



RESTITUTION IN MYANMAR

Building Lasting Peace, National
Reconciliation and Economic Prosperity
Through a Comprehensive Housing, Land
and Property Restitution Programme

DISPLACEMENT SOLUTIONS AND NORWEGIAN
REFUGEE COUNCIL

March 2017



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This report was drafted by Scott Leckie (Director and Founder, Displacement Solutions) in co-operation with José Arraiza (Information, Counseling & Legal Assistance Specialist, Norwegian Refugee Council) based on field research and consultations conducted during 2016 and early 2017.

Cover image: Women in Dawei, Tanintharyi (José Arraiza/NRC)

CONTENTS

Message from the NRC Myanmar Country Director	1
Executive Summary	2
I. Introduction	6
International Law and Restitution – Basic Principles to Guide Restitution in Myanmar	9
Restitution and its Relevance to Myanmar	20
II. Off to a Positive Start: Some of the Building Blocks of Restitution are in Place	26
Law	27
Policy	30
Procedural Mechanisms	32
Restitution in Practice	38
III. Restitution Hurdles yet to be Overcome: Gaps Between Domestic Restitution Measures and International Standards and Best Practice	40
IV. Completing the Restitution Puzzle: Recommended Steps to Ensure Restitution for Everyone	48
V. Conclusions	54
VI. Selected References	56
Annex: UN Principles on Housing and Property Restitution for Refugees and Displaced Persons	58

MESSAGE FROM THE NRC MYANMAR COUNTRY DIRECTOR

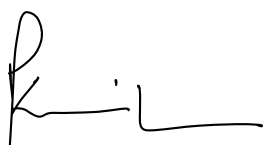
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Housing, land and property rights are fundamental human rights and a global advocacy priority for the Norwegian Refugee Council. The restitution of housing, land and property rights after conflicts and periods of non-democratic governance are fundamental aspects of transitional justice which are essential for the achievement of durable solutions to forced displacement, and to broader concerns of peace, reconciliation and economic prosperity. The NRC Country Office in Myanmar considers it necessary and positive to increase attention to the benefits of establishing specific post-conflict restitution mechanisms that would enable everyone with a restitution claim to have access to an appropriate remedial mechanism.

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

For these reasons, in partnership with Displacement Solutions, the NRC has supported the drafting of this report on potential options for the restoration of housing, land and property rights. It is not meant as a prescription, but rather as a tool to enrich and inform an already ongoing important debate which will benefit Myanmar and its people and hopefully contribute to peace and national reconciliation in the long term.

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



Prasant Naik
Country Director
March 2017

Our government wishes to give back land to the rightful owners.¹

EXECUTIVE SUMMARY

1. The question of housing, land and property (HLP) restitution has received increased attention over the past several years throughout Myanmar as the country continues to consolidate recent democratic gains and political reforms. This paper has been prepared in the spirit of paragraph 80 of the 2016 National Land Use Policy which asserts that: “The following priorities shall be carried out when implementing research initiatives, capacity building activities, educational programs and pilot projects: ...(n) Conduct research on best procedures for restitution of rights to land and housing of individuals, households and communities that had to abandon the area where they previously resided due to illegal land confiscation, civil war, natural disasters or other causes.” Both Displacement Solutions and the Norwegian Refugee Council are hopeful that the research contained in the present report is useful to the government in developing further initiatives on restitution for everyone in the country with an outstanding restitution claim. Several governmental bodies have been established since the outset of the political reform process to address some of the outstanding restitution claims based on land confiscation, various ethnic actors have adopted policies noting the central importance of restitution within land policies and the ongoing peace process, and increasingly sophisticated views have been put forth by various civil society organisations and displaced populations themselves on this complex question, both within the context of conflict-induced, as well as other forms of forced displacement and land acquisition. Significantly, as many as 400,000 acres of formerly confiscated land has been restituted to legitimate rights-holders over the past several years, and there is a general sense in many quarters that now is the time to make the principle of restitution a reality for everyone with a valid claim, but who have not yet been able to return to and reclaim their homes and lands.

2. Restitution - which for the purposes of this report refers to returning a situation to what it once was, through restoring rights over a certain piece of land or a home (immovable properties) to those with recognized formal and/or customary rights over it - is now a common feature of the political fabric of countries emerging from conflict, undemocratic periods of governance and shifts in the political paradigm. As valued and central as the restitution process is, however, to the construction of societies grounded in the rule of law and equal protection under the law, the path leading towards restitution can also be a highly complex, sensitive, and challenging process

¹ Tun Win (Deputy Minister of Agriculture, Government of the Union of Myanmar (June 2016)) “In his statement, the deputy minister implored people to be patient over this “complicated issue,” while the government formulates clear laws and procedures for the return of confiscated land. “Government authorities at various levels, including township development committees, and the military have grabbed land on false ‘public’ pretexts and sold it off in plots,” said the deputy minister.” (Source: <http://www.irrawaddy.com/burma/return-of-seized-land-a-top-nld-priority-deputy-agriculture-minister.html>).

notwithstanding how such land dispossession originally took place and the circumstances in which this occurred. Given the large number of people in Myanmar who are seeking or who will seek to exercise their restitution rights in the context of eventual return to their places of habitual residence and the highly complicated nature of many potential restitution claims, it will be vital to generate an improved understanding of the basic principles of restitution; what form a potential restitution law and procedure could foreseeably take in Myanmar; precisely who may have valid restitution claims over which parcels of land; which entities will review such claims and how any such decisions will ultimately be enforced.²

3. All State entities and public officials in Myanmar (including the military) and its various ethnic negotiating partners engaged in the peace process – just as with all countries that have undergone deep political changes in recent decades, including those emerging from lengthy conflicts – need to fully appreciate and comprehend the nature and scale of the restitution issues that have emerged due to practices widely carried out during past decades, how these continue to affect the rights and perspectives of justice of those affected, and the measures that will be required to remedy land-related concerns in a fair and equitable manner that strengthens the foundations for democracy and peace. Resolving displacement, acts of unfair/arbitrary acquisition and occupation of land, addressing the HLP and other human rights of returning refugees and IDPs in areas of return, ensuring livelihood and other economic opportunities and a range of other measures will be required if return and recovery of lost lands is to be sustainable and imbued with a sense of justice. Work towards developing an eventual nationwide restitution programme covering the entire physical territory of Myanmar and involving peace agreements with all ethnic groups should be premised on the basic contention that embracing restitution will ultimately make the whole of Myanmar a better, kinder, wealthier country and an ever improving place for all who dwell there. Pursuing restitution for all is as sure a sign as there could be that all parties are truly interested in securing a lasting and mutually beneficial peace.

4. Though not always widely understood by the public, Myanmar already has in place some of the key foundational components needed to develop more comprehensive and refined restitution mechanisms. Developing better restitution mechanisms would ensure that every person and community with a restitution claim can have an effective opportunity to have such claims independently and impartially reviewed and verified. The coming period will be vital in generating the political and social support needed for a more effective *all-inclusive* nationwide restitution process; a process which is a fundamental step towards ever greater democracy, ever greater justice, and ever greater respect for human rights. A society-wide embrace of an improved restitution process can provide an institutional, procedural and legal basis for building bridges between those with legitimate restitution claims, those who may have acquired such homes and lands in the past, and the new government. Indeed, the new government was brought to power on a platform solidly recognizing the rights of all people in Myanmar to live in a country that abides by the rule of law, including international law, and where acts such as land grabbing and the arbitrary expropriation of land without due process are confined to the past. Achieving such an embrace, however, will certainly be challenging, for the stakes are high, the numbers of people involved considerable and the political and social risks very significant.

² See, for instance: UNHCR, Housing, land and property issues in the context of return of displaced populations in South-East Myanmar, Summary Report (March 2016).

5. There may be views in Myanmar that posit the contention that as ideal as the principle of restitution may be, the actual approval of a new restitution law and programme to augment the important but incomplete mechanisms currently in place would simply not be politically possible due to potential opposition by a range of political actors in the country. These actors are most notably private companies, the military (which continues to be guaranteed some 25% seats in the national Parliament) and various ethnic armed groups. However, there are indications of major changes within each of these sectors, many of which are highly amenable to and supportive of the principles associated with restitution. For instance, an important Presidential Directive in 2015 addresses the role of the military in terms of land, outlining the following instructions concerning the Ministry of Defense: (a) Army shall neither lease confiscated land, meant for construction of military posts, for *Theesaa* farming nor other purpose to gain profits; (b) Army shall take only the area required for security of the military post, office and training activities; and (c) Army shall return the extra lands to the original owners who are demanding their lands through every possible means for which their complaint letters are submitted to all the Regional/State parliaments.³ These instructions build on evolving sentiments within the military itself exemplified in, for instance, remarks made by the Minister of Defense in 2013 on the important links between the role of the military and its vital role in the process of restitution: “In conclusion, the fundamental duty of *Tatmadaw*, the military is to protect the nation with the arms. To protect the nation means protecting the lives, homes and properties of our people. Just like protecting with the arms, returning the lands to support the lives of people to be stable and those of farmers to have something to live on is a way of protecting the lives, homes and properties of our people. I would like to express that we will solve the remaining cases, prioritizing the welfare of the people”.⁴ Expanding sentiments such as this will greatly enhance the prospects of comprehensive restitution throughout the country. Ethnic Armed Groups have also started exploring the need and viability of restitution processes, with the Karen National Union, for instance, issuing a land policy in 2015 which explicitly does just that. Similarly, many companies currently possessing or controlling land which is potentially subject to valid restitution claims, should note that one of the world’s largest companies, Coca-Cola, which now operates in Myanmar, has adopted a ‘Zero Tolerance for Land Grabbing Policy’ that sets a standard for other companies to be aware of their responsibilities within the land sector and the vital importance of having clarity about all questions concerning land and HLP rights over it throughout the country.⁵

6. Should Myanmar expand its already important, albeit nascent and partial, embrace of restitution principles and commit to a *comprehensive* and *nationwide* restitution programme enabling *everyone* with a restitution claim to make one, it will join numerous other countries throughout the world that have undertaken formal restitution programmes over the past 25 years. Countries ranging from Bosnia-Herzegovina to Colombia, Germany to Estonia, Kosovo to El Salvador, Iraq to Georgia, Poland to Hungary, the Czech Republic and many others have all decided that redressing

3 Directive from the Office of the President, dated 28-05-2015, ref. 578/(37)/12/President Office.

4 Minister of Defense, Speech to the Parliamentary Land Confiscation Inquiry Commission (16 July 2013).

5 Coca Cola recently submitted their first report on their Myanmar operations to the US State Department under the Responsible Investment Reporting Requirements required of all US companies investing more than US\$500,000 in Myanmar. (<http://burma.usembassy.gov/reporting-requirements.html>). The first Coca Cola “Responsible Investment in Myanmar Report” (December 2013) is available here <http://photos.state.gov/libraries/burma/895/pdf/TCCCStateDepartmentResponsibleInvestment%20in%20MyanmarReport121213.pdf>. A second updated report (30 June 2014) is available here: <http://photos.state.gov/libraries/burma/895/pdf/TCCCDoSResponsibleInvestmentMMReport63014.pdf>.

past acts relating to land confiscation was not only the right thing to do, but also the smart thing to do to build peace, reconciliation and to create better conditions for economic development.⁶ Many major peace agreements concluded over recent decades have also made explicit reference to HLP issues, including restitution, as areas vital for sustainable peace.⁷ Where these programmes have been successfully implemented they have formed fundamental steps in the larger quest for political stability and building the foundations of democracy. Indeed, the attributes of a modern, vibrant and prosperous society are all well served by courageous decisions to secure restitution rights to those with valid claims.

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

8. This report explores those instances of displacement where those affected are forced to move from their homes and lands due to circumstances beyond their control, in particular cases of armed conflict, massive violence or gross violations of human rights such as arbitrary land confiscation, where legal procedures are not followed, where compensation is not provided and where those forced to flee from their homes assert their claim to repossess them once they feel it is safe and secure enough for them to return. The people of Myanmar have endured many decades of forced displacement and land confiscation. It is through the process of restitution that at least some of the injustices associated with these processes can be reversed and redressed. There is a growing conviction in the country - from the level of communities all the way up to the national government and military - that Myanmar will be a better, more peaceful, unified and compassionate country if restitution demands are met in the near term. Through this report Displacement Solutions and the Norwegian Refugee Council aim to assist this process and provide constructive and informed guidance on how to reach this goal in the best possible manner.

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

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

I. INTRODUCTION

9. The question of land remains one of the most complex, challenging and sensitive topics in Myanmar, just as it is all other countries; Myanmar is far from unique in this regard.⁸ This is true in many respects, but particularly so with regard to land that was either confiscated or otherwise changed hands in less than equitable ways during recent decades, or land that was left behind and subsequently acquired by third parties following the flight of refugees and internally displaced persons. The parameters of the land question are increasingly well understood and have been subject to extensive review and analysis in recent years, with a growing number of publications and reports outlining land-related concerns.⁹ Land acquisition has been widespread throughout the country since independence. For decades, using either the *1953 Nationalisation of Land Act*, the *1894 Land Acquisition Act*, or outright force, combined with a prevailing view that all land within Myanmar ultimately belongs to and is controlled by the State, created conditions that led to very large-scale land confiscation throughout the country. Similarly, the period of military rule from 1988-2011 when the country was governed successively by the State Law and Order Restoration Council (SLORC) and the State Peace and Development Council (SPDC), is viewed as an historical period when arbitrary land grabbing, land confiscation/acquisition and subsequent displacement from these lands was particularly extensive. While a portion of this displacement and confiscation may have been consistent with the domestic laws in force at the time, and carried out in a manner not that dissimilar to land alienation measures undertaken by governments elsewhere, the vast majority of these actions were arguably contrary to prevailing international and national norms which are quite clear in terms of what is and what is not allowed in this regard. It is in recognition of the unjust nature of many land measures that growing support for restitution of this land has emerged.

