



Restitution Before Return?

The Pinheiro Principles and Housing Land and Property Restitution for Myanmar's Displaced Communities

2019

This briefing paper is a summary of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons¹ (the Pinheiro Principles) and how they relate to the context of Myanmar, referencing two case study examples – Colombia and Sri Lanka. The Pinheiro Principles are particularly relevant to Myanmar as armed conflict over several decades has left hundreds of thousands of people as internally displaced persons (IDPs) or refugees. Fragile ceasefires in southeast Myanmar, where a substantial amount of ethnic Karen, as well as Mon, Karenni, Shan, and Burman had to flee their homes, has facilitated a narrative of return for refugees, despite fears over human security, livelihoods, and access to essential health and education services. Meanwhile, active conflict in the north of the country, especially Kachin and northern Shan States, displaces more people by the day.²

The Pinheiro Principles

The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons, commonly and henceforth known as the Pinheiro Principles, were adopted by the UN sub-commission on Human Rights in 2005.³ The Pinheiro Principles are non-binding and give guidance on the restitution of the homes and land of displaced

This briefing paper thus argues that one of the key elements of sustainable and peaceful refugee/IDP return is the promotion and protection of returnees' housing, land and property (HLP) rights, including restitution for lost land and property, as outlined in the Pinheiro Principles. This is not to say that the Pinheiro Principles are a panacea for the full restoration of HLP rights, let alone human security, as the implementation of the policies that adhere to the Pinheiro Principles must go hand-in-hand with comprehensive land reform that includes the protection of customary land use systems practiced by many communities in eastern Myanmar. Yet the Pinheiro Principles do provide an internationally recognized standard for incorporating IDPs' and refugees' rights to restitution in any return process.

persons, thus providing an international set of standards for the return of refugees and IDPs after armed conflict. While non-binding, the core principles (2-10) apply existing human rights law to the context of displacement, and do not create new rights or obligations. Principle 2.1 states;

1 Principles on Housing and Property Restitution for Refugees and Displaced Persons, (The Pinheiro Principles), E/CN.4/Sub.2/2005/17. Accessed at <https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>

2 "Myanmar: New Displacement in Shan State (1 Jan to 9 April 2019)." UN Office for the Coordination of Humanitarian Affairs. 22 April, 2019. Accessed at <https://reliefweb.int/map/myanmar/myanmar-new-displacement-shan-state-1-jan-9-apr-2019>

3 Principles on Housing and Property Restitution for Refugees and Displaced Persons, (The Pinheiro Principles), E/CN.4/Sub.2/2005/17. Accessed at <https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>

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.⁴

The Pinheiro Principles highlight how the right to restitution is;

the preferred remedy for displacement and as a key component of restorative justice.⁵

There are three conditions in which compensation can be provided in lieu of restitution. These are if a) it is not “factually possible” to provide restitution, i.e. the land or property has been destroyed, b) compensation is knowingly and voluntarily accepted, or c) compensation is combined with restitution as part of the terms of a peace agreement.⁶

Gender considerations are included in the Pinheiro Principles which outline that men and women have equal rights to HLP res-

titution, that policies and programs must “recognize the joint ownership rights of both male and female headed households as an explicit component of the restitution process,” and that states should “adopt positive measures” to avoid disadvantaging of women and girls in restitution programs.⁷

One crucial component of the Pinheiro Principles that is outlined in Principle 10.1 is that the right to return, a separate right to restitution, must be voluntary and based on an informed choice;

All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin.⁸

The Principles further elaborate;

Refugees and displaced persons shall not be forced, or otherwise coerced,

4 Pinheiro Principles 2.1

5 Pinheiro Principles 2.2

6 Pinheiro Principles 21.1

7 Pinheiro Principles 4

8 Pinheiro Principles 10.1

either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.⁹

Thus, solutions other than return must be respected. The Principles also address the issue of secondary occupants. For those who have moved into the property or onto the land that displaced people may have left behind, or third parties that bought the property in good-faith, provisions to address their HLP rights are included, although such provisions should not delay or affect the restitution rights of returning persons.¹⁰

