of the Republic of the Union of Myanmar to be administered by the Commission. The Fund shall be replenished by taxation proceeds from natural resource extraction, direct payments from the Signatories, or from contributions by States or international or nongovernmental organizations.

I. PROCEEDINGS BEFORE A RESTITUTION MECHANISM

77. The rules of procedure before the Commission will be a lynchpin in ensuring the success of any eventual restitution body. These rules will need to ensure a consistent approach to all claims received, secure a fair and impartial consideration of each claim and be fully consistent with internationally recognised human rights standards. The procedures developed will empower the Commission to determine the lawful owner and/or rights holder of the housing, land and/or property claim, and in making such a determination the Commission will need to have full and free access to all relevant HLP records in the country, both those collected by government as well as those collected by EAGs, as well as other evidence supportive of claims as noted elsewhere. After having considered claims, the Commission will either reject a claim or award return of the housing, land and/or property that is subject to the claim back to the successful claimant. The Commission will also need to determine any compensation that may be awarded and the circumstances and rules governing such awards.

SUGGESTED AGREEMENT TEXT

ARTICLE VIII - PROCEEDINGS BEFORE THE COMMISSION

1. Upon receipt of a valid restitution claim, the Commission shall determine the lawful owner and/or rights holder of the housing, land and/or property with respect to which the claim is made and the value thereof.

2. The Commission, through its staff or a duly designated international or nongovernmental organization, shall be entitled to have access to any and all housing, land and/or property records in the Republic of the Union of Myanmar, and to any and all housing, land and/or property located in the Republic of the Union of Myanmar for purposes of inspection, evaluation and assessment related to consideration of a claim.

3. Any person requesting the return of housing, land and/or property who is found by the Commission to be the lawful owner and/or rights holder (under either statutory law and/or customary law) of that housing, land and/or property shall be awarded its return.

4. 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.

5. *The Commission shall make decisions by a majority of its members.*

6. *In determining the lawful owner and/or rights holder of any housing, land and/or property, the Commission shall not recognize as valid any housing, land and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution linked to any armed conflicts in the territory of the Republic of the Union of Myanmar, including any transfer that was made under duress, in exchange for exit permission or documents.*

7. *Any person who is awarded return of property may accept a satisfactory lease arrangement rather than retake possession.*

8. *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 the territory of the Union of Myanmar.*

9. *Failure of any Party or individual to cooperate with the Commission shall not prevent the Commission from making its decision.*

J. THE LEGAL BASIS AND OUTCOME OF DECISIONS

78. In making their determination of restitution claims, any new Myanmar restitution body will need to indicate the legal basis for each decision and determine the precise type of decision it makes and why. By way of guidance, under the Rules of Procedure of the Housing and Property Claims Commission in Kosovo seven types of decisions were possible. Section 22 of the Rules entitled the HPCC to: decide such property rights as are necessary to resolve the claim; make an order for possession of the property in favour of any party; order the registration of any property right in the appropriate public record; where necessary, to resolve a claim, vary the terms of any contract made for the purpose of avoiding discriminatory law, so as to reflect the actual intention of the parties to the contract; cancel any lease agreement in respect of a property which is subject to an order in terms of the present regulation and make ancillary order to give effect to the cancellation; refuse a claim; and make any other decision or order necessary to give effect to the present regulation.

SUGGESTED AGREEMENT TEXT

ARTICLE IX - LEGAL BASIS AND OUTCOME OF DECISIONS

1. *In determining the validity of claims submitted under this procedure, the Commission shall take into account all relevant legislation including, but not limited to: (a) the national laws of the Republic of the Union of Myanmar; (b) the regulations adopted by ethnic actors signatory to this agreement; (c) international human rights and other laws relevant to housing, land and/or property rights; (d) general principles of international law; and (e) the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons.*

2. *Successful claimants shall be issued with the official documentation recognising their rights to return to and reclaim the housing, land or property claimed within the claims process, including a formal decision by the Commission to this end. These decisions shall be publicly announced, recorded and registered within the national land registry.*