⁸ See, for instance, Transnational Institute, *The Meaning of Land: A Primer*, TNI, Nov 2015. This report also asserts that “the long-simmering land problem has become a burning land problem with the start of yet another new wave of land confiscations (...) The wave of land grabbing since 2010 is occurring on top of and in interaction with previous waves of land grabbing. Evidence suggests that the amount of land lost in these previous waves is significant and may even be larger than what has been lost under the current wave of land confiscations. (p. 10). This report also outlines the real meaning of land and land rights to the people of Myanmar, where land is described in the following terms: Land is livelihood and life with dignity. Without land, there is enslavement, struggle, fragmentation, and mere survival devoid of dignity and self-determination; Land is also inheritance with remembrance; Land is family integrity and togetherness; Land means family continuation across generations. Land is knowledge passed from one generation to the next; Land is the link between people's past, present and future; it connects lives from the past with those in the present and to a foreseeable future; Land is individual identity; Land is ethnic identity; land is community; Land is education and health; Land is safety and security; and The value of land cannot be measured; land that is taken away can never be properly compensated.

⁹ See, for instance, Displacement Solutions, *Bridging the HLP Gap. The Need to Effectively Address Housing, Land and Property Rights During Peace Negotiations and in the Context of Refugee/IDP Return*, June 2013; Displacement Solutions, *Myanmar at the HLP Crossroads*, 2012, available at: <http://displacementsolutions.org/files/documents/MyanmarReport.pdf>; Displacement Solutions, ‘Housing, Land and Property Rights in Burma: the Current Legal Framework’, 2009; Food Security Working Group, ‘Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law’, 2012; Improving the Legal and Policy Frameworks Relating to Land Management in Myanmar’, 2012; Karen Human Rights Group (KHRG) *Losing Ground: Land conflicts and collective action in eastern Myanmar*, 2013, available at: <http://www.khrg.org/khrg2013/khrg1301.html>; Transnational Institute, ‘The Challenge of Democratic and Inclusive Land Policy Making in Myanmar. A Response to the Draft National Land Use Policy’, 2015; Transnational Institute (TNI) & Burma Centrum Nederland (2013) *Access Denied: Land Rights and Ethnic Conflict in Burma -Burma Policy Briefing Nr 11*, May 2013. Available at: <http://www.tni.org/briefing/access-denied> (last accessed 20 June); UNHCR Policy Development and Evaluation Service, ‘Forced Migration and the Myanmar Peace Process’, prepared by Ashley South and Kim Joliffe, Research Paper 274, 2015, and many others.



*Image: Rice paddies in Tanintharyi
(José Arraiza/NRC)*

10. Land acquisition and confiscation and resultant involuntary displacement in Myanmar, both prior to and during the reform process, has been carried out for a number of reasons. These include State-sponsored agriculture projects, the establishment of agro-industrial plantations by private entities, large industrial development projects, special economic zones, military settlements, large public infrastructure projects, urban expansion, hotel zones, land speculation by individuals and as a consequence of conflict. Most acts of land confiscation follow a similar process involving the frequently arbitrary nature of land acquisition with little or no effort to find alternatives to reduce or preclude the need for subsequent displacement; a lack of consultation or free and informed consent with affected communities; disputed, inadequate or non-existent just and satisfactory compensation; the absence of any policy on resettlement following land acquisition; insufficient opportunities for judicial or other forms of redress to prevent or resolve displacement due to land acquisition, and effectively a complete disavowal of the housing, land and property rights of those affected.¹⁰ Though certain forms of land confiscation have slowed, these processes have not ceased since the onset of the political reforms, despite recent statements by the new National League for

¹⁰ According to an in-depth analysis on Land Concession, Acquisition, and Confiscation: "In Myanmar, land-related discussions frequently circle back to (a) land confiscated without due process or compensation (and probably using force or political authority); (b) land acquired through a largely faulty process; and (c) limited-period permits granted for use of land for development and production/extraction. Since the early 1990s, development planners have conceived ambitious national projects to achieve economic benefits from natural resources. However, fertile tracts targeted by investors are usually occupied or used by rural communities. This resulted in, and continues to cause land conflicts that negatively affect the livelihoods of many households and social and political stability. The government's policies and regulations on classifying land as "fallow" and acquiring land from current holders are rather vague. Antiquated laws such as the 1894 Land Acquisition Act give the regime the right to take over any land, making local people extremely vulnerable to forced displacement without any remedy. Large-scale concessions for investors were established by the General Ne Win government in the 1960s and refined by the State Law and Order Restoration Council (SLORC) regime from 1991. Land acquisition was facilitated by the police and armed forces and uncertain laws and administrative procedures were used to take over land for "public purposes." Contradictory regulations and instructions, manipulation, coercion, and confusion were reportedly used to acquire land from farming households and allocate it to favored individuals or groups. Civil society groups have expressed concern that despite awarding numerous concessions since 2001, few long-term jobs have been given to local residents as compensation. Reports published by the Ministry of Agriculture and Irrigation (MoAI)/SLRD and MoECAP on land use and State-land leases suggest that about 20 percent of all of Myanmar's land has been awarded to foreign or joint venture investors for 30 to 70 years. MoAI's 2014 report (Myanmar Agriculture in Brief) indicated that only close to 20 percent of the five million hectares approved for land concessions had been developed. Senior government officials conceded that State land leases/concessions have been negotiated and awarded in haphazard and inconsistent ways with negligible quantification and qualification of their impacts. The government's experiment with land concessions has yielded little positive economic or social results. Investors are reluctant to invest anything more than nominal sums on land. Consequently, few concessions have generated expected revenue streams for the government. (Source: Shivkumar Srinivas and U Saw Hlang, Myanmar: Land Tenure Issues and the Impact on Rural Development, FAO (May 2015)). See also: 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).

Democracy (NLD)-led government aiming to curtail these practices. One recent report outlines the tenure types of confiscated land, pointing out that 57% of land confiscated was customary land, 30% rights based on occupation-usage and 8% where land rights were purchased. According to this report, there was no consultation prior to confiscation in the vast majority of cases, and the same applies to receipt of compensation. This study indicates that land was confiscated by the following entities: military 47.7%, government department 18.8%, company 13.9%, local authority 5.8%, foreign company 4.4%, military with government department and company 1.3%, military with government department 1.3%, government department with local authority 1%, individual 1%, ethnic armed group 0.9%, government department with company 0.4%, military with company 0.4%, unknown 3.1%.¹¹

11. While no reliable national figures are collected or exist as to the precise scale of land confiscation carried out in the country during past decades, nor do systematic nationwide inventory maps exist comprehensively revealing the locations of such land acquisitions, it is certain that the total number of acres acquired is clearly not measured in thousands, but rather in millions of acres, and almost certainly affecting millions of people.¹² A publically accessible database of restitution claims and maps indicating the size of land parcels, the number of people affected and the location of unresolved claims would give much needed clarity to the true scale of the restitution challenges facing the country. As such, in recognition of the seriousness of the land question, various measures - both legal and political - were undertaken by the previous USDP government as part of the political reform process, including the adoption of new land legislation and the establishment of Parliamentary committees entrusted with examining past cases of land grabbing. The present NLD-led government has prioritized the land issue further and has instigated a series of steps to implement commitments made in its Party Platform presented at the 2015 elections, which are discussed below.

12. Before examining the many important steps taken in Myanmar towards the ultimate goal of restitution for everyone with a legitimate restitution claim, it is vital to look briefly at how the principle of restitution has been addressed internationally, and some of the important lessons learned from the experiences in other countries that have embarked on their own restitution journeys.

¹¹ Land in Our Hands Network, *Destroying People's Lives: The Impact of Land Grabbing on Communities in Myanmar*, December 2015, 29.

¹² "By 2013, 5.3 million acres of land has been leased for agriculture, mostly to local crony companies with close connections to government and military officials" (Source: Global Witness, Press Release, 11 May 2016). Another article indicates lower figures: "According to findings of the Farmers Affairs Committee in the Upper House of Parliament, as many as 2 million acres of land across Burma could be considered 'confiscated.'" (Source: <http://www.irrawaddy.com/burma/return-of-seized-land-a-top-nld-priority-deputy-agriculture-minister.html>). One report of the Food Security Working Group report claims that over 6 million acres of land from farmers were confiscated with 4 million acres seized by Tatmadaw. (Source: Mon News, 9 April 2016, 'Tatmadaw and Gov't Return Over 16,000 Acres of Seized Land. Source: <http://monnews.org/2016/04/09/tatmadaw-govt-return-16000-acres-seized-land/>, viewed on 5 November 2016. Added to this, figures point to the existence of hundreds of thousands of IDPs within Myanmar, and at least 215,000 refugees from Myanmar living within camps along the Thai border.

Article 34: A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.¹³

INTERNATIONAL LAW AND RESTITUTION – BASIC PRINCIPLES TO GUIDE RESTITUTION IN MYANMAR

13. Historically, land dispossession linked to armed conflict frequently meant individuals lost their properties for good. Persons, families and communities who were displaced and/or lost their possessions – whether due to armed conflict, arbitrary expropriation of land or human rights violations – were permanently displaced. The past several decades, however, have been witness to a remarkable turn of events where it has been increasingly accepted that displaced persons are not simply entitled to return to their countries of origin or allowed some form of temporary humanitarian access to their original homes, but that they also have a legally enforceable right to return to, recover, repossess, re-assert control over and reside in, the homes and lands they had earlier fled or from which they had been displaced; the implementation of the process of

¹³ Responsibility of States for Internationally Wrongful Acts 2001, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). This vital standard discusses these matters in the following way: Responsibility of a State for its internationally wrongful acts - Every internationally wrongful act of a State entails the international responsibility of that State; Article 2 Elements of an internationally wrongful act of a State - There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State; Article 3 Characterization of an act of a State as internationally wrongful - The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. Chapter II - Attribution of conduct to a State - Article 4 Conduct of organs of a State - 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State; Article 5 Conduct of persons or entities exercising elements of governmental authority - The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance; Article 6 Conduct of organs placed at the disposal of a State by another State - The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

restitutio in integrum. While it may still be difficult to argue that all persons who have ever been displaced have a universally applicable codified right to housing, land and property restitution under international human rights law in all circumstances, or that all people with this right will actually be capable of exercising it, the emergence of this principle as a core human rights issue for refugees, IDPs and others who suffered HLP losses is now abundantly clear. Displacement is such a broad phenomenon, and affects people in such a diverse series of ways, that arguing that restitution is the appropriate or legally guaranteed remedy of choice in each and every case would be difficult to support. For instance, cases of clear and over-riding public interest involving the expropriation of land for use in constructing social housing in a country with severe housing shortages, carried out according to law, and involving the full and satisfactory provision of compensation to those affected, would perhaps weaken a potential restitution claim. Economic migrants not forced by conflict or violence to flee their homes would also not generally be entitled to formal housing, land and property restitution rights. However, in a great many instances of land confiscation and displacement, restitution is clearly the preferred and appropriate remedy.

14. The concept of restitution, of course, has a lengthy history in terms of international law and has long been accepted as an important judicial remedy within a wide range of national and international legal codes. It is on these foundations that much of the subsequent progress specifically on *housing, land and property* restitution has been built. International law approaches restitution generally through the lens of infringements of law due to what are defined as wrongful acts or omissions attributable to States through the application of the law of State responsibility.¹⁴ One of the premier international law making bodies, the International Law Commission in their 2001 *Articles on State Responsibility* outlines the legal meaning of the term ‘internationally wrongful acts’, as noted above.

15. While an analysis of the degree to which each particular manifestation of land acquisition/confiscation in Myanmar may have constituted internationally wrongful acts (which arguably they do) is beyond the scope of this paper, it is clear that the principles established under the *Articles* are of direct relevance to the country today.¹⁵ It is also abundantly clear that it is only through the presence of an all-inclusive restitution programme that such determinations can be made, and justice secured. Moreover, the seriousness accorded the land acquisition issue as indicated by the establishment of governmental bodies to restore rights in land to those whose land was taken, the development of special procedures in this regard and the official statements by the office of the President instructing various agencies to refrain from further land confiscation, all point to at least a tacit recognition within the State organs of Myanmar that past practices of land acquisition were at the very least unacceptable, unfair or unjust, and arguably acts that could be construed, indeed,

¹⁴ A legal opinion of the Inter-American Juridical Committee has asserted that restitution is required for any violation of an international obligation: “Pursuant to the rules governing state responsibility in international law, any state that violates an international obligation must make reparations for the consequences of the violation. The reparation has the purpose of returning, to the extent possible, the situation to the way it was before the transgression occurred. Only to the extent that this would prove impossible, or that the aggrieved party would so agree, could there be room for any substitute reparation”. (Inter-American Juridical Committee, Legal Opinion on the Decision of the Supreme Court of the United States of America, OAS Doc. CJI/RES.II-15/92, para. 10 (1992)).