Principle 22 also highlights that the international community has a role to promote and protect the rights to HLP restitution, including by providing support for a restitution program that is compatible with international human rights, refugee, and humanitarian laws and standards.¹¹

The Pinheiro Principles focus explicitly on restitution of HLP rights of displaced people, rather than a broader process of transitional justice, yet if respected and followed, as outlined in Principle 2.2, they can certainly be one component of restorative justice for the victims of armed conflict. In the context of Myanmar, the momentum for return is building, and while many refugees do not wish to return to Myanmar due

to fears for their security as conflict continues and peace has yet to be achieved, policymakers and donors are already preparing for the return of refugees and IDPs. Alongside human security, the issue of land, both land that was previously owned by refugees and IDPs as well as the current (un)availability of new or replacement land - and its inextricable links to livelihood, culture, and identity of ethnic groups in Myanmar – is a major obstacle to a safe, dignified and sustainable return of refugees and IDPs. Many IDPs and refugees previously owned land that has been confiscated by the military or government, or occupied by secondary occupants, since they were displaced. Given the importance of land, it is vital that as policymakers prepare and plan for refugee and IDP return, they must incorporate the international principles that guide the protection of refugees' and IDPs restitution of housing land and property – the Pinheiro Principles. There are precedents of including restitution for displaced victims of war in recent history, and it is worthwhile briefly looking at other countries' experience of such restitution programs, how they comply with the Pinheiro Principles, and the lessons learned.

9 Pinheiro Principles 10.3

10 Pinheiro Principles 17

11 Pinheiro Principles 22

Colombia



Colombia has endured a civil war almost as long as in Myanmar, displacing up to 6 million people. Conflict broke out in the 1960's between the left-wing Revolutionary Armed Forces of Colombia (FARC) and the Colombian central Government over land issues, unequal distribution of resources and political exclusion. The conflict evolved as drug production and trafficking facilitated the emergence of drug cartels, while right-wing paramilitary groups also entered the conflict. By 2016, when a peace accord was signed with the FARC, up to 6 million people had been displaced, with eight million hectares of land seized, and around 220,000 people killed.¹²

Efforts at restitution, however, predate the 2016 peace accord. In 2004, a ruling by the Constitutional Court stated that “the circumstances of IDPs in Colombia comprised an unconstitutional state of affairs” and in a later ruling, explicitly referenced

the Pinheiro Principles.¹³ These rulings established IDPs' legal right to restitution of housing, land and property in Colombia. In 2011, the Ley de Víctimas (Victims' Law) was passed establishing a judicial procedure for restitution. An analysis of the law by Attanasio and Sanchez in 2012 found that the Victim's Law largely complied with the Pinheiro Principles.¹⁴ The law stipulates that anybody “deprived of their property rights by an illegal, armed group since 1991” can file their claim with a register, which is administered by a specific administrative body. The law requires that within four months the case is heard by a judge with specific restitution experience. The administrative body is then in charge with restoring land or property to the victim, based on the judge's decision. The design of the law means that restitution of property is the preferred option although compensation can also be granted in either monetary form or land that is the equivalent value of that lost. The law also stipulates that cases of female-headed households would be prioritized.¹⁵

Yet while on paper the law did comply with the Pinheiro Principles, the implementation was a different matter and has been criticized for being slow to deliver justice. While the law was enacted in 2011, by September 2016 the courts had only delivered rulings

12 Internal Displacement Monitoring Centre, ‘Colombia.’ <http://www.internal-displacement.org/countries/colombia>

13 David L. Attanasio & Nelson Camilo Sánchez. “Return Within the Bounds of The Pinheiro Principles: The Colombian Land Restitution Experience.” *Washington University Global Studies Law Review*. 11(2). 2012. Accessed at https://openscholarship.wustl.edu/law_globalstudies/vol11/iss1/2/