K. RELATIONSHIP OF RESTITUTION MECHANISM DECISIONS AND OTHER INSTITUTIONS

79. In developing the powers of an eventual Commission within the context of a peace agreement, the parties will need to determine whether the Commission shall have exclusive jurisdiction over restitution claims, and if not, how the Commission will relate in legal terms to other bodies that could make similar decisions about such claims, including the *Reinvestigation Committee* and local and national courts. In Bosnia, the CRPC was given exceptional powers and exclusive jurisdiction to settle certain types of claims, while in South Africa that Land Claims Court was given exclusive powers to determine restitution claims.

SUGGESTED AGREEMENT TEXT

ARTICLE X - PRE-EMINENCE OF COMMISSION DECISIONS

1. If and when a decision by the Commission is contrary to or conflicts with earlier decisions, whether judicial, administrative or otherwise, the decision by the Commission shall take precedence.

L. ENFORCEMENT OF DECISIONS

80. Any peace agreement outlining restitution processes will also need to include the explicit duty of all parties to successful restitution claims to fully enforce these decisions by all legal means.

SUGGESTED AGREEMENT TEXT

ARTICLE XI - ENFORCEMENT OF COMMISSION DECISIONS

1. The Signatories agree to fully enforce Commission Decisions.

M. REGISTRATION OF DECISIONS

81. Restitution mechanisms must have free, unhindered and cost-free access to all existing housing, property and land records relating to restitution claims, and must have clear procedures for determining the validity and relative evidentiary status of such records. Existing records, even if incomplete, must also be accessible to any claimant seeking restitution. All possible claimants must be allowed to submit whatever records or other evidence they have in their possession as evidence in support their restitution claims. At the same time, while records are crucial for determining claims, no refugee can be penalised or treated differently from other refugees, simply on the grounds that they no longer possess records or evidence of their own.

82. Principle 15 of the *Pinheiro Principles* outlines the importance of recording and registering housing, land and property rights as an ‘integral component’ of any restitution programme. While some successful restitution claims may result in the return of land and the eventual conferral of a Form-7 Land Use Certificate, Form 105 or other official documents conferring housing, land and property rights, clearly the vast majority of those either making claims or yet to make claims lack official recognition over the homes and lands they claim are legitimately theirs. The prevalence of customary land arrangements in much of the country and the continuing failure to legally recognise HLP rights derived from these customary systems of land governance acts as a further hindrance to the prospects of restitution. Once decisions are reached by a new restitution body, it will be incumbent on the body to forward these decisions to DALMS (under the Ministry of Agriculture and Irrigation) which maintains a register of all land parcels in towns, villages, farmlands and vacant, fallow and virgin lands.



SUGGESTED AGREEMENT TEXT

ARTICLE XII - REGISTRATION OF DECISIONS

1. All decisions by the Commission shall be duly recorded and held in perpetuity within the relevant housing, land and property records/archives of the government and by the relevant signatories to the present agreement.

N. FACILITATING RETURN

83. All signatories to an eventual peace agreement(s) will need to agree to carry out active measures to facilitate the return of refugees and IDPs to the homes, land and properties that form the basis of their restitution claims. This facilitation can take a variety of forms, and all parties will need to create conditions conducive to return.

ARTICLE XIII - FACILITATING RETURN

1. The Signatories undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. The Signatories shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner.

2. The Parties shall not discriminate against returning refugees and displaced persons with respect to conscription into military service, and shall give positive consideration to requests for exemption from military or other obligatory service based on individual circumstances, so as to enable returnees to rebuild their lives.

O. INTERIM MEASURES OF PROTECTION OF IDP AND REFUGEE LAND

84. Efforts towards restitution may be hampered if the land of refugees and IDPs is under the threat of occupation, unlawful acquisition or property transfers under duress. It is of utmost importance that the executive introduces interim measures of protection in the form of policy, administrative or legal reform measures that address such threats. As Principle 20 of the Pinheiro Principles advises, States should adopt specific measures to prevent further erosion of housing, land and property rights of displaced persons and refugees. Principle 21.3 of the UN Guiding Principles on Internal Displacement, in this regard, mandate that the “property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use”.