¹⁵ Many analyses support this contention, including, for instance: “Myanmar does not have detailed procedures on land acquisition and appears primarily to be using outdated laws as the basis for land acquisition. These laws do not reflect more modern protections developed in other common law countries to define procedural and substantive protections, nor let alone the more recent international principles on security of tenure...” Source: 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), 12.

to constitute internationally wrongful acts.¹⁶ While all States, including Myanmar maintain legal powers to expropriate land subject to certain criteria being met, these powers are far from absolute and are increasingly regulated by relevant legislation, both domestic and international, hence the world's growing support for the principle of restitution.¹⁷

16. In addition to these norms, we must also refer to international humanitarian law that also addresses grave breaches of residential rights that can give rise to measures of restitution.¹⁸ 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*

¹⁶ It is important to point out at this juncture that international law is quite unequivocal about the contention that relying on a domestic law as a justification for violating an international rule is inconsistent with the Vienna Convention on the Law of Treaties (1969) which clearly states in Article 27 that "A party may not invoke the provisions of its internal law as justification of its failure to perform a treaty. This rule is without prejudice to article 46." Article 46 provides that: 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

¹⁷ See, for instance, this view of HLP restitution by the US State Department: A successful property restitution program is an indicator of the effectiveness of the rule of law in a democratic country. Non-discriminatory, effective property laws are also of crucial importance to a healthy market economy. We recognize that in rem property restitution may not be possible in all cases. Payment of compensation is the obvious alternative. Property restitution is often complicated and controversial. Changing the ownership and use of buildings and land from one party or purpose to another can cause major disruptions that already economically challenged countries can ill afford. There is no single system of property restitution laws and procedures that can be applied to all countries. In encouraging restitution, the U.S. government bears in mind the following considerations: Restitution laws should govern both communal property owned by religious and community organizations and private property owned by individuals and corporate entities; To document claims, access to archival records, frequently requiring government facilitation, is necessary; Reasonable alternative evidence must be permitted if archives have been destroyed; Uniform enforcement of laws is necessary throughout a country; The restitution process must be non-discriminatory; There should be no residence or citizenship requirement; Legal procedures should be clear and simple; Privatization programs should include protections for claimants; Governments need to make provisions for current occupants of restituted property; When restitution of property is not possible, adequate compensation should be paid; Restitution should result in clear title to the property, not merely the right to use the property; Communal property should be eligible for restitution or compensation without regard to whether it had a religious or secular use. Some limits on large forest or agricultural holdings may be needed; Foundations managed jointly by local communities and international groups may be appropriate to aid in the preparation of claims and to administer restituted property; Cemeteries and other religious sites should be protected from desecration or misuse before and during the restitution process. The United States has been encouraged with the progress many countries have made on this difficult, complex and frequently controversial issue. Still, there is a great deal of work to be done in this area. Some countries still do not have property restitution laws. Others have laws in place but have found it difficult to administer existing laws in a non-discriminatory manner. Achieving passage and effective, timely implementation of restitution laws and procedures is both a critical indicator of rule of law in a democratic society and a crucial feature of a market economy. (Source: <https://2001-2009.state.gov/p/eur/rls/or/93062.htm> - accessed on 16 Oct 2016). In addition, The Rome Statute of the International Criminal Court specifically addresses a series of acts and omissions relating directly to HLP rights which could even constitute international crimes. (See: Displacement Solutions, Housing, Land and Property Rights and International Criminal Justice: Holding HLP Rights Violators Accountable, September 2012).

¹⁸ The *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)* is particularly clear in prohibiting activities involving arbitrary displacement and the destruction of property. Art. 33 No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited; Art. 49 ...Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased....The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies; Art. 53 Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered necessary by military operations; Art. 147 Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the present Convention:extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. In addition, Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) further strengthens these principles: Art. 17 (1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Art. 17(2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

specifically addresses restitution in terms of eventual Court decisions.¹⁹ The *International Criminal Tribunal for the Former Yugoslavia* has also explicitly included restitution of property amongst a range of possible remedies.²⁰ 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 29.²¹ In turn, the Guiding Principles helped to subsequently 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.*²²

17. These points were further refined in the United Nations Principles on Housing and Property Restitution (*Pinheiro Principles*), also approved by the UN in 2005.²³ Over the past decade, inter-governmental agencies, government officials, United Nations and NGO field staff and

¹⁹ Art. 75(1) The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. (2) The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79. (3) Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. (UN Doc. A/CONF.183/9 (1998), 17 July 1998).

²⁰ Article 105 of the Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (adopted 11 February 1994) permits the Tribunal, in conjunction with a judgment of conviction, to award the restitution of property or its proceeds to victims, even property in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty. In the context of the Rwanda Tribunal, one of the categories for prosecution is the destruction of property.

²¹ 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.

²² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>).

²³ See: The 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).

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. A range of institutions have also directly addressed housing and property restitution as rights.²⁴ 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'.²⁵

18. 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. The *Principles* are inclusive in nature and apply in situations where displacement has resulted in people 'arbitrarily' or 'unlawfully' being deprived of their former homes, lands, properties or places of habitual residence. In practical terms, 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'. The *Principles* apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as 'ethnic cleansing', development projects, acts of land confiscation resulting in displacement, forced evictions and natural and manmade disasters. Whenever a person or community is arbitrarily displaced from their homes and lands the *Principles* can be used as guidance for how best to return the situation to what it once was. In recognising the restitution rights of all refugees and displaced persons with HLP losses in need of reversal, the *Principles* do not distinguish between categories of displaced persons in terms of defining their restitution rights. This is an important expansion of the language frequently used

24 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." CERD expressed similar sentiments in General Recommendation No. 23 (1997) (on indigenous peoples), which outlines the rights of indigenous peoples to have any lands and territories which they were deprived from, restored to them. The Recommendation states, inter alia, "5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories." (UN Doc. A/52/18, annex V (1998), adopted 18 August 1997).

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

to describe displacement, which often refers more limitedly to ‘refugees and internally displaced persons.’ The *Principles*, however, use the simplified but more expansive language of ‘refugees and displaced persons’. Ultimately, the *Principles* take the perspective that neither war, human rights abuses, development nor disaster are in and of themselves justifiable grounds upon which to legitimise the arbitrary or unlawful acquisition, expropriation or destruction of homes and lands over which refugees and displaced persons continue to retain rights. Grounded firmly in existing international law, policy and best practices, the *Principles* recognise the fundamental nature of housing, land and property restitution as a key concern of States and the international community, and ultimately as a fundamental feature of sustainable peace and development.

19. Indeed, the international housing, land and property rights normative framework relevant to restitution is far more advanced and comprehensive than is often known.²⁶ The HLP norms upon which much of the *Principles* are based, are found widely throughout international, regional, national and local law, within the legal regimes of human rights law, humanitarian law, refugee law, criminal law, constitutional law and civil law. This extensive normative framework is useful in developing consistent and clear approaches to restitution. Some of the specific rights that are clearly enshrined within these regimes include the right to voluntary return, the right to adequate housing, the right to be protected against forced eviction, the right not to be arbitrarily deprived of one’s property, the right to privacy and respect for the home, the right to freedom of movement and others. These rights can be seen as the core HLP rights that need to be considered in developing laws, policies and procedures on restitution, four of which are particularly relevant to the situation in Myanmar today:

20. *The Right to Voluntary Return* - The right of refugees and IDPs to voluntarily return to their homes is one of the primary HLP restitution rights. Widely reaffirmed in numerous human rights standards, the right to voluntary return forms a cornerstone of the *Pinheiro Principles*.²⁷ These provisions reflect the transformation of the right to voluntary return (or repatriation) into a concept involving not simply the return to one’s country or region of origin, but to one’s *original home, land or property*. Increasingly, therefore, return rights and HLP restitution rights need to be treated in tandem with one another. At the same time, the right to voluntary return – whether for refugees or displaced persons – is indeed *not* an obligation to return. Return cannot be restricted, and

26 See, for instance: FAO, IDMC, OCHA, OHCHR, UN-Habitat and UNHCR, Handbook on Housing and Property Restitution for Refugees and Displaced Persons - Implementing the Pinheiro Principles, March 2007; International Center for Transitional Justice, The Contemporary Right to Property Restitution in the Context of Transitional Justice, New York, May 2007; Leckie, S., Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials, (editor), Cambridge University Press, 2007; and Leckie, S., Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional Policy Framework, UNHCR, 2005.

27 Principle 10 of the Pinheiro Principles addresses voluntary repatriation in the following terms: 10(1) 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; 10(2) States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations; 10(3) Refugees and displaced persons shall not be forced, or otherwise coerced, 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; and 10(4) States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons. 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.

conversely it cannot be imposed. It must be a free choice by those concerned, and procedures and mechanisms need to be developed to ensure that this right can be secured for all who wish to assert it. Practice clearly indicates that the presence of a viable and all-inclusive restitution programme will facilitate voluntary repatriation.

21. *The Right to Adequate Housing and Security of Tenure*: The right to adequate housing is found throughout international human rights law, most notably in Article 25(1) of the Universal Declaration on Human Rights in 1948, and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁸ Those entitled to the right to adequate housing are legally entitled to housing that is *adequate*. Under *General Comment No. 4*, adequacy has been specifically defined to include: security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy, and this would apply to returning refugees and IDPs as much as it would to any other persons.²⁹ Governmental obligations derived from this right include duties to take measures to confer security of tenure (and consequent protection against arbitrary or forced eviction and/or arbitrary confiscation or expropriation of housing); to prevent discrimination in the housing sphere; to ensure equality of treatment and access vis-à-vis housing; to protect against racial discrimination; to guarantee housing affordability; and many others. Returnees and displaced persons generally, as well as all other rights-holders, need to be assured that these rights will be protected and secured.

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

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



*Image: Displaced
mother and child (NRC)*

22. *The Right to be Protected Against Forced Evictions:* Building on the legal foundations of the rights to adequate housing and secure tenure, international standards increasingly assert that forced evictions constitute 'a gross violation of human rights, in particular the right to adequate housing'.³⁰ The 1998 *UN Guiding Principles on Internal Displacement* adopt a similar perspective and state clearly in Principle 6 that 'Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'. *UN General Comment No. 7 on Forced Evictions* (1997)³¹ issued by the UN Committee on Economic, Social and Cultural

³⁰ A 2004 UN Commission on Human Rights resolution on the 'Prohibition of forced evictions', for instance, rather unequivocally reaffirms 'that the practice of forced eviction that is contrary to laws that are in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing', and which also urged Governments 'to undertake immediately measures, at all levels, aimed at eliminating the practice of forced eviction by, inter alia, repealing existing plans involving forced evictions as well as any legislation allowing for forced evictions, and by adopting and implementing legislation ensuring the right to security of tenure for all residents, [and to] 'protect all persons who are currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups'. Commission on Human Rights Resolution 2004/28 (10 April 2004).

³¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (1997) - The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions (UN doc. E/C.12/1997/4), adopted 16 May 1997 by the UN Committee on Economic, Social and Cultural Rights at its' 16th session, held in Geneva).

Rights, is perhaps the most detailed statement interpreting the view of international law on this practice, re-affirming the sentiments of the 1991 *General Comment No. 4* that: '[t]he Committee considers that instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law (para. 18)'. *General Comment No. 7* goes one step further in demanding that 'the State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions'. The *Comment* requires countries to 'ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards by private persons or bodies'. The 2015 signature by Myanmar of the ICESCR is particularly noteworthy in indicating the clear intent to ratify and bind itself in good faith to all of the norms found in this important treaty, as well as norms such as *General Comment No. 7*.

23. *The Right Not to be Arbitrarily Deprived of One's Property*: Closely related to the security of tenure question, and rights to privacy and respect for the home, the right not to be arbitrarily deprived of one's property is widely addressed throughout human rights law. It is in determining the scope of both the rights of individuals and those of the State that we can determine which measures resulting in land confiscation and subsequent displacement are truly justifiable and which are not. While land acquisition/confiscation is not in and of itself a prohibited act, under human rights law it is subject to increasingly strict criteria against which all such measures must be judged to determine whether or not they are lawful. The power of States to expropriate carries with it five fundamental pre-conditions, namely when housing, land or property rights are limited, this can only be carried out when the expropriation concerned is: 1) subject to law and due process; 2) subject to the general principles of international law; 3) in the interest of society and not for the benefit of another private party; 4) proportionate, reasonable and subject to a fair balance test between the cost and the aim sought; and 5) subject to the provision of just and satisfactory compensation. Every act of land confiscation, acquisition, grabbing and expropriation, in Myanmar can be assessed against these five pre-conditions.