14 Ibid.

15 Ibid.

for 4,100 claims out of a total of 93,000.¹⁶ In 2014, Amnesty International reported that the law was “failing the vast majority of people whose lands were stolen. Many have been unable to return home due to ongoing threats of violence and the slowness of the restitution process,” and that “[b]y the end of August 2014, the Office of the Attorney General was investigating at least 35 killings of individuals who were involved in the land restitution process.”¹⁷ Specifically, the armed groups that emerged out of paramilitary groups after a flawed demobilization process used extreme violence to intimidate claimants and prevent the rightful restitution of land, as well as creating more displacement.¹⁸ Furthermore, while victims had received restitution titles, many were unable to actually use them in practice as

their lands were still being used by powerful economic actors involved in agribusiness, particularly palm oil plantations, and natural resource extraction such as mining projects.¹⁹ Thus while the Victims’ Law for restitution is Pinheiro Principles-compliant on paper, in practice, significant and violent obstacles remained.

Five years after the Victims’ Law, a final, comprehensive peace agreement was concluded and signed between the Government and FARC in 2016 - the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace.²⁰ Within the agreement, the collective right to return is outlined, as well as stating that victims are at the heart of all reparations measures;

the National Government and the FARC-EP both wish to reverse the effects of the conflict, to achieve restitution for the victims of dispossession and forced displacement and the restoration of land rights to communities, and will promote the voluntary return of displaced men and women.²¹

Further, the agreement establishes the Comprehensive System for Truth, Justice, Repa-

rations and Non-Recurrence, a component of which explicitly addresses restitution;

16 “World Report 2016 - Colombia.” Human Rights Watch. 2016. <https://www.hrw.org/world-report/2017/country-chapters/colombia#05e37e>

17 “Colombia’s Land Restitution Process Failing those Forced Off their Land.” Amnesty International. 27 November, 2015. <https://www.amnesty.org/en/latest/news/2014/11/colombia-s-land-restitution-process-failing-those-forced-their-land/>

18 “Colombia: Victims Law a Historic Opportunity.” Human Rights Watch. 10 June, 2011. <https://www.hrw.org/news/2011/06/10/colombia-victims-law-historic-opportunity>

19 Greg Norman. “Colombia’s Palm Oil Boom Marred by Bloody Past and Violent Present.” Mongabay. 5 January, 2016. <https://news.mongabay.com/2016/01/colombias-palm-oil-boom-blighted-by-bloody-past-and-violent-present/>

20 Final Agreement to End the Armed Conflict and Build Stable and Lasting Peace. 24 November, 2016. Available at <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>

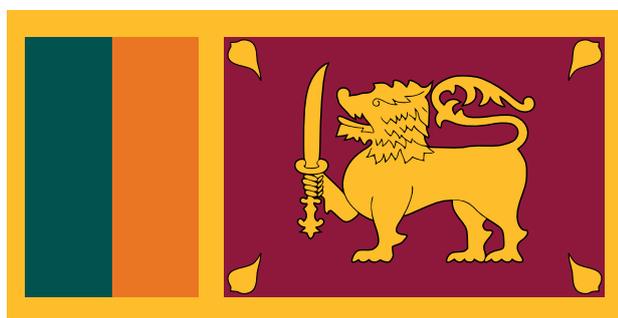
21 Final Agreement to End the Armed Conflict and Build Stable and Lasting Peace. Section 5.1

These measures seek to ensure the comprehensive reparation of the victims, including the rights to restitution, indemnification, rehabilitation, realisation and non-recurrence; and the collective reparation of the territories, the populations and the communities most affected by the conflict and most vulnerable, alongside the implementation of the other agreements.²²

Yet while the inclusion of such issues is welcomed, the 2016 final agreement has created a large bureaucratic structure diverting

human resources from the implementation of the 2011 Victims' Law and thus further slowed down the restitution process.