**ARTICLE XIV – INTERIM MEASURES**

1. The Government of Myanmar will design and implement interim measures of protection of IDP and refugee land in the interim period, to protect them against destruction and arbitrary and illegal appropriation, occupation or use, as well as irregular sales, of such lands.

2. The Myanmar National Restitution Commission shall monitor the implementation of the interim measures.



Farmer in Hpa An, Karen State (José Arraiza/NRC)

85. Ultimately, restitution mechanisms are only as effective as the enforcement mechanisms available to ensure that restitution decisions are subject to full compliance. Under ideal circumstances, the mechanisms entrusted with restitution should also be given the powers necessary to enforce their decisions and to ensure that Government and other relevant parties comply. The lack of enforcement powers held by the CRPC in Bosnia and Herzegovina, for instance, was widely seen as a reason why so many of their determinations of ownership or other legal interest were not enough in the majority of cases to actually restore many claimants to their original homes. Clearly, an impartial mechanism will issue some decisions deemed as controversial by the authorities, and there must be an obligation on them to enforce the decisions made. Without such assurances, a Bosnia-like situation could easily arise, where solid judicial decisions are not enforced by the local authorities.

86. Principle 20 of the *Pinheiro Principles* covers the enforcement of restitution decisions and judgments. As noted, the best the *Reinvestigation Committee* can offer restitution claimants are recommendations and general support. When disputes arise as a result of their recommendations, they can defer to courts to resolve these. However, given the extensive needs for judicial reform in the country, it is clear that the overwhelming majority of those whose restitution claims did reach a court of law would have neither the funds, legal assistance or trust in the courts to adjudicate their claims in a fair and equitable manner. The 2016 World Justice Project's Rule of Law Index, for instance, places Myanmar at 98th of 113, ranking it as Asia's worst, with the exception of Cambodia supports this contention.

SUGGESTED AGREEMENT TEXT

ARTICLE XV - IMPLEMENTATION

1. *The Myanmar National Restitution Commission shall have exclusive jurisdiction to consider any and all relevant restitution claims.*
2. *The Union Government of Myanmar, the Tatmadaw and recognised Ethnic Armed Groups agree to facilitate the full and equitable implementation of Commission decisions regarding restitution claims.*

ANNEXURE

ANNEX 1

DRAFT AGREEMENT ON HOUSING, LAND AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS AND THE ESTABLISHMENT OF THE REPUBLIC OF THE UNION OF MYANMAR NATIONAL RESTITUTION COMMISSION

Recognising that national reconciliation and peace, as well as national economic development, the broadening enjoyment of human rights and the foundations of a peaceful, stable and democratic nation are best served by ending displacement and securing housing, land and/or property restitution rights for everyone with a legitimate restitution claim;

Aware that resolving all outstanding housing, land and/or property restitution claims and ending displacement will strengthen the foundations of peace and provide a solid basis for ending the arbitrary acquisition of land throughout The Republic of the Union of Myanmar;

Reaffirming Article 34 of the 2001 *Articles on State Responsibility* that asserts: “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.”;

Also Reaffirming 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 (2005)*, which notes in para. 19: “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.”;

Further Reaffirming the principles contained within the *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005)* as well as internationally recognised fundamental human rights which are indispensable for the enjoyment of restitution rights, including but not limited to the right to voluntary return and repatriation; the right to pursue options other than return; the right to just and satisfactory compensation; the right to citizenship, and the right to adequate housing and secure tenure;

Recalling provisions within the 2008 Constitution recognising relevant rights to the right to land restitution;

Taking Note of the important work of the *Central Land Grab Reinvestigation Committee* and other actions designed to address the loss of housing, land and/or property rights;

Convinced that all refugees and displaced persons who fled their homes, lands and properties do not at present have sufficient recourse to judicial or other procedures to enable them to return to, reclaim and have restored to them housing, land and property over which they have legitimate and valid claims;