24. These and similar HLP principles have been repeatedly reaffirmed, and are each in their own way fundamental in any quest for all-inclusive restitution.³² In terms of jurisprudence supporting the position that restitution constitutes a primary remedy for violations of international law, the Permanent Court of International Justice, as far back as 1928, ruled in the well-known *Chorzów Factory (Indemnity) Case*, that restitution was the preferred remedy for correcting illegal

³² For instance, in the Restatement of Foreign Relations Law of the United States it is clearly stipulated that for a breach of international law, "[o]rdinarily, emphasis is on forms of redress that will undo the effect of the violation, such as restoration of the status quo ante, restitution, or specific performance of an undertaking" Restatement (Third) of Foreign Relations Law of the United States Sec. 432(2) (1987). While restitution can take various forms (even in the context of housing and property), in cases of illegally occupied territory, restitution in kind, i.e. the return of the territory, is the only 'legal' remedy, and thus all other potential remedies may not be appropriate in such cases. (Ian Brownlie (1983) *Principles of Public International Law*, Oxford, 210).

governmental takings of property.³³ Thus, 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 confiscation of housing, land or property.³⁴ The legal doctrines of proportionality and fair balance are also of vital importance in determining the legitimacy of cases dealing with housing, land or property losses in the context of restitution claims. In general terms, if State organs revoked any pre-existing rights to housing, land or property in an arbitrary manner or applied the law based upon racial, ethnic or national origin or other forms of discrimination, this would necessarily be classified as disproportionate, and thus a violation of international law. Similarly, the now widely accepted fair balance doctrine³⁵ stipulates that in determining the compatibility of a certain act by a State with regard to HLP issues, any interference in the exercise of these rights must strike a *fair balance* between the aim sought to be achieved and the nature of the act, particularly when a victim of land confiscation has suffered an individual and excessive burden because of the confiscation concerned.³⁶

25. Influenced by and building upon these many clear restitution principles under international human rights law, the particular remedy of restitution stems ultimately from the broader right to an effective remedy for violations of human rights; a core right pervading this entire body of law.³⁷

³³ Chorzów Factory (Indemnity) Case (Germany v. Poland), 1928 PCIJ (ser. A) No. 17 (Judgment of Sept. 13 1928), p. 47. The Chorzów Factory case sets out what are widely agreed to be the basic remedial norms for violations of international law: "The principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are principles which should serve to determine the amount of compensation due for an act contrary to international law". This case was based on the specific violation of a treaty. However, the Court's decision concerning the appropriate remedy did not distinguish between treaty violations and any other violations of international law. As such, a violation of customary law would presumably be subject to the same remedial norm as a violation of a treaty. (See: Frederic L. Kirgis (2001) 'Restitution as a Remedy in US Courts for Violations of International Law' in *American Journal of International Law*, vol. 95, no. 2, p. 343).

³⁴ In cases involving formal expropriation of housing, land or property – which in many cases is clearly legal under international law – illegal acts can and still do occur. According to one leading international lawyer "[i]nternational law will clearly be engaged where the expropriation is unlawful, either because of, for example, the discriminatory manner in which it is carried out or the offering of inadequate or no compensation." (Malcolm N. Shaw (1997, 4th ed.) *International Law*, Cambridge University Press, p. 574). Shaw continues, stating that "[i]n the case of an unlawful taking, full restitution in kind or its monetary equivalent was required in order to re-establish the situation which would in all probability have existed if the expropriation had not occurred, while in the case of lawful taking, the standard was the payment of the full value of the undertaking at the time of dispossession" (p. 580), thus capturing another core element of the restitution process.

³⁵ In determining the existence of fair balance, the European human rights bodies have noted there had been a violation of Article 1 of Protocol No. 1 ('the peaceful enjoyment of possessions') when no fair balance had been struck between the interest of protecting the right to property and the demands of the general interest as a result of the length of expropriation proceedings, the difficulties encountered by the applicants to obtain full payment of the compensation awarded and the deterioration of the plots eventually returned to them. (*Zubani v. Italy* (European Court on Human Rights, Judgment 7 August 1996)).

³⁶ The European Court on Human Rights has also issued the following pronouncement with respect to the legitimacy of actions by the State resulting in the deprivation of property: 'In this connection, the Court recalls that not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the aim employed and the aim sought to be realized....The requisite balance will not be found if the person concerned has had to bear an individual and excessive burden....Clearly, compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions (*Lithgow and others v. U.K.* (Judgment 8 July 1986, Series A, No. 102; (1986) 8 EHRR 329, Para. 120)).

³⁷ A right to an effective remedy for victims of violations of international human rights law is found in the Universal Declaration of Human Rights (UDHR) (Art. 8), the International Covenant on Civil and Political Rights (CCPR)(Art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)(Art. 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)(Art. 11), the Convention on the Rights of the Child (CRC)(Art. 39), the African Charter on Human and Peoples' Rights (Art. 7), the American Convention on Human Rights (Art. 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)(Art. 13).

This means, of course, that victims of wrongful acts and/or human rights violations – including the arbitrary loss of residential resources and assets – must have an enforceable right to have the act or violation remedied, repaired and reversed.³⁸

26. The restitution process, thus, effectively provides a formal and legal basis for de-legitimizing the arbitrary acquisition of territory, assets, immovable (and sometimes movable) property and lands, and for putting these goods back into the possession of those holding rights over them at the time of the initial confiscation. Restitution allows losses incurred due to wrongful acts to be reversed, and the situation returned to what it once was and should be in terms of law. The recognition of restitution rights often provides the first official pronouncement that whatever may have taken place in the past which is responsible for people being forced to vacate their homes was wrong and should not be allowed to occur again in the future. It also re-affirms the basic proposition that displaced persons should never be penalized or suffer detriment due solely to the fact that they were forced to flee their homes and lands.³⁹

27. These and other remedial norms, then, have evolved from general legal principles into increasingly specific areas of law and practice, now clearly pointing to the emergence of an explicit right of displaced persons to the restitution of housing, land or property. In other words, restitution itself has been recognized not just as a preferred general legal remedy, but as a distinct right, above and beyond the purely remedial and general international law contexts just noted.⁴⁰ Many newer standards provide an even more direct generic normative link between the displaced and their rights to exercise housing, land and property restitution rights.⁴¹

38 Indicative of the growing seriousness accorded these issues by UNHCR, the agency issued an internal memorandum to all UNHCR offices throughout the world in late 2001 outlining UNHCR policy on the recovery of refugee homes and properties. (UNHCR Inter-Office Memorandum No. 104/2001, 28 November 2001, UNHCR Field Office Memorandum No. 101/2001, 28 November 2001.) The memorandum contains a range of far-reaching provisions which reveal just how extensively housing and property restitution rights have percolated not only into law, but into the largest inter-Governmental agencies: "Recovery of refugees' homes and property in their countries of origin needs to be addressed consistently to ensure that effective solutions to refugee displacement are found. Experience has shown that voluntary repatriation operations are unlikely to be fully successful or sustainable in the longer term if housing and property issues – being an integral part of return in safety and dignity – are left unattended."

39 Such principles have been widely recognized. For instance, Article 4 of the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), 1001 U.N.T.S. 45 (1969), entered into force June 20, 1974, asserts that: "Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations". Only recently, however, has the housing and property element of this duty not to penalize been included in this equation.

40 UN Sub-Commission on Protection and Promotion of Human Rights Resolution 1998/26 'Housing and property restitution in the context of the return of refugees and internally displaced persons' (E/CN.4/Sub.2/Res/1998/26, adopted without a vote on 26 August 1998.

41 Id. In increasingly commonly heard language, this resolution: Reaffirms the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish. The resolution continues: 2. Reaffirms also the universal applicability of the right to adequate housing, the right to freedom of movement, the right to privacy and respect for the home and the particular importance of these rights for returning refugees and internally displaced persons wishing to return to their homes and places of habitual residence; 3. Confirms that the adoption or application of laws by States which are designed to or result in the loss or removal of tenancy, use, ownership or other rights connected with housing or property, the active retraction of the right to reside within a particular place, or laws of abandonment employed against refugees or internally displaced persons pose serious impediments to the return and reintegration of refugees and internally displaced persons and to reconstruction and reconciliation; 4. Urges all States to ensure the free and fair exercise of the right to return to one's home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems.

Image: Displaced persons in Palaw, Tanintharyi
(José Arraiza/NRC)



RESTITUTION AND ITS RELEVANCE TO MYANMAR

28. What, then, does all of this mean specifically for Myanmar? After decades of relative isolation and enduring strong international economic sanctions and international pariah status, the political reform process has facilitated Myanmar's growing engagement with the international community and fundamental changes within the country at almost every level. A core element of this engagement – which remained, of course, in place during the military-led governments in place from 1962-2011 but which was widely ignored – is the relevance of the international legal regime to the State of Myanmar and its people, just as it is to all other member States of the United Nations who are all equally bound by countless provisions of international law. Though international law has not traditionally been treated as a major aspect of the legal regime, Myanmar is far from immune from the rules developed under international law. And, indeed, these standards can be of great assistance in developing a restitution system in Myanmar that complies in full with it.

29. By simple virtue of the fact that the State of Myanmar is a formal member of various inter-governmental organisations, most notably the UN, it has committed to complying with international legal norms developed under the auspices of these organisations. As such, basic international law standards such as the *UN Charter*, the *UN Convention on the Law of Treaties*, the *Articles on State Responsibility*, the *Universal Declaration on Human Rights* and countless others are as relevant to Myanmar as they are to all other sovereign States throughout the international community. Moreover, the State of Myanmar has formally ratified several of the key international human rights treaties (though many more remain to be ratified) signaling their clear intent, in good faith, to comply with the rights and obligations these important standards generate.⁴² Consequently, vital international legal standards cannot be simply dismissed as irrelevant to the country, and in fact, such standards can provide useful guidance to the Government of Myanmar and assist it in grappling with many of the fundamental challenges it faces including the current absence of a national restitution process and remedy for everyone with outstanding restitution claims. Bearing all of this in mind, it is vital to point out that restitution as a legal principle and practice is far more common than is often realized. As we have seen, many international standards address restitution issues, and dozens of peace agreements and voluntary repatriation agreements enshrine restitution rights for returning refugees and internally displaced persons.⁴³ Scores of resolutions adopted by the UN Security Council and UN General Assembly also address restitution concerns, as do numerous texts approved by various UN human rights bodies. All of these are pertinent to Myanmar to one degree or another. Regionally speaking, Myanmar is a signatory to the 2012 ASEAN Human Rights Declaration, which recognizes relevant principles such as the right to property and the the right to an effective remedy.⁴⁴

⁴² 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).

⁴³ Scott Leckie (2007) *Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials* (editor), Cambridge University Press.

⁴⁴ ASEAN Human Rights Declaration and Phnom Penh Statement on its Adoption, available at: http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf

30. Should Myanmar decide to undertake additional restitution measures to resolve the many outstanding HLP restitution claims in the country notwithstanding the nature of the land confiscation or displacement that occurred, important guidance can also be found in the experiences of other countries which have undertaken similar restitution programmes. The list of such countries is far more diverse than often assumed, and includes Afghanistan, Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Colombia, Estonia, Georgia, Germany, Iraq, Kosovo, Romania, Rwanda, South Africa⁴⁵, South Sudan, Tajikistan and elsewhere. Political reform and peace processes in a range of countries led to the establishment of dedicated commissions and other bodies (including adjudicative bodies entrusted with making binding determinations) designed to facilitate the rights of returnees to return to, reclaim and re-possess their original homes. And there is nothing inherently unique about Myanmar that would preclude this as an option in the country as well.

31. While restitution can take place in a spontaneous manner due to changing circumstances, 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. Mass claims mechanisms, in particular, offer important advantages for the resolution of large groups of claims. These bodies define types of claims, according to the needs of a particular situation involving large scale dispossession and thus involving the systematic disrespect of basic principles of justice. Mass claims mechanisms assume that such systematic patterns of abuse were the rule rather than the exception and reverses the burden of proof.⁴⁶ Hence, defining the scope of the claim allows their grouping and a speedy decision making process on claims that present similar merits. Moreover, the processing of claims, including the provision of information to claimants, is computerized, increasing effectiveness and accessibility. Claimants often benefit from a free of charge process in which the investigation is carried out by the administrative body. The claimant does not need to hire a private lawyer for his or her claim. Moreover, the establishment of offices and mobile units allows the mechanism to reach displaced persons.⁴⁷ Specialized bodies created to achieve these objectives have been

⁴⁵ In South Africa, a Land Claims Court was entrusted with resolving restitution claims. Pursuant to Article 22 of the Land Restitution Act, the Land Claims Court has exclusive jurisdiction to: (a) determine a right to restitution of any right in land in accordance with this Act; and (b) to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act. The Act reads further: Restitution of Land Rights Act 22 of 1994 (South Africa): "Whereas the Constitution of the Republic of South Africa, 1996 (Act. No. 108 of 1996) provides for restitution of property or equitable redress to a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory law or practices; 1. In this Act, unless the context indicate otherwise - 'Restitution of a right in land' means: (a) the restoration of a right in land; or (b) equitable redress. 'Restoration of a right in land' means the return of a right in land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices; 'Right in land' means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question." Determining how to deal with cases involving successive acts of dispossession, the Court decides what is 'just and equitable' (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 any beneficial capital improvements are all taken into account in this respect. See: Geoff Budlender (1999) "Restitution for Housing and Property Rights - Some Lessons From the South African Experience" in *Refugee Survey Quarterly*, vol. 19, no. 3, pp. 224-231.