Sri Lanka



The civil war in Sri Lanka bears some striking similarities to the conflict in Myanmar. After independence, a series of policies by the dominant Buddhist Sinhalese including language and religious discrimination exacerbated divisions between the Tamil and Sinhalese communities.²³ Small groups of Tamil militants emerged in the 1970's and anti-Tamil riots in 1983 proved to be the flashpoint for all out civil war at which point the Liberation Tigers of Tamil

Elam (LTTE) became the dominant force fighting the Sinhalese-dominated central Government.²⁴ The LTTE gained ground and controlled and administered large swathes of land in the north and east of the country.²⁵ The brutality and scale of armed conflict increased throughout the period between 1983 and 2009 with human rights violations committed by both parties. In 2009, the central Government's armed forces inflicted a final defeat of the LTTE, ending with a brutal massacre of Tamil civilians, with up to 40,000 civilians killed.²⁶ Up to one million people had been displaced by the civil war, and at the end of the conflict in May 2009, there were approximately 600,000 IDPs.²⁷ This displacement crisis was compounded by the huge

22 Final Agreement to End the Armed Conflict and Build Stable and Lasting Peace. Section 5.1

23 "Sri Lanka: The Failure of the Peace Process." International Crisis Group. 28 November, 2006. <https://d2071andvip0wj.cloudfront.net/124-sri-lanka-the-failure-of-the-peace-process.pdf>

24 Ibid.

25 "Q&A: Post-war Sri Lanka." BBC. 9 January, 2015. <http://www.bbc.com/news/world-south-asia-11393458>

26 Colum Lynch. "U.N.: Sri Lanka's Crushing of Tamil Tigers may have killed 40,000 civilians." The Washington Post. 21 April, 2011. https://www.washingtonpost.com/world/un-sri-lankas-crushing-of-tamil-tigers-may-have-killed-40000-civilians/2011/04/21/AFU14hJE_story.html?utm_term=.41253c29abf8

27 Internal Displacement Monitoring Centre, 'Sri Lanka.' <http://www.internal-displacement.org/coun->

tsunami in 2004 that further displaced one million people, 500,000 of which ended up in protracted displacement conditions.²⁸

Prior to the final defeat of the LTTE, the Sri Lankan military gained control of the eastern part of the country and initiated a return process of 250,000 IDPs in 2007, yet this process was fraught with failures. Some IDPs agreed to return on the condition that a permanent home would be provided for them, but one year later, they were still residing in temporary shelters with no access to their previous livelihoods. The Government claimed that the delay was due to a lack of sufficient funding. IDPs were also provided with wrong information regarding the return process, including the timeline, highlighting the need for a transparent process in which the full disclosure of information regarding return conditions and timeframe is provided to refugees and IDPs. Furthermore, development projects on IDPs' land meant that IDPs were not allowed to return to their original lands.²⁹

Post-2009, Government efforts towards return of IDPs were inadequate and “crucial

opportunities to create conditions for durable solutions for IDPs were lost as a result of the previous [2009 – January 2015] government's preoccupation with large-scale and prestigious development projects.”³⁰ Rather, a “military-driven agenda” focused on deregistering IDPs was implemented rather than finding durable solutions.³¹ This lack of political will to develop a comprehensive policy that included restitution contributed towards a failure to protect and promote the rights of IDPs. Compensation was often inadequate to replace damaged or lost property, livestock and other livelihood equipment, human rights violations, particularly extrajudicial killings and enforced disappearances within IDP communities occurred with no access to justice or redress, the lack of land rights protection due to occupation on IDPs' land by military or other state authorities was prevalent while no intercommunal, trust-building measures or policies were implemented between ethnic Sinhalese and Tamil communities, creating tensions.³²

In 2012, the Sri Lankan Government declared that the resettlement program of

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28 Internal Displacement Monitoring Centre, ‘Sri Lanka.’ <http://www.internal-displacement.org/countries/sri-lanka>

29 Todd Wassel. “Protecting Housing Rights for IDPs in Sri Lanka.” *Forced Migration Review*. September 2009. <http://www.fmreview.org/protracted/wassel.html>

30 “Time for a New Approach: Ending Protracted Displacement in Sri Lanka - Discussion Paper.” Internal Displacement Monitoring Centre. July 2015. <http://www.internal-displacement.org/assets/library/Asia/Sri-Lanka/pdf/201507-ap-sri-lanka-time-for-a-new-approach-en.pdf>