Therefore, the Signatories agree to the following Articles:

ARTICLE I - RIGHT TO RETURN TO HOMES, LANDS AND PROPERTIES OF ORIGIN

1. All refugees and internally displaced persons, or anyone else with a valid restitution claim, has the right to return to and have restored to them any and all housing, land and/or property of origin that was unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution between 1 January 1988 - 31 December 2018.
2. The Signatories shall ensure that all refugees and displaced persons are permitted to voluntarily return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.
3. The Signatories shall take all necessary steps to prevent activities within their territories that would hinder or impede the safe and voluntary return of refugees and displaced persons.
4. The Signatories agree that choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Signatories shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. The Signatories shall facilitate the flow of information necessary for refugees and displaced persons to make informed judgments about local conditions for return.

ARTICLE II - RIGHT TO PRESENT A RESTITUTION CLAIM

1. All refugees and internally displaced persons, or anyone else with a valid restitution claim has the right to present a claim for the restitution of housing, land and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution between 1 January 1988 - 31 December 2018 to the National Land Restitution Commission [hereinafter 'The Commission'].
2. Restitution claims may be presented individually and collectively.
3. Restitution claims may be presented by claimants concerning housing, land and/or property that they cannot currently access or otherwise exercise control over due to, *inter alia*, earlier confiscation and/or acquisition of the said housing, land and/or property, the secondary occupation of the said housing, land and/or property or any other reason, with or without reference to legal justification.
4. Restitution claims must be presented on the basis of objective evidence supporting the claim in question, including but not limited to: formal property records, verified sale contracts, verified gift contract, inheritance decision with legal validity, court decision on ownership, valid decision made in administrative procedures, building permits, mortgages or credit

agreements, property taxes or income taxes, utility bills, construction license or building permits, usage permits, contract on use of apartment, excerpt from official records, decision on allocation of apartment, decision on apartment rent or rent levels, apartment rent slip, decision by which the apartment is declared abandoned, certificate of place of residence at claimed apartment, utility, phone, gas, bills, eyewitnesses, personal identity cards, car registration, census records, personal contracts, dismissal records and others.

ARTICLE III - CLAIM CUT-OFF DATE

1. Everyone with a legitimate restitution claim shall submit such claims by 31 December 2021.
2. The Republic of the Union of Myanmar National Restitution Commission will consider and provide decisions on all claims received and determined on or before 31 December 2031, and preferably sooner.

ARTICLE IV - ESTABLISHMENT OF A THE REPUBLIC OF THE UNION OF MYANMAR NATIONAL RESTITUTION COMMISSION

1. The Signatories to the present agreement hereby establish the The Republic of the Union of Myanmar National Restitution Commission [hereinafter 'The Commission'].
2. The Commission shall have exclusive jurisdiction to receive, consider and determine restitution claims concerning any and all housing, lands and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution linked to any armed conflicts in the territory of the Union of The Republic of the Union of Myanmar between 1 January 1988 - 31 December 2018.
3. The Commission shall have Nay Pyi Daw as its headquarters and shall establish one office in each state to facilitate the receipt and processing of restitution claims.
4. The Commission shall be supported by a Secretariat that will be responsible for, *inter alia*: (a) Receiving, processing and managing all claims; (b) Issuing prompt decisions on claims for which there is clear and compelling evidence and no counter claims by any other party; (c) Considering and deciding upon other claims where there are more than one claimant.
5. The Signatories agree to fully cooperate with the work of the Commission, and shall respect and implement its decisions expeditiously and in good faith, in cooperation with relevant international and nongovernmental organizations having responsibility for the return and reintegration of refugees and displaced persons.
6. The *Tatmadaw* agrees to fully cooperate with the Commission and to implement and honour all decisions emerging from the Commission which may involve its activities or its members.