⁴⁶ R. Williams, 'The Contemporary Right to Property Restitution in the Context of International Justice' (2007), International Center for Transitional Justice Occasional Paper Series, 51.

⁴⁷ Arraiza, Jose-Maria and Moratti, Massimo, 'Getting the Property Questions Right: Legal Policy Dilemmas in Property Restitution in Kosovo (1999-2009)', 21 (3) *International Journal on Refugee Law*, 421-452, 429.

created in Bosnia and Herzegovina (Commission on Real Property Claims)⁴⁸, 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),⁴⁹ 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.⁵⁰

32. We could mention many other such institutions, human rights standards and pronouncements supporting housing, land and property restitution⁵¹, but suffice it to say that in 2017 there is nothing exceptional, rare or revolutionary, either in Myanmar or globally, about the recognition of restitution rights in law, policy and practice. A situation has arisen, thus, where specific norms, bodies and procedures have been created, while simultaneously large numbers of people have returned to and reclaimed their former places of residence or received just and satisfactory compensation in countries ranging from Bosnia and Herzegovina to Tajikistan and from South Africa to Kosovo. Under the restitution processes in Germany (concerning former East Germany) claims were made for 2.7 million pieces of property. In the Czech Republic, property collectively valued at US\$ 10.7 billion has been successfully restored to its former owners. In Estonia more than 200,000 applications for the restitution of 160,000 properties were received by the bodies responsible for managing the nationwide restitution program.⁵² In Colombia, up to 360,000 households or 1.5m people may be eligible for restitution under the restitution programme there. Norms and facts, thus, have increasingly intersected, and lofty sounding laws on restitution have actually been taken seriously and enforced. The point here, therefore, is that during the last three decades an historic shift took place where – at least as far as restitution is concerned – some of the world’s politically least organized and economically weakest groups, were enabled to assert claims and recover HLP rights that in earlier eras would have been virtually impossible to even contemplate. From the age-old tendency of ‘once displaced, always displaced’, we have been transported to a period more aptly captured by ‘once displaced, *increasingly* entitled to return home’.

48 Article XI of the Mandate outlines the key function of the CRPC: “The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.” The CRPC developed a sophisticated series of criteria and eligibility procedures enabling it to make binding legal decisions on the rights of individual refugees to return to their homes of origin within six weeks after taking the claims. For an overview of the work of the CRPC, see: Madeline Garlick (2000) ‘Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina’, *Refugee Survey Quarterly*, volume 19, number 3, pp. 64-85. The housing and property claims were computerized 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 were final and binding on all local authorities and as such, any title, deed, mortgage, or other legal instrument created or awarded by them had to be recognized as lawful throughout the country. The CRPC claims system allows anyone who believed their homes, lands and properties to have been either confiscated or occupied illegally by others to put their case before this independent body. (See: CRPC (2000) *Promoting a Unified Real Property Market in Bosnia and Herzegovina*).

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

50 For a compilation of laws, peace agreements and other texts that established these and other bodies, see: Scott Leckie (2007) *Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials* (editor), Cambridge University Press.

51 *Id.*

52 See, for instance: Blacksell, Born and Bohlander (1996), *Settlement of Property Claims in Former East Germany*, in *Geographical Review*, vol. 86(2), pp. 198-215.

And yet it would be wrong to pretend that the restitution process has always gone smoothly, been entirely equitable or universally enjoyed by all of those with rights to return to their original homes. Indeed, we cannot overstate this point enough; the struggle for restitution remains. Nevertheless, this should not detract from the significance of the new embrace of restitution as a right for ever-increasing proportions of the displaced. This physical reversal of former acts of injustice – in this case the arbitrary theft, occupation or expropriation of one's home and lands, without justification or compensation – represents nothing less than a human rights milestone in terms of actually undoing infringements of human rights law.⁵³

33. Broadly stated, thus, the process of restitution as a remedy for repairing wrongful acts has expanded and continues to grow. To cite one of the most contemporary restitution processes, that of Colombia – a country with many parallels to Myanmar in terms of restitution challenges – a recent judicial decision reveals that: “The right to the restitution of the property which the people have been plundered, is also a fundamental right...Article 17 of the Protocol Additional to the Geneva Conventions, the UN Guiding Principles on Internal Displacement (21, 28 and 29), and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons [Pinheiro Principles], constitute part of the constitutional framework, as they represent developments adopted by the international doctrine on the fundamental right to integral reparation for harm caused.”⁵⁴ This judicial statement provides a useful model for the future jurisprudence of Myanmar.

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

35. One obvious key aim of any restitution process anywhere, including Myanmar, is to create both the legal and social realities in the country to ensure the *non-repetition* of the actions that generated the forced displacement in the first place. In other words, a restitution process serves not only the purpose of securing a sense of justice (sometimes called ‘residential justice’) for those with successful restitution claims, but strengthens the prospects of peace and reconciliation, as well as the rule of law by creating conditions that prevent or at least strongly discourage similar forms of forced displacement in the future. Successful restitution ensures HLP rights and security of tenure for everyone, the formal resolution of all outstanding restitution cases, and a permanent end to all the types of acts that generated restitution claims in the first place whereby land acquisition is only ever carried out as a last resort.

53 For a thorough study of the progress on human rights remedies, see: Dinah Shelton (2000) *Remedies in International Human Rights Law*, Oxford University Press, Oxford.

54 MP Catalina Botero Decision T-821 of 2007 (Constitutional Court of Colombia) 43.

*Image: Housing for
displaced persons
(NRC)*



36. Past decades have been witness to a growing number of efforts grappling with the complexities of housing, land and property restitution built on ever-expanding and refined international legal norms and standards. Bearing all of this in mind, we can distill ten key points that should form the basis for a comprehensive approach to restitution in Myanmar, for the journey may have begun but it is far from complete:

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. The growing awareness that the resolution of housing, land and property restitution claims and disputes can be a vital contributor to economic and social stability, as well as broader reconciliation efforts within post-conflict peace building efforts. Myanmar will be a better country if restitution demands are met in the near term.

37. Myanmar's restitution journey has commenced; new perspectives and procedures are in place, the beginnings of a legal and policy framework supporting the restitution idea are visible, a considerable amount of land has been returned to its rightful owners, and the voices of those demanding a comprehensive restitution process ensuring that everyone with a restitution claims can have it heard, are growing. But how far has the country actually come, and how much further does it have to go to secure restitution rights for all, both in law and practice? It is to these issues we will now turn.

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.

Relevant laws, rules and procedures shall be amended, repealed and newly enacted, if necessary to conform to the objectives, basic principles, practices and instructions in this policy.⁵⁵

– **National Land Use Policy (2016)** (paras 38 and 39)

II. OFF TO A POSITIVE START: SOME OF THE BUILDING BLOCKS OF RESTITUTION ARE IN PLACE

38. Although there are no comprehensive restitution laws yet in place in the country addressing the restitution claims of all potential claimants, nor remedial bodies 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.⁵⁶ 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. In this section we will examine the extent to which restitution concerns have thus far been addressed in law, policy and in terms of the procedural mechanisms that are in place to address restitution issues. This will be followed in Section III with a discussion of gaps within the restitution system, and in Section IV with a series of specific recommendations designed to create a comprehensive restitution programme in Myanmar.

⁵⁵ National Land Use Policy, Republic of the Union of Myanmar (January 2016).

⁵⁶ For instance, in one case of land confiscation in Arakan State, one official noted publicly that “If they confiscated land for personal benefit, we will take action against them according to the existing laws. If the land was grabbed in the public interest we will address the farmers’ losses in line with current laws.” (Source: Moe Myint, ‘Confronting Land Confiscation Allegations, Arakan State Chief Minister Orders Halt to Renewed Construction in Industrial Ward’, in *The Irrawaddy*, 15 August 2016).



Image: Daily workers, Yangon Region (José Arraiza/NRC)

39. Although the 2008 Myanmar *Constitution* does not explicitly single out recognition of restitution rights or contain a comprehensive right to adequate housing or concomitant rights to security of tenure or protection against forced eviction or displacement, as such, it does recognize a series of central HLP rights themes, and may, therefore, be useful as a foundational basis in pursuing an improved restitution environment in the country. Of central importance, 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.*” (emphasis added). While much can be said about Article 37, suffice it to say that the State has extensive powers over land in the country, and it will rest on the same State to ensure that these powers are exercised in a manner fully consistent with all of the rights relevant to those with restitution claims.

40. Chapter VIII of the *Constitution* outlines fundamental rights and duties of citizens, and contains the following provisions which are relevant to the framework of housing, land and property rights and to eventual restitution guarantees:

Article	
347.	The Union shall guarantee any person to enjoy <i>equal rights</i> before the law and shall equally <i>provide legal protection</i> .
348.	The Union <i>shall not discriminate</i> any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, <i>status, culture, sex and wealth...</i>
353.	Nothing shall, except in accord with existing laws, be <i>detrimental to the life</i> and personal freedom of any person....
355.	Every citizen shall have the <i>right to settle and reside in any place</i> within the Republic of the Union of Myanmar according to law.
356.	The Union <i>shall protect according to law movable and immovable properties of every citizen</i> that are lawfully acquired.
357.	The Union shall <i>protect the privacy and security of home, property, correspondence and other communications</i> of citizens under the law subject to the provisions of this Constitution....
372.	<i>The Union guarantees the right to ownership, the use of property and the right to private invention and patent in the conducting of business if it is not contrary to the provisions of this Constitution and the existing laws.</i>

41. Thus, understanding these constitutional norms in terms of how they address vital aspects of what the terms ‘restitution’ and ‘HLP rights’ mean in both law and practice, we can see that citizens of Myanmar have rights to equal protection of law, without discrimination, to settle and reside where they wish, to have their immovable properties, privacy, security of the home protected, and the right of ownership and use of property. These are all central HLP themes and both relevant and supportive to implementing restitution rights, even while they fall short of ensuring a comprehensive right to restitution, nor the full spectrum of HLP rights presumed with recognition of restitution rights.

42. 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 Act* and the 2012 *Vacant, Fallow and Virgin Land Act*.⁵⁷ 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.⁵⁸ It is important to point out that all three of these laws are currently under review and are expected to be amended in coming months, though little is known to date about the precise shape such amendments may eventually take. 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.⁵⁹ A new comprehensive restitution law could change all this for the better.

⁵⁷ For an overview of some of the structural flaws in both of the 2012 land laws, see: Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar, Food Security Working Group's Land Core Group, Yangon, November 2012, 13-14.

⁵⁸ 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.

⁵⁹ 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.

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

44. Similar sentiments are also found in the 2015 Election Manifesto of the now governing National League for Democracy which states, inter alia, that: “We will strive, in accordance with the law, to ensure the return to farmers of illegally-lost land, and payment of compensation and restitution. We will defend against illegal land confiscation practices. We will amend the existing land laws that are not appropriate



Image: IDPs in Rakhine (Japeen/NRC)

for the present era.”⁶⁰ This, again, demonstrates the clear intention of the present government to address both the restitution demands of the people, as well as committing to preventing illegal land confiscation in the future.

45. At least one of the ethnic actors with whom the government is currently engaged in peace talks has also addressed restitution in detail, with others expected to do the same. The December 2015 *Land Policy of the Karen National Union* (KNU) notes that “internally displaced persons have the right to reoccupy their land, which they owned previously, and to receive compensation” (1.1.7); “1.2.5 – To recognize, prioritize and promote the rights of restitution of refugees and displaced persons who have been forced from their lands, livelihoods and homes”; and “1.2.9 – To establish an appropriate, accessible and effective system for addressing and remedying tenure-related grievances and disputes”. Article 4.2 of the KNU Policy specifically mentions their intent to comply with the *Pinheiro Principles* and to work closely with government bodies including the Central Land Committee to address restitution demands.⁶¹

46. We have, thus the beginnings of an important convergence between international standards and best practice on restitution, some aspects of national law, national land policy, the governing party’s

60 The Platform also addresses the following relevant themes: (ii) Agriculture workers - 1. Farmers’ rights and economic well-being must be secure. We will encourage the emergence of independent farmers’ organisations. Farmers will have the right to freely plant, produce, store, mill and sell their crops. Farmers will have the right to own and to transfer land in accordance with the law. 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....(g) We will identify fallow, vacant and virgin lands that are suitable for agriculture, and distribute these lands to landless people, providing them with legal ownership rights. (h) We will systematically establish an accurate land registry system, and work to ensure easy access to land records....(xii) Urban - 4. We will establish, as quickly as possible, a programme for the rehousing of homeless migrants, who have moved to the cities as a result of natural disasters, economic opportunities and land confiscation.... Section 4: The freedom and security to prosper - (i) Economy....5. We will work towards the development of a modern farming sector, the fair resolution of farmland disputes, the establishment of land tenure security, and transparency in line with laws and regulations regarding the protection and transfer of farmland. We will work to ensure sufficient access to necessary inputs and finances for the development of the farming sector and rural areas. We will enable access to livelihood programmes for the landless and itinerant workers. Through the development of the agricultural sector, we will also see the bolstering of the industrial and service sectors and increased exports. 6. Where there is natural resource extraction and usage, we will lay down appropriate methods so as to avoid environmental and ecological damage. We will work to ensure that extractive projects are planned transparently and that the public is informed. We will establish a dedicated fund to ensure that the profits of such projects are used for the long-term development of the country.