31 Ibid.

32 Mirak Raheem. “Protracted Displacement, Urgent Solutions: Prospects for Durable Solutions for Protracted IDPs in Sri Lanka.” Centre for Policy Alternatives. 17 September, 2013. <http://www.cpalanka.org/protracted-displacement-urgent-solutions-prospects-for-durable-solutions-for-protracted-idps-in-sri-lanka/>

IDPs had been “successfully concluded”³³ yet despite the closure of camps, many people still lived in protracted displacement conditions. Factors that prevented voluntary return included lack of guarantees for safety, as areas remained militarized; lack of livelihood opportunities for returning IDPs; lack of land available due to military occupation of land for high security zones and investment projects; and gender-based violence without access to justice for women who had returned and poor law enforcement by corrupt authorities.³⁴

recognizes that providing protection and assistance to displaced and displacement-affected populations in all phases of displacement and the search for durable solutions is a duty and responsibility.

The policy lists the rights and entitlements of the displaced, with the ultimate aim that IDPs can secure restitution solutions. It also highlights the need for transitional justice and recommends that “resettlement is integrated into reconciliation and develop-

the primary responsibility of the State to provide protection includes measures to address human rights concerns and ensure access to justice, mechanisms for redress of grievances, compensation and reparations, and resolution of conflict over housing, land and property arising from displacement³⁸

As of 2016, 40,000 IDPs and 100,000 refugees, mostly residing in India, remained displaced. On 16 August 2016, the Sri Lankan Government published a National Policy on Durable Solutions for conflict-affected displacement.³⁵ The policy was approved after several drafts and rounds of consultation with a multitude of actors, including ministries, stakeholders, UN agencies and displaced communities and attempts to incorporate the UN Guiding Principles on Internal Displacement.³⁶ This policy:

ment policies.”³⁷

While there is no direct mention of the Pinheiro Principles in the policy, it does mention many of the same principles and ideas. The policy states that;

33 Ibid.

34 “Time for a New Approach: Ending Protracted Displacement in Sri Lanka.” Internal Displacement Monitoring Centre.

35 National Policy on Durable Solutions for Conflict-affected Displacement. Government of Sri Lanka. 16 August, 2016. <https://reliefweb.int/report/sri-lanka/national-policy-durable-solutions-conflict-affected-displacement>

36 Laurie S. Wiseberg & Mirak Raheem. “New Policy on Durable Solutions in Sri Lanka: The Challenge of Implementation.” Internal Displacement Monitoring Centre. September 2016. <http://www.internal-displacement.org/library/expert-opinion/2016/new-policy-on-durable-solutions-in-sri-lanka-the-challenge-of-implementation>

37 Wiseberg & Raheem. “New Policy on Durable Solutions in Sri Lanka: The Challenge of Implementation.” Internal Displacement Monitoring Centre.

38 National Policy on Durable Solutions for Conflict-affected Displacement. Government of Sri Lan-

It also states that;

recognizing the importance that land has to the attainment of durable solutions, the State will ensure the right of IDPs and refugees to return to their former homes and land. This policy commits the State to release in a timely manner all state-held land from which people were displaced or which they owned, retaining only that land legitimately required for public purposes in exceptional cases.³⁹

This acknowledges the Sri Lankan Government's role in restitution and what it needs to do to allow this process to begin.

Myanmar – Lessons Learned from Colombia and Sri Lanka and Applying the Pinheiro Principles

Learning from the experiences of Colombia and Sri Lanka, Myanmar can certainly see some clear parallels. One which must not be glossed over is that implementing a restitution process will add to the momentum for refugee return, which will not be successful if violent armed actors are still active. Restitution in an unsafe environment would put returnees in danger. Similar to Colombia, eastern Myanmar has a myriad of armed groups with well-documented histories of human rights abuse and violence. The most obvious is the Myanmar Army, but its proxy forces such as the Border Guard Forces and other ethnic armed organizations (EAOs) and EAO splinter groups remain powerful. Despite ceasefires, sporadic outbreaks of violence between the Myanmar Army and/or the BGF with EAOs have broken out

throughout Myanmar, including over dams and infrastructure construction projects, not only contributing to land confiscation but causing more displacement. The militarization of IDPs' homeland, something which is particularly prevalent in eastern Myanmar, was also a major obstacle in Sri Lanka as it restricted certain basic civil and political rights of the displaced, including freedom of religion, association, assembly and movement.⁴⁰

The Myanmar Army is engaged in a number of projects in conjunction with private businesses in conflict-affected areas, including monoculture plantations growing crops such as rubber, infrastructure construction (including military installations), and natural resource extraction.⁴¹ The past few years

ka. Section 2.4.