ARTICLE V - COMPOSITION OF A THE REPUBLIC OF THE UNION OF MYANMAR NATIONAL RESTITUTION COMMISSION

1. The Commission shall be comprised of eleven (11) members. Three (3) members shall be appointed by the Government of The Republic of the Union of Myanmar, three (3) shall be appointed from ethnic actors, two (2) shall be appointed by the Tatmadaw, two (2) shall be appointed from civil society, and one (1) shall be appointed by ASEAN.
2. Every effort shall be made by the parties to ensure gender parity in the membership of the Commission, and at no time shall the Commission have less than five members who are women.
3. Members of the Commission must be of recognized high moral standing, capable of making judicial decisions and act impartially and independently.
4. Upon accepting membership within the Commission, Commissioners shall take the following official oath: "I, [name of commissioner], hereby agree to act wholly impartially and independently in deciding on all claims presented to the Commission. I will never accept instructions, bribes or other gifts or favours from anyone during the full period of my term as a commissioner".
5. Commissioners shall serve terms of five years, and may be reappointed.
6. The Commission shall elect a new Chairperson on 1 January of each year.
7. The Commission may sit in panels, as provided in its rules and regulations.
8. The Commission shall have the power to promulgate working rules and regulations consistent with this Agreement, as may be necessary to carry out its functions. This power is vested solely in the Commission as a whole. In developing these rules and regulations, the Commission shall consider domestic and international laws on governing housing, land and property rights.

ARTICLE VI - FACILITIES, STAFF AND EXPENSES

1. The Government of The Republic of the Union of Myanmar shall be responsible for the full implementation of the present law including the establishment of the National Land Restitution Commission, and providing all necessary budgetary resources for the effective functioning of the Commission including all necessary office space in all states.
2. The Commission shall have appropriate facilities and a professionally competent staff, experienced in administrative, financial, banking and legal matters, to assist it in carrying out its functions. The staff shall be headed by an Executive Officer, who shall be appointed by the Commission.
3. The salaries and expenses of the Commission and its staff shall be determined jointly by the Signatories and shall be borne equally by the Parties.
4. Members of the Commission shall not be held criminally or civilly liable for any acts carried out within the scope of their duties. Members of the Commission, and their families, who are not citizens of the Union of The Republic of the Union of Myanmar shall be accorded the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.
5. The Commission may receive assistance from international and nongovernmental organizations, in their areas of special expertise falling within the mandate of the Commission, on terms to be agreed.

ARTICLE VII - MANDATE

1. The Commission shall receive and decide any claims for housing, land and/or property anywhere in the territory of the Union of The Republic of the Union of Myanmar where the property has not voluntarily been sold or otherwise transferred since 1 January 1988, and where the claimant does not now enjoy possession of or control over that property.
2. Claims may be for return of the property or for just compensation in lieu of return.
3. In determining compensation claims, the Commission shall apply rules governing compensation arrangements, including but not limited to the principles that:
 - (a) compensation must be both just and satisfactory;
 - (b) reasonableness and proportionality will guide any determination of compensation arrangements;
 - (c) compensation can take many forms, not limited to monetary grant (cash), bond, in-kind arrangements, or the provision of alternative housing, land and/or property of an equitable quality and location;
 - (d) in determining the adequacy of cash payments, current market value is the acceptable rate of consideration; and
 - (e) any determination of material impossibility in terms of claims for return and restitution will only be applied in circumstances where this can be objectively determined to be true.
4. A Restitution Fund shall be established in the Central Bank of the Union of The Republic of the Union of Myanmar to be administered by the Commission. The Fund shall be replenished by taxation proceeds from natural resource extraction, direct payments from the Signatories, or from contributions by States or international or nongovernmental organizations.

ARTICLE VIII - PROCEEDINGS BEFORE THE COMMISSION

1. Upon receipt of a valid restitution claim, the Commission shall determine the lawful owner and/or rights holder of the housing, land and/or property with respect to which the claim is made and the value thereof.
2. The Commission, through its staff or a duly designated international or nongovernmental organization, shall be entitled to have access to any and all housing, land and/or property records in the Union of The Republic of the Union of Myanmar, and to any and all housing, land and/or property located in the Union of The Republic of the Union of Myanmar for purposes of inspection, evaluation and assessment related to consideration of a claim.
3. Any person requesting the return of housing, land and/or property who is found by the Commission to be the lawful owner and/or rights holder (under either statutory law and/or customary law) of that housing, land and/or property shall be awarded its return.