61 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.

election platform and the policies of ethnic groups such as the KNU. Before turning to suggestions as to how to merge these various approaches into an ever closer unified and all-inclusive approach to the question of restitution, which we will address in sections III and IV below, we need to first examine the important and unprecedented procedural steps that have been taken since the instigation of the political reform process in 2011 to address the questions of land dispossession that have led to ever-growing calls for restitution in the country.

PROCEDURAL MECHANISMS

47. 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.⁶² 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.

48. 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, as of early 2016, 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. What is clear is that many thousands of cases remain either not reviewed or without any form of adequate redress. The success of these bodies in restituting land to claimants remains an open question, with wildly divergent views on the scale to which actual restitution and/or compensation has occurred under these various measures.⁶³

⁶² In July 2012, a short-lived Cabinet-Level Land Allotment and Utilization Scrutiny Committee was also established to examine national land-use policy, land-use planning and the allocation of land for investment.

⁶³ 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."

49. Indicative of the seriousness of these restitution processes, the General Administration Department (GAD) of the Ministry of Home Affairs has developed a set of procedures for redistributing confiscated land that the current occupants/rights-holders wished to relinquish and return to their original owners,⁶⁴ and which also specifically note that any compensation or restitution for annual or perennial crops would be subject to the rules outlined in the 1894 Land Acquisition Act and the 2012 Farmland Act.⁶⁵

50. The body currently responsible for examining land confiscation and potential restitution cases is the *Reinspection Committee of Farm Land and Other Land Acquisition*, which was formed by the Office of the Union President in May 2016.⁶⁶ The *Reinspection Committee* is entrusted with resolving 'conflicts from farmland and other land acquisition', as well as to 'supervise solution procedures of the relevant Ministries, the Nay Pyi Taw Council or Division and State Governments in Connection with

64 The General Administration Department (GAD) of the Ministry of Home Affairs, Procedures on Redistribution for Confiscated Land, September 2013. Sec 3. The following are methods to be used in giving up the confiscated lands. (a) The procedures to be abided by the people concerned in giving up farm lands; (b) The procedures to be used in giving up vacant, fallow and virgin lands; and (c) The procedures to be used in giving up other lands. (p. 2). Further norms include: Compensation and Restitution for Annual and Perennial Crops - 7. For land acquisition, compensation and restitution for annual and perennial crops, the following laws and rules must be abided by those who concerned. (a) The 1894 Land Acquisition Act; and (b) The 2012 Farmland Act. 8. When the compensation of land acquisition is given according to the 1894 Land Acquisition Act 23(1) the value of confiscated land must be decided based on market value of the day of notice by Land Acquisition Law 4(1). The annulled law, the 1953 Land Nationalization Law is not legal. According to that law, the compensation of land confiscated by the state must be equal to 11 times of the land revenue. 9. According to the 2012 Farm Land Act-67, Compensation for land and restitution for crop and building are adopted as follow: (a) Restitution for Crops and Building - (1) For currently planted crops, market value must be calculated at the rate of the yield per acre. Actual value must be three times based on the market value of the present region. (2) For perennial crops, the compensation must be three times of the market value based on the value of trees. (3) For buildings, infrastructure of development, decoration and other services, compensation must be two times of the market value in the region; (b) Compensation for Land - (1) For farm land confiscated by the government in order to use long-term national interest and national security and land acquisition relating to the lands producing non-profit for construction work, such type of land needs calculating at the rate of existing market value in the region. (Not to use the 1953 Farm Land Nationalization Law 42(1) and by this law, the compensation must be 11 times of revenue tax. Moreover, this law has been annulled.) (2) For profitable farm land confiscated/seized by the government in order to use long-term national interest, the Central Farm Land Management Task Force must make a reasonable decision not to suffer any advantages for land owner and the compensation must be calculated at the rate of market value in the region and based on the type of business operation. The compensation given must not be below the market value. 10. In connection with compensation and restitution given to the land owner whose land was confiscated by the 2012 Farm Land Acquisition Law - 68, there are other proper ways to use for not suffering the owners. (a) In case of complaint, the Nay Pyi Taw Council or Relevant Division or State Farm Land Administration Task Force must make a final decision according to the law prescribed. (b) According to the article (a) of the 2012 Farm Land Acquisition Law, the Central Farm Land Management Task Force must carry out the requirements with close operation of relevant agencies.

65 It notes that: "[w]hen the compensation of land acquisition is given according to the 1894 Land Acquisition Act 23(1) the value of confiscated land must be decided based on market value of the day of notice by Land Acquisition Law 4(1)", a perspective which is the likely source of extensive dissatisfaction concerning previous compensation payments. The rules for land confiscated under the 2012 Farmland Act appear to be more reasonable providing, for instance, that "[f]or profitable farm land confiscated/seized by the government in order to use long-term national interest, the Central Farm Land Management Task Force must make a reasonable decision not to suffer any advantages for land owner and the compensation must be calculated at the rate of market value in the region and based on the type of business operation. The compensation given must not be below the market value."

66 Republic of the Union of Myanmar, The Union President Office, Notification 14/2006, 13 Waning of Tagu Fullmoon, 1378 ME (5 May, 2016), Formation of the Reinspection Committee of Farm Land and Other Land Acquisition. See also: Tin Htet Paing, Parliament Receives Thousands of New Complaints of Confiscated Farmland, The Irrawaddy, 6 July 2016: "The central committee is even considering returning lands that were confiscated before 1988, but no decision has been made," he added. In late April, Ba Myo Thein talked to The Irrawaddy about the same land confiscation cases and said that according to the letters of complaint, the land was allegedly seized for the development of infrastructure and industrial zones, with most of the reported incidents occurring in Mandalay Division and Karen State. Lawmaker Sein Win, chair of the Lower House's farmers and laborers committee told The Irrawaddy that his committee had also received nearly 1,500 complaints before Parliament took a recess in early June. Most of the complaints came from Mandalay and Irrawaddy Divisions, he added. In addition to the complaints received by the two committees that handle land disputes, the citizens' fundamental rights, democracy and human rights committee of the Upper House also received some 75 letters complaining about land seizures, committee chair Htay Kywe told The Irrawaddy. The committee even found some confiscations that happened during the socialist era, he said, referring to the years from 1962 until 1988. According to a report by the state-owned Global New Light of Myanmar in April, the Upper House's farmers affairs committee revealed that some 200,000 acres of farmland had been confiscated nationwide during past decades, but Ba Myo Thein was unable to confirm the figure for The Irrawaddy."

land acquisition expressed in the report of the Enquiry Commission submitted to the Union Parliament about farm land and other land acquisition', and to 'give back systematically the former affected persons the farmlands forsaken by the relevant ministries, companies and private enterprises'.⁶⁷ The *Reinspection Committee* has also adopted a policy that dispossessed farmers should be compensated for their losses when the return of land is not possible. The *Reinspection 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 order relating to its authoritative rights, tenures and duties with approval of the government'.⁶⁸ The *Reinspection Committee* indicated its intent to settle all land disputes within the first six months of the new government, although this will clearly not be the case.⁶⁹ The body is

67 Based on the 1 August 2016 Order from the Central Committee, the following is the composition of the concerned committees:

Central Committee – 10 Members: Chair-Vice-President (2), Vice Chair-Union Minister for Home Affairs, Vice Chair-Union Minister for Agriculture, Livestock and Irrigation, Member-Union Minister for Defense-Union Minister for Natural Resources and Environmental Conservation, Union Minister for Industry, Union Minister for Construction, Chairman of Nay Pyi Taw Council, Minister for Home Affairs, and the Deputy Minister for Home Affairs; A Regional Committee – 12 Members: Chair-Chief Minister, MOALI-Minister of Agriculture, Chair-Hluttaw Committee on Agriculture & Livestock Affairs, MOHA-DG General Administration Department, MONREC- Director Forestry Department, MOALI- Agriculture Department, Military Intelligence-Divisional Staff Officer, Farmers Affairs & Social Organization (Farmers Union)-Secretary, Farmers Affairs & Social Organization (Farmers Union)-Representative, Farmers Affairs & Social Organization (Farmers Union)- Representative, Community Representative and the Regional Director-Farmland Mgt & Statistics Depart (DALMS); A District Committee – 12 Members: Chair-MOHA GAD District Administration Official, District Regional Hluttaw Representative, MOALI District Manager Agriculture Department, MONREC District Manager Forestry Department, MOALI DALMS District Staff Officer, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Township Committee – 13 Members: Chair-MOHA GAD District Administration Official, Chair of Development and Support Committee, MOHA GAD Deputy Township Officer, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Township Development Committee Chair, MOALI DALMS Staff Officer, MPF Planning Department Staff Officer, MONREC Forestry Dept Staff Officer, MOALI Livestock, Breeding and Veterinary Department Staff Officer, MOALI Agriculture Department Staff Officer and the Regional Hluttaw Representative; Village Tract / Ward Committee – 9 Members: Chair-Local GAD Staff, Village Cooperative Association Member, MONREC Forestry Department appointee (gov't or non-gov't), MOALI Land Surveyor, Town Elder, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative, Farmers Affairs & Social Organization (Farmers Union) Representative.

68 The full text of the order reads as follows: Republic of the Union of Myanmar, The Union President Office, Notification 14/2006, 13 Waning of Tagu Fullmoon, 1378 ME (5 May, 2016), Formation of the Reinspection Committee of Farm Land and Other Land Acquisition - 1. To give quick solution to the conflicts of Farm Land and Other Land Acquisition in the Republic of the Union of Myanmar and not to suffer people's grievances due to them, the Central Reinspection Committee of Farm Land and Other Land Acquisition has been formed for reviewing the problems with the following persons: (a) Vice-President (2) Chairman; (b) Union Minister for Home Affairs - Vice-Chairman; (c) Union Minister for Agriculture, Livestock and Irrigation - Vice-Chairman; (d) Union Minister for Defense - Member; (e) Union Minister for Natural Resources and Environmental Conservation - Member; (f) Union Minister for Industry - Member; (g) Union Minister for Construction - Member; (h) Chairman of Nay Pyi Taw Council - Member; (i) Prime Minister for Home Affairs - Member; (j) Deputy Minister for Home Affairs - Secretary; 2. The duties of the Central Reinspection Committee of Farm Land and Other Land Acquisition are as follow: (a) Formation of the Consecutive levels of Reinspection Committees for Farm Land and Other Land Acquisition in Nay Pyi Taw/ Division State / District/ Township/ Quarter / Village tract and with reference to advice and suggestion expressed in the report, action taken for farm land and other land acquisition by successive levels of the Scrutiny Committees Organized by the relevant ministries, Nay Pyi Taw/ State/ Division/ District / Township/ Quarter/ Village tract, giving solution to the problems according to law and procedures. (b) To supervise solution procedures of the relevant Ministries, the Nay Pyi Taw Council or Division and State Governments in Connection with land acquisition expressed in the report of the Enquiry Commission submitted to the Union Parliament about farm land and other land acquisition, (c) To give back systematically the former affected persons the farmlands forsaken by the relevant ministries, companies and private enterprises, (d) To be made careful scrutiny by the Successive levels of Reinspection Committee whether the solution and procedures performed by the relevant ministries, Nay Pyi Taw, Yangon and Mandalay Municipal Committees are in agreement of the existing laws or not, referring to in carrying out land conflicts relating to farm lands and other land acquisition taken over by Nay Pyi Taw/ Division/ State District/ Township/ Quarter/ Village tract; 3. The Reinspection Committee of Farm Land and Other Land Acquisition can issue notice and order relating to its authoritative rights, tenures and duties with approval of the government; 4. The present government has been giving top priority to solve farmland conflicts. The present government has been making earnest efforts as top priority task to solve farmland conflicts so that the affairs of land acquisition must be stopped until previous farm land acquisition has been cleared by law. --Sd/ Htin Kyaw, President.

69 <http://www.irrawaddy.com/news/burma/govt-committee-to-settle-all-land-grab-cases-in-six-months.html>

chaired by Vice President (2) Henry Van Thio and is distinct from other parliamentary committees working on land issues. Relevant claims can be submitted directly to the Union Assembly Legal Affairs Advisory Committee, which has authority to call Chief Ministers, Ministers and others to address these cases as part of the work of the *Reinspection Committee*. Ordinary cases go from the village tract to the township to the district levels (and may resolved at the district level), and then to the regional level (and may be resolved there), and finally to Union level (for ultimate resolution, where the Union Assembly Legal Affairs Advisory Committee may send an observer).