39 National Policy on Durable Solutions for Conflict-affected Displacement. Government of Sri Lanka. Section 7.2

40 "Sri Lanka: A Hidden Displacement Crisis." Internal Displacement Monitoring Centre. 31 October, 2012. <http://www.internal-displacement.org/south-and-south-east-asia/sri-lanka/2012/a-hidden-displacement-crisis>

41 "Truce or Transition? Trends in Human Rights Abuse and Local Response in Southeast Myanmar

of ceasefire in eastern Myanmar have seen huge swathes of land expropriated for financial gain to support these projects. Not only do they potentially create new triggers of displacement, damage the local environment, and serve as a catalyst for human rights violations, they are often in areas from which IDPs and refugees fled, and can involve confiscation of land owned by displaced people who are unable to object to the confiscation, further complicating return and restitution.

In the years following the war in Sri Lanka, the armed forces engaged in various post-conflict economic activities, often using land that IDPs previously lived on and owned for agricultural purposes. Poor access to HLP rights, coupled with forced evictions with no mechanism to solve disputes, has proved to be one of the biggest obstacles for a sustainable return of IDPs in post-conflict Sri Lanka.

In Colombia, powerful economic interests exploited land which had previously been the homes of the displaced. Furthermore, economic projects such as mining and palm oil plantations have further displaced people, exacerbating a fragile situation. Thus, according to the Center for Research on

Multinational Corporations (SOMO), “Large-scale economic projects such as the production of palm oil, that legalise forced displacement and have consolidated an unequal, discriminatory, exclusive and undemocratic rural economic model contribute to the fragility.”⁴² In Myanmar, clear parallels can be seen with mining, agribusiness, and investment-induced displacement contributing to the fragility of the peace process, while exacerbating grievances over natural resource governance throughout the country, not only in ceasefire areas. For example, banana plantations occupy land previously used by IDPs in Kachin State in northern Myanmar.⁴³ The Myanmar Army has a well-documented record of using ceasefires to make gains, expanding their administration and control over natural resources and the economy of ceasefire areas to entrench their political authority and control development sites in previously hard to access regions. Defined as “ceasefire capitalism,” by Kevin Woods when analyzing the post-ceasefire landscape in northern Myanmar in the 1990s and 2000s, he outlines the strategy of how “[t]he Burmese regime allocates land concessions in ceasefire zones as an explicit post-war military strategy to govern land and populations to produce regulated, legible, militarized territory.”⁴⁴

since the 2012 Ceasefire.” Karen Human Rights Group. 13 May, 2014. <http://khr.org/2014/05/truce-or-transition-trends-human-rights-abuse-and-local-response>

42 “Reconquering and Dispossession in the Altillanura.” SOMO & INDEPAZ. November 2015. <https://www.somo.nl/nl/wp-content/uploads/sites/2/2015/11/The-case-of-Poligrow-Colombia-2017.pdf>

43 Htun Khaing. “Kachin IDPs Fear Land Grabs in the Villages they once Called Home.” Frontier. 19 January, 2018. <https://frontiermyanmar.net/en/kachin-idps-fear-land-grabs-in-the-villages-they-once-called-home>

44 Kevin Woods. “Ceasefire Capitalism: Military-private partnerships, resource concessions and military-state building in the Burma-China borderlands.” *The Journal of Peasant Studies*. 38 (4) September 2011. <https://www.tandfonline.com/doi/abs/10.1080/03066150.2011.607699>

This military-business nexus is one of the key drivers of land confiscation from the rural poor.