4. 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.
5. The Commission shall make decisions by a majority of its members.
6. In determining the lawful owner and/or rights holder of any housing, land and/or property, the Commission shall not recognize as valid any housing, land and/or property unlawfully, arbitrarily, unfairly or inequitably acquired by any person, company, government body or other official institution linked to any armed conflicts in the territory of the Union of The Republic of the Union of Myanmar, including any transfer that was made under duress, in exchange for exit permission or documents.
7. Any person who is awarded return of property may accept a satisfactory lease arrangement rather than retake possession.
8. 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 The Republic of the Union of Myanmar.
9. Failure of any Party or individual to cooperate with the Commission shall not prevent the Commission from making its decision.

ARTICLE IX - LEGAL BASIS AND OUTCOME OF DECISIONS

1. In determining the validity of claims submitted under this procedure, the Commission shall take into account all relevant legislation including, but not limited to: (a) the national laws of the Union of The Republic of the Union of Myanmar; (b) the regulations adopted by ethnic actors signatory to this agreement; (c) international human rights and other laws relevant to housing, land and/or property rights; (d) general principles of international law; and (e) the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons.
2. Successful claimants shall be issued with the official documentation recognising their rights to return to and reclaim the housing, land or property claimed within the claims process, including a formal decision by the Commission to this end. These decisions shall be publicly announced, recorded and registered within the national land registry.

ARTICLE X - PRE-EMINANCE OF COMMISSION DECISIONS

1. If and when a decision by the Commission is contrary to earlier decisions, whether judicial, administrative or otherwise, the decision by the Commission shall take precedence.

ARTICLE XI - ENFORCEMENT OF COMMISSION DECISIONS

1. The Signatories agree to fully enforce Commission Decisions.

ARTICLE XII - REGISTRY OF COMMISSION DECISIONS

1. All decisions by the Commission shall be duly recorded and held in perpetuity within the relevant housing, land and property records/archives of the government and by the relevant signatories to the present agreement.

ARTICLE XIII - FACILITATING RETURN

1. The Signatories undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. The Signatories shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner.

2. The Parties shall not discriminate against returning refugees and displaced persons with respect to conscription into military service, and shall positively consider the requests for exemption from military or other obligatory service based on individual circumstances, so as to enable returnees to rebuild their lives.

ARTICLE XIV - INTERIM MEASURES

1. The Government of Myanmar will design and implement interim measures of protection of IDP and refugee land in the interim period, to protect them against destruction and arbitrary and illegal appropriation, occupation or use, as well as irregular sales, of such lands. Interim measures may include executive decisions, special administrative procedures and legislative reforms.

2. The Myanmar National Restitution Commission shall monitor the implementation of the interim measures.

ARTICLE XV - IMPLEMENTATION

1. The The Republic of the Union of Myanmar National Land Restitution Commission shall have exclusive jurisdiction to consider any and all relevant restitution claims.

2. The Union Government of The Republic of the Union of Myanmar, the *Tatmadaw* and recognised Ethnic Armed Groups agree to facilitate the full and equitable implementation of Commission decisions regarding restitution claims.

MODEL BASIC RESTITUTION CLAIMS FORM

Name, address and identification of claimant:

Location of Claimed Housing, Land and/or Property
(including the physical address and GPS coordinates)

Current Status of Claimed Housing, Land and/or Property

Evidence of Your Claim (including official records, tax receipts, utility receipts, sworn testimony, photographs, etc)

Neighbour Affidavits (provide sworn affidavits of immediate neighbours, eg. adjacent housing, land and/or property, as pertinent)

Legal Assistance (Do you require legal assistance to complete your claim?)

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