51. The *Reinspection Committee* has developed rather detailed policies and procedures outlining its tasks and those of other government bodies to 'urgently address the land-grabbing issues'.⁷⁰ Specifically, they have developed a five-point policy to be followed by the Union ministries and various level committees on Confiscation of Farmlands and Other Lands, a three-point policy for the lands confiscated as military-owned lands and an eight-point work procedure for immediate return of released lands into the hands of the original owners.⁷¹ In implementing this regulation, government bodies at the national, region and state levels are, in cases involving confiscated lands, instructed to scrutinize, *inter alia*, 'whether the projects being implemented on the confiscated land benefit the region or not; whether the confiscated land is actually in use or not; whether the task being implemented on the confiscated land creates jobs for the local people or not; whether the project being implemented on the confiscated land is of the type originally planned for or not; whether those who claim the confiscated land have complete and correct ownership documents or not; and to check the remaining period if the confiscated land is being leased to a certain organization'. In situations involving 'confiscated land that are not to be

⁷⁰ See: Letter to Union Ministers Dated June 10th 2016 by the Central Reinvestigations Committee for Confiscated Farmlands and Other Lands (Reference: (1) The President's Office notification No. 14/2016 dated 5-5-2016; (2) Letter No. 39/1- Committee/Land (Central) 2016 dated 9-6-2016 of this office; and (3) Minutes of Meeting 1/2016 of the Central Reinvestigation Committee for the Confiscated Farmlands and Other Lands held on 27-5-2016.

⁷¹ (a) The policies concerning confiscated lands are - (1) To check whether the confiscated lands are in use for agriculture, industry, services industries or not as well as the condition of buildings built by relevant ministry as necessary, how they are benefiting the public and the condition of basic infrastructure. (2) To scrutinize whether the confiscated lands are used in the way that bring economic growth to the region and create jobs for the locals or not. (3) To scrutinize whether many acres of confiscated lands are in use or not. (4) The lands that were taken lawfully and pragmatically being utilized for the interest of the state and the people are not necessary to be released by those ministries but to keep working on the land. (5) If a certain relevant department or organization is going to release the confiscated land that are not being used for the state and the people, they need to return the lands to the Union Government and the Central Reinvestigation Committee for Confiscated Farmlands and Other Lands within 2 months and to hand them back to the original owners in line with the Land Law, rules and regulations, systematically. (B) 3 policies adopted for lands confiscated as the military-owned lands - (1) Not to lease civilians to cultivate nor work on joint-venture basis at all on the land confiscated as military-owned land with the purpose of building military infrastructures on it. (2) As for security purpose and to be used as the training ground of the battalions or military commands, the least required area must be calculated and confiscated. (3) For the land issues raised and claimed in various ways and means across the country and at the Hluttaws, the military must hold the land area that it actually needs and release the rest of the grabbed lands to their original owners in line with rules and regulations at the soonest. (C) work procedure for soonest returning of released lands into the hands of the original owners. (1) To temporarily transfer and permit to work on the land in soonest time to those who can show the documents and evidences that they had the rights to use the land and to urgently carry out the official procedure in line with existing law, rules and regulations of the departments concerned to get permit with their names. (2) For those who cannot show the evidences or documents for various reasons, but the respected community elders can testify that they had the rights to use the land, it must be transferred temporarily to them urgently, scrutinize whether the ownership is true or not and let them cultivate during a limited time and re-confiscate if the fact is found untrue but if the fact is found true, it must carry out official procedures urgently in line with existing law, rules and regulations of relevant departments for them to get permit with their names. (3) If any dispute occurs between two or more parties or organizations for the ownership of the land to be released, they need to go to the court and seek legal judgment urgently. (4) Relevant ministry or organization must scrutinize and record the compensation which is already paid for the lands that are not released and to draw budget and submit it in line with financial rules during compensation. (5) While compensating, the amount must be as negotiated and designated by relevant region / state government so as to avoid the controversial rate and for the owners not to face losses. (6) The term of temporary working permit for one season must not be longer than one year. (7) The tasks implemented by various levels committees on Confiscated Farmlands and Other Lands must be publicized once in every month transparently. (8) The lands on which permission is given to implement regional development tasks but are not in use shall be reoccupied in line with regulations for the benefit of the country and the people.

released”, the *Reinspection Committee* instructs the various actors involved to: (1) scrutinize whether the lands are grabbed in line with the Land Application Act 1894 and Agricultural Land Nationalization Act 1953; (2) To scrutinize whether the owners are compensated or not; (3) scrutinize whether the budget is claimed for the lands that are not compensated yet or not; (4) scrutinize whether the compensated land is registered by the organization for ownership or not; (5) make a field-trip to investigate whether the project is implemented or not; (6) If there is no project implementation on the confiscated land, it must be scrutinized whether there is an exact schedule for implementation of the project in the future; and (7) inspect whether the owners are informed transparently that the land is not going to be released. And, thirdly, in cases involving confiscated lands that are released (eg. restituted to the original owners), it instructs the relevant committees to: (1) scrutinize whether the area, type of land and location are correct or not; (2) check whether it has verification on releasing and entrusting of the land signed by the Land Record Officer of the township where the land is situated and the Officer-in-charge of the Department/ Enterprise/ Project to which the land will be released and entrusted;

*Image: Rubber plantation in Pa Pyin,
Tanintharyi (José Arraiza/NRC)*





*Image: Shepherd in
Hpa An, Karen State
(José Arraiza/NRC)*

(3) scrutinize whether there are controversial disputes or not before the released land is transferred to the original owner; (4) scrutinize whether matters on the released lands are publicized or not; and (5) inspect whether the Department or Organization that releases the land entrust it to the relevant district administrator within 1 month after releasing the land.⁷²

⁷² In addition, the guidelines instruct the relevant bodies to pay serious attention to the following issues: (A) Effectiveness of weekly and monthly coordination and management of the Review Committees on Confiscation of Farmlands and Other Lands; (B) Ministries and Offices of Reinvestigation Committees for Confiscated Farmlands and Other Lands must work in cooperation by communicating directly and to inform Central Reinvestigation Committee for Confiscated Farmlands and Other Lands; (C) To assign adequate number of staff at the Offices of Reinvestigation Committees for Confiscated Farmlands and Other Lands by systematically setting up and manage to win trust and reliance from the people; (D) The Committees on Confiscated Farmlands and Other Lands must go down to the field township-wise to address the land issues and inform people about the land issue management in line with Land Laws; (E) Land dispute cases must be assigned to resolve systematically to the District/Township Reinvestigation Committees on Confiscated Farmlands and Other Lands; (F) Relevant Committees on Confiscated Farmlands and Other Lands must work for the ministries, relevant organizations, companies and private entrepreneurs to get strong documents completely for the lands that are not released; (G) For the cases of the lands that are not released are not compensated yet, the amount must be decided by the relevant region/state government management committee and budget must be claimed in line with financial rules of relevant ministry/ organization to make compensation; (H) The cost for Reinvestigation Committee members to make field trips, conducting capacity building training courses and holding workshops must be used from the budget of relevant region/state government; (I) To strictly examine the correctness of such subjects as not releasing due to strong reason, not releasing after reaching consensus after negotiation, partially releasing, totally releasing, same complaint letter, to address through legal channel and mistakenly making complaint; (J) For the land dispute cases of concerning ministries, measures must be taken only with approval of the relevant ministry; (K) As for the ministries that are utilizing the lands, careful scrutiny of the type of land, map and soil where the land is located is needed before releasing and entrusting the land; (L) Region, state, township Reinvestigation Committees for Confiscated Farmlands and Other Lands must oversee the procedure to urgently transfer the released lands to the relevant owners; (M) In issuing temporary form and Farmland Grant Form-7 to relevant owners, township various level Reinvestigation Committees for Farmlands and Other Lands must perform the task by going down field trip to the ground; (N) After transferring the released land to the original owner, the remaining land must be listed as the State's Reserve Land and the Region/State Review Committee must send the gazette to the Central Reinvestigation Committee for Confiscated Farmlands and Other Lands by the 10th of every month; (O) To be able to review land disputes concerning with public, special task forces formed with members of review committees at various levels must make field trip investigation and submit report to the region/state Review Committee on Confiscated Farmlands and Other Lands which must proceed the reports with their remarks to the Central Reinvestigation Committee for Confiscated Farmlands and Other Lands.

RESTITUTION IN PRACTICE⁷³

52. And finally, before examining the extent to which current law, policy and practice converge with prevailing international standards and best practice on HLP restitution, it is important to note the scale to which actual *de facto* restitution of land has already been carried out since 2011, for voluntary land returns have occurred during the past five-year period. While much remains to be done, and many restitution claims remain outstanding and unresolved, particularly those linked to conflict, 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. As noted above, according to one recent estimate, more than 400,000 acres of land have been restituted to the original owners.⁷⁴ A variety of actors have voluntarily returned formerly confiscated land, including the military⁷⁵ and local and regional governments.⁷⁶ 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 have yet to be made) have not been considered by judicial bodies, but rather through administrative or political mechanisms that may or may not necessarily be consistent with

⁷³ 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.

⁷⁴ 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.

⁷⁵ For instance, "Over 16,000 acres of seized land was returned by the military across 10 townships in Mon State" (Min Paing, Monnews, 9 April 2016); Government returns land confiscated by the military in the north, Asia News/RFA, 26 May 2016: "Myanmar's new government has decided to return to the peasants of Tant-Se (Northeast of the Sagaing region) much of the land expropriated by the military junta in previous decades. At least 2,500 acres will be back in the hands of its rightful owners, from which they were stolen over 35 years ago." See also: Minister of Defense Speech to the Parliamentary Land Confiscation Inquiry Commission, 16 July 2013: "That means, if the land area exceeds the real area of the military unit, just let the lands of the ministry of forest, the lands of government aside, the private lands will be returned. We will give them up if the land is wide and returnable....After a long time, the market price has changed, if we gave the compensation to those lands with the today market price, there can be limitations to use the National fund....If the lands can be returned, we will give the priority to return the lands that can be allowed and the personal consideration rather than the legal ownership proof as I said in the earlier paragraph. I would like to express respectfully that if we can give the lands back, we will not need any official proof, but only the personal proof. I will continue to present about the returned lands. Out of 14 Regions, we have already checked 10 regions. However, all the analysis has not finished. Some cases have not finished. I have ordered to re-check some cases. Right now, we have already analyzed the 382 cases out of 488 cases. From them, the area of lands military cannot return for good but will let the farmers grow on is 615.73 acres. The area of lands that we can give up for good is 7664.49 acres. The area of the lands which are not included in the complaint letters but we think they should be returned to the rightful owner is 10700 acres. Therefore, to date, the area of lands Tatmadaw (the military) is giving up will be 18364.49 acres....Although we can confiscate lands under the land confiscation law, I would like to mention that we will act fairly to save the peasants who have no lands and to get the life security of peasants....Therefore, the lands that we got with the order of Ministry of Home Affairs (LN/39), we will have to return them to the State. The other types lands to give up, for example, the lands confiscated with the form 105/106 will be returned to the government of the Regions and the States...When we returned the lands, as the investigation commission also recommended, they must be returned to the rightful owners. Therefore, we will return them to the State and with the management of the State, the Ministry of Home Affairs with its administrative forces will return the lands to the rightful owners systematically. As there are battling for the lands, and demanding, before officially returning the lands to the rightful owner under the right procedure, if whoever comes and grows on the lands that are free now, there can be more complications.

⁷⁶ '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.

the rights possessed by those making such restitution claims. Revealing the many challenges facing the existing mechanisms, the *Reinspection Committee* has received 2,056 cases submitted by hluttaws, states and regions, but thus far only 33 cases have been resolved by local committees.⁷⁷ 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.

53. Having said that, however, for restitution to succeed in Myanmar, unilateral determinations on potential restitution claims without independent oversight and review would fall 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.⁷⁸ A restitution process driven by the wishes of civil society and restitution claimants that is put in place by Parliament, 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 a huge benefit to the entire country as it continues in its quest for sustainable peace, reconciliation and development.

⁷⁷ Reinspection Committee Chair, VP Henry Van Thio, public statement made on 2 November 2016, published by the *Myanmar News Agency* on 2 November 2016.

⁷⁸ 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.”

The land issue is one of the biggest challenges in Myanmar. Most of the lands were grabbed illegally and thus there are a lot of problems regarding land ownership. We find it quite difficult to go ahead with our project due to those problems. For instance – our agricultural projects, we have already developed those projects. However the projects are connected with land ownership of the farmers. Until the ownership issues are solved through legal means, we cannot implement our projects. We are trying to solve those issues at soonest, but to be honest, it is very difficult. Those illegal land acquisition and land grabbing have been happening in Myanmar seriously since 20 years ago. There could be a few land cases even before that. The legislative branch of government has been trying to solve all those land issues since 2013. However it is not as successful as expected. We are now trying our best to solve land cases at soonest.