In this context, it is key that while restitution programs for refugees and IDPs must be part of peace negotiations, their chances of success will remain low until a more comprehensive and sustainable peace is achieved. Sustainable peace must include demilitarization of conflict-affected areas and a halt in business investments in contested land. Given the current deadlock and stumbling of the peace process, this remains a distant possibility. Yet while a sustainable restitution program will not be feasible until peace is accomplished, the right to restitution should be established as soon as possible in Myanmar.

Other lessons can be learned from the inadequacies of the post-conflict Sri Lankan experience. A lack of a comprehensive strategy and political will for the sustainable return of refugees and IDPs - if indeed return is their preferred option – that includes restitution of housing, land and property meant that in the years following the end of the war, durable solutions for IDPs were not found. Such issues must be addressed in the peace process in Myanmar.

Furthermore, as outlined in the Sri Lankan example of unfinished homes in return sites, sufficient resources and a well-funded return program that accounts for the costs

of restitution of housing, land and property rights is vital. In Myanmar, already, the pilot return of 71 refugees from refugee camps along the Thailand-Myanmar border in October 2016, facilitated by the UNHCR and the Myanmar Government, immediately ran into problems as families who moved to Yangon did not have enough money to purchase the housing that was provided and were not aware of the need to do so. Not only does this raise questions of adequate disclosure of information but also of the resources needed to support sustainable return.⁴⁵ Evidently, for Myanmar, there must be enough resources to support refugees and IDPs to return before any large-scale return is initiated and the responsibility lies with the Government which so far it has not taken. This is also an area where the international community can contribute although it must be reiterated, that this must not be at the expense of the support to existing refugee camps and IDP sites whose population for the most part remains unwilling to return to their place of origin due to security concerns.

When a restitution program is introduced, the existing legal and judicial procedures will not be able to handle the huge amount of cases and claimants given the extent of displacement in Myanmar. Additionally, normal legal procedures use the assumption that illegal acts are the exception yet in times of war, incidences such as forced eviction are normal.⁴⁶ Furthermore, it is dif-

45 Where do we go from here? A Snapshot of Recent Developments for Refugees along the Thailand-Myanmar Border. Progressive Voice. 19 December 2016. <http://progressivevoicemyanmar.org/2016/12/19/briefing-paper-where-do-we-go-from-here-a-snapshot-of-recent-developments-for-refugees-along-the-thailand-myanmar-border/>

46 Housing and Property Restitution in Sri Lanka: Learning from other Jurisdictions – Seminar Re-

difficult for victims to provide proof if legal documents have been destroyed, which is particularly common in a conflict situation. Thus, special procedures and jurisdiction bodies must be put into place that “relax the burden of proof⁴⁷” that normally applies, so that it is normatively assumed that victims from a particular area of conflict are legitimate claimants - for example, the Victims’ Law in Colombia shifted the burden of proof from the claimant to the defendant. Furthermore, such procedures must be independent, impartial and possess legitimacy in the eyes of the all stakeholders, including displaced persons. This is especially so given Myanmar’s corrupt, politically pliant, and ineffective judicial system.

Conclusion

While conditions in conflict-affected areas of Myanmar remain uncertain, particularly related to human security, a mass organized return that involves a restitution program would face major obstacles and the prospect of a sustainable return that complies with the Pinheiro Principles is becoming less and less likely. However, recognizing the right to restitution of displaced people is crucial before a detailed program can be established. The fragile ceasefires have seen an uptick in land-grabbing in southeast Myanmar, where many of the refugees and

One problem that Myanmar will have with any restitution process is determining when the start-date from which claims can be made is. The war in Myanmar has been ongoing since 1949 and has displaced hundreds of thousands of people. Multiple waves of displacement mean that in many places, displaced people have become secondary occupants on land owned by previously-displaced people. Adjudicating all of these claims would be overwhelming for a restitution program yet if a date was chosen arbitrarily, excluding victims may hinder the process. It is not in the scope of this briefing paper to propose a cut-off date for restitution claims, but this will be an important and potentially fraught issue with any restitution program in Myanmar.