– Aung San Suu Kyi, State Counselor⁷⁹

III. RESTITUTION HURDLES YET TO BE OVERCOME: GAPS BETWEEN DOMESTIC RESTITUTION MEASURES AND INTERNATIONAL STANDARDS AND BEST PRACTICE

54. Without question, particularly when viewed in historical terms, a series of rather remarkable steps have been taken in recent years to address the ongoing challenges of land confiscation and subsequent restitution. These major departures from decades-long approaches by previous governments are momentous and make commendable contributions to building a society grounded in the rule of law, basic principles of democracy and human rights. And yet, very extensive work remains to be done if the quest of restitution for all is to be achieved. The ongoing lack of a permanent peace agreement between the government and the eighteen ethnic armed groups with whom they are negotiating remains a major hurdle for restitution in areas where these groups are still active. Recent displacement, continued instability and active conflict in Rakhine, Kachin, Shan states and elsewhere all augur poorly for the promise of restitution reaching *everyone* to whom it should. That some farmers attempting to return to land they view as theirs have faced lawsuits from powerful interests, and that many refugees and IDPs remain either unwilling or unable to return to

⁷⁹ Speech made by the State Counselor while meeting with Myanmar community in Myanmar Embassy, New York on 17 September 2016. Grabbing and released land cases (Farmland and other types of land). Powerpoint presentation by U Zaw Min (Natmauk), Deputy Director (Retired), SLRD

their places of habitual residence, all contribute to the complexity of making restitution a reality.⁸⁰ In addition, detailed analysis convincingly shows that not only are thousands of claims submitted to the government's various committee still to be considered, but also that a considerable majority of these remain effectively unresolved.⁸¹ In practice thus far, despite important steps forward, only a small portion of those with legitimate restitution claims have actually been able to return to and re-establish control over land from which they were displaced.⁸²

55. In preparing the present report, we have comprehensively examined the current state of restitution in the country and the measures in place to address it. Based on this analysis, we have identified a range of key gaps that remain between the ideal of restitution and the reality in the country today. We have systematically explored the state of restitution rights under international law and best practice, in particular the *Pinheiro Principles*, and have identified a range of important steps that will require the attention of the authorities in Myanmar should they wish to streamline domestic practices with international law and best practices from other countries that have also undertaken their own restitution journeys. Beyond the basic international legal principles in place concerning restitution norms which were outlined in Section I above, because the *Pinheiro Principles* are viewed as the primary international normative framework on the type of restitution challenges facing Myanmar, it may be useful to examine several of the key provisions of the *Pinheiro Principles* that are not yet in place in Myanmar in their entirety, and to identify some of the steps that may be required to streamline domestic law, policy and procedures with the generic norms of the *Pinheiro Principles*, and create a situation whereby everyone in the country with an outstanding restitution claim will have access to an effective remedy to exercise these rights. The full text of *Pinheiro Principles* is contained in the annex at the end of this report.

80 See, for instance: Su Phyi Win, 'Homecoming brings new cast of problems for Tanintharyi IDPs', Myanmar Times, 4 October 2016 - "The villagers are calling for the lawsuits to be withdrawn, and for the authorities to verify how much land the companies have under cultivation, to restore the land to its original owners and to ensure that IDPs who are yet to return do not face the same problem". See also: Associated Press, 'Myanmar's Farmers Face Criminal Charges Over Land Rights' (3 Nov 2016) "Despite the process of democratic transition, farmers in Myanmar's Karen State are being pushed off their land and face arrest and prison for standing up for their rights".

81 See, for instance: Namati, Returns of Grabbed Land in Myanmar: Progress After 2 Years, December 2015. "According to the Secretary General of the Farmland Investigation Commission, as of June 2015, approximately 30,000 cases have been submitted to the Commission, of which about 20,000 have been heard. Of those, a small number of cases (882 or 4%) have been found justified to receive compensation (...) Namati's own experience suggests that the number of cases justified to receive compensation or return of land should be much higher. We further recommend actions the government can take to help streamline the return and compensation of grabbed land and improve the likelihood that outcomes are fair and equitable." (p. 1)

82 See, for instance: Caitlin Pierce, 'Whose Land is it Anyway?', in The Irrawaddy, 7 July 2016. "According to the now defunct Parliamentary Land Investigation Committee, the military, government ministries, and private companies have released or given back over 400,000 acres to the State since 2013. This is only a fraction of the 2 million acres that the Farmers' Affairs Committee in the Upper House of Parliament believes could be considered "confiscated." In reality, this "returned" land often doesn't reach the individuals from whom it was initially taken. Rather than being fully resolved by the formal government mechanisms, historic land disputes between government ministries, the military, or companies and farmers are now transforming into local inter-communal conflicts."

56. Principle 2 of the *Pinheiro Principles* addresses the right to housing and property restitution.⁸³ Though the term ‘restitution’ is increasingly common in Myanmar, there is no distinct ‘right to housing and property restitution’ as yet within Myanmar law. While one could argue that an emergent restitution right may be inferred by a comprehensive reading of the constitution, the NLUP policy and the growing practices of State bodies such as the *Reinspection Committee*, it is clear that no stand-alone restitution right exists, and therefore, it needs to be put in place, possibly in the form of a national Restitution Law. 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.

57. 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 five years 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.

58. Principle 8 of the *Pinheiro Principles* asserts the right to adequate housing.⁸⁴ Despite the widespread recognition of the right to adequate housing throughout numerous international texts and the domestic legal regimes of scores of countries, including widespread constitutional recognition, such a right does not yet exist within Myanmar law. Though important elements of this right do exist within law (eg. the right to settle and reside in any place, protection of immovable properties, privacy and security of the home, the right to ownership, etc), a comprehensive right to adequate housing remains absent.

83 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.

84 It reads as follows: 8.1 Everyone has the right to adequate housing; 8.2 States should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing.

59. 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.⁸⁵ 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. Though the precise form that this will take may differ between countries, such measures will be required for any restitution programme to be carried out in an orderly, legally consistent and comprehensive manner. 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. Indeed, conflict often results in a non-existent, mal-functioning or seriously over-burdened judicial system where fair and impartial procedures for resolving housing, land or property disputes are unavailable. 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.⁸⁶ 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.

85 It reads as follows: 12.1 States should establish and support equitable, timely, independent, transparent and nondiscriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner; 12.2 States should ensure that housing, land and property restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women, as well as the equal rights of boys and girls, and reflect the overarching principle of the “best interests of the child”; 12.3 States should take all appropriate administrative, legislative and judicial measures to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner; 12.4 States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms, including guidelines pertaining to institutional organization, staff training and caseloads, investigation and complaints procedures, verification of property ownership or other rights of possession, as well as decisionmaking, enforcement and appeals mechanisms. States may integrate alternative or informal dispute resolution mechanisms into these processes, insofar as all such mechanisms act in accordance with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination; 12.5 Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies; 12.6 States should include housing, land and property restitution procedures, institutions and mechanisms in peace agreements and voluntary repatriation agreements. Peace agreements should include specific undertakings by the parties to appropriately address any housing, land and property issues that require remedies under international law or threaten to undermine the peace process if left unaddressed, while demonstrably prioritizing the right to restitution as the preferred remedy in this regard.

86 In Iraq, for example, the Commission for the Resolution of Real Property Disputes received more than 130,000 restitution and compensation claims. Leaving the courts to deal with such a caseload would not only result in unacceptable delays for the claimants, but would also risk having a serious impact on the normal work of the court system thus endangering the return to the rule of law. While judicial proceedings are good in dealing with isolated cases of property restitution, they are usually much less well equipped to deal with tens or hundreds of thousands of such cases, which requires a more flexible and pragmatic approach.

60. Bearing these points in mind, how close is Myanmar currently to what is envisaged in Principle 12 in terms of the *Reinspection Committee* and other steps towards restitution? In brief, while the *Reinspection 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 expected under the norms of Principle 12 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;⁸⁷
- 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 (by the end of 2016), which was always a wholly unrealistic time-frame given the nature of the problems at hand, and which, if strictly enforced, will leave large numbers of restitution claims unaddressed;
- 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.

61. 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 which aims to do just that, a point to which we will turn in the following section.

⁸⁷ Indeed, many of the recommendations made by the Committee are never implemented. See, for instance, Caitlin Pierce, 'Whose Land is it Anyway?', in *The Irrawaddy*, 7 July 2016: "In reality, this "returned" land often doesn't reach the individuals from whom it was initially taken. Rather than being fully resolved by the formal government mechanisms, historic land disputes between government ministries, the military, or companies and farmers are now transforming into local inter-communal conflicts. Firstly, a complex history of land-related laws in Burma contributed to the development of an unofficial shadow system of land tenure and possession in the country; and laws and mechanisms for resolving land disputes remain opaque....In many instances, official records do not reflect actual land use, limiting the evidence available for farmers to reclaim their land....Thirdly, farmers reclaiming seized land must present two key pieces of evidence that are difficult for many to obtain. These are: proof in the form of tax receipts or eyewitness testimony that they previously possessed the land; and specific maps and coordinates that demonstrate that the same plot of land has been released".

62. Next, Principle 13 of the *Pinheiro Principles* discusses the need for accessible claims procedures in considerable detail.⁸⁸ This Principle follows on from the norms found in Principle 12 and points 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.

⁸⁸ It reads as follows: 13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination. States should not establish any preconditions for filing a restitution claim; 13.2 States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive. States should adopt positive measures to ensure that women are able to participate on a fully equal basis in this process; 13.3 States should ensure that separated and unaccompanied children are able to participate and are fully represented in the restitution claims process, and that any decision in relation to the restitution claim of separated and unaccompanied children is in compliance with the overarching principle of the “best interests of the child”; 13.4 States should ensure that the restitution claims process is accessible for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum or countries to which they have fled. States should ensure that all affected persons are made aware of the restitution claims process, and that information about this process is made readily available, including in countries of origin, countries of asylum or countries to which they have fled; 13.5 States should seek to establish restitution claims-processing centres and offices throughout affected areas where potential claimants currently reside. In order to facilitate the greatest access to those affected, it should be possible to submit restitution claims by post or by proxy, as well as in person. States should also consider establishing mobile units in order to ensure accessibility to all potential claimants; 13.6 States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims; 13.7 States should develop restitution claims forms that are simple and easy to understand and use and make them available in the main language or languages of the groups affected. Competent assistance should be made available to help persons complete and file any necessary restitution claims forms, and such assistance should be provided in a manner that is age and gender sensitive; 13.8 Where restitution claims forms cannot be sufficiently simplified owing to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner that is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf; 13.9 States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin; 13.10 States should ensure that persons needing special assistance, including illiterate and disabled persons, are provided with such assistance in order to ensure that they are not denied access to the restitution claims process; 13.11 States should ensure that adequate legal aid is provided, if possible free of charge, to those seeking to make a restitution claim. While legal aid may be provided by either governmental or non-governmental sources (whether national or international), such legal aid should meet adequate standards of quality, non-discrimination, fairness and impartiality so as not to prejudice the restitution claims process; 13.12 States should ensure that no one is persecuted or punished for making a restitution claim.

63. 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.⁸⁹ While some successful restitution claims may result in the return of land and the eventual conferral of a Form-7 Land Use Certificate, 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.⁹⁰

64. Principle 20 of the *Pinheiro Principles* covers the enforcement of restitution decisions and judgments.⁹¹ As noted, the best the *Reinspection 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 recent 2016 World Justice Project’s Rule of Law Index

89 It reads as follows: 15.1 States should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution programme, respecting the rights of refugees and displaced persons when doing so; 15.2 States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure. These determinations shall comply with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination; 15.3 States should ensure, where appropriate, that registration systems record and/or recognize the rights of possession of traditional and indigenous communities to collective lands; 15.4 States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection in situ or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognizing the authenticity of said copies; 15.5 States and other responsible authorities or institutions should provide, at the request of a claimant or his or her proxy, copies of any documentary evidence in their possession required to make and/or support a restitution claim. Such documentary evidence should be provided free of charge, or for a minimal fee; 15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee’s or displaced person’s former home, land, property or place of habitual residence. Such information should be sought whenever information is gathered from refugees and displaced persons, including at the time of flight; 15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims; 15.8 States shall not recognize as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried out contrary to international human rights standards.

90 Interestingly, the group Namati which works with communities to assist them in achieving restitution of their land, claims that a full two-thirds of those they work with have documentation to support possession at the time of taking which, of course, increases the prospects of a clear restitution decision-making processes based on evidence supporting the various claims.

91 It reads as follows: 20.1 States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgments; 20.2 States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement and enforce decisions and judgements made by relevant bodies regarding housing, land and property restitution; 20.3 States should adopt specific measures to prevent the public obstruction of enforcement of housing, land and property restitution decisions and judgements. Threats or attacks against officials and agencies carrying out restitution programmes should be fully investigated and prosecuted; 20.4 States should adopt specific measures to prevent the destruction or looting of contested or abandoned housing, land and property. In order to minimize destruction and looting, States should develop procedures to inventory the contents of claimed housing, land and property within the context of housing, land and property restitution programmes; 20.5 States should implement public information campaigns aimed at informing secondary occupants and other relevant parties of their rights and of the legal consequences of noncompliance with housing, land and property restitution decisions and judgements, including failing to vacate occupied housing, land and property voluntarily and damaging and/or looting of occupied housing, land and property.

places Myanmar at 98th of 113, ranking it as Asia's worst, with the exception of Cambodia supports this contention.⁹²

65. Finally, Principle 21 of the *Pinheiro Principles* elaborates the issue of compensation when actual restitution is 'factually impossible'.⁹³ 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 seen as a simple alternative to restitution when States are hesitant to accept the return of refugees and displaced persons.⁹⁴ 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, 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 Articles on State Responsibility, "create a burden out of all proportion to the benefit deriving therefrom".

⁹² <http://worldjusticeproject.org/rule-of-law-index>.

⁹³ It reads as follows: 21.1 All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation; 21.2 States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.

⁹⁴ It should be noted, for example, that although both restitution and compensation rights were enshrined in the peace accords ending the war in Bosnia-Herzegovina, the international community decided to focus only on restitution and return and did not use the mechanism foreseen by the Dayton agreement which envisaged a fund for compensation of destroyed property. The envisaged compensation fund remained empty because of a fear among