IDPs consider their homeland. Monoculture agribusiness such as palm oil plantations are leaving more rural people landless, as the current national land legal framework does not respect customary land rights and facilitates the seizure of such land by businesses.⁴⁸ If rural people currently living in potential return areas are having their land confiscated, it is difficult to envisage a restitution program for hundreds of thousands of returning refugees and IDPs. This is why it is important that the Pinheiro Principles are just one part of a broader land reform

port. Centre on Housing Rights and Evictions. September 2007. http://www.cepa.lk/content_images/publications/documents/217-S-COHRE-Housing%20and%20property%20restitution%20in%20SL.pdf

47 Ibid.

48 Jennifer Franco, Hannah Twomey, Khu Khu Ju, Pietje Vervest, and Tom Kramer. “The Meaning of Land in Myanmar.” Transnational Institute. 28 January 2016. <https://www.tni.org/en/publication/the-meaning-of-land-in-myanmar>

policy in Myanmar that recognizes customary land rights, recognizes local, non-state ethnic administration and land titling, and prioritizes smallholder, rural communities over big business. If a ceasefire agreement and any potential future peace agreement does not address these issues, communities that have suffered decades of armed conflict will find that peace brings them a loss of their common land, livelihoods, and economic self-determination in favour of low-paying day labor jobs at plantations owned by elite business people.

Thus, it is vital that restitution for returning refugees and IDPs, in compliance with the Pinheiro Principles, is explicitly addressed in peace talks, and also that such talks also include a broader agreement on land use and land tenure. While land is just one component of a sustainable peace agreement, it is a vital one for the long-term peace and stability of Myanmar, for restorative justice for victims of violations of HLP rights, as well as for the protection of the social, economic and cultural rights of rural communities, whether displaced or not.

Recommendations

To the Myanmar Government

- Ensure that HLP rights are explicitly discussed in the peace process;
- Announce a halt to natural resource-extraction and other major infrastructure and agribusiness projects in conflict-affected ethnic areas until a comprehensive peace agreement has been reached;
- Reform existing land laws to recognize customary and traditional land use;
- Prepare for a fully-funded restitution program with an appropriate time-line that restores refugees and IDPs' HLP rights in line with the Pinheiro Principles;
- Recognize the right to HLP restitution for IDPs and refugees in advance of the development of a detailed program of restitution;
- Declare that land owned by displaced people should not be declared "vacant" under current Myanmar land law;
- Warn the Myanmar Army and private companies that land confiscated in conflict-affected areas, including from displaced people, will be subject to a restitution process;
- Recognize and include customary and traditional land use practices in any policy on restitution for HLP rights of refugees; and
- Ensure full access as well as clear information for returning refugees' HLP rights, whether under customary or statutory law.

To the Myanmar Army

- Unilaterally and immediately declare a nationwide ceasefire, halt all military offensives and militarization in ethnic areas and engage in *inclusive* peace talks; and
- Immediately halt all land confiscations and return the land to the original owners or adequately compensate them where restoration is not possible.

To the International Community

- Continue to provide support for essential services and provisions for refugees in Thailand and IDPs inside Myanmar until voluntary, safe and dignified return is possible;
- Ensure that all relevant information is freely available, accessible and clearly provided in local languages to refugees and local host communities prior to any return;
- Include refugees and CBOs working with the refugee community in all phases of the preparation and implementation of return, including decision-making; and
- Provide support to a restitution process, based on the Pinheiro Principles, when conditions are right for safe, dignified and sustainable return.

To Ethnic Armed Organizations

- Consult widely with displaced populations and local community-based organizations on any decision or policy regarding return of refugees and IDPs; and
- Ensure that HLP rights for any returning IDPs and refugees are explicitly discussed in the peace process, in line with the Pinheiro Principles.



Progressive Voice is a participatory rights-based policy research and advocacy organization rooted in civil society, that maintains strong networks and relationships with grassroots organizations and community-based organizations throughout Myanmar. It acts as a bridge to the international community and international policymakers by amplifying voices from the ground, and advocating for a rights-based policy narrative.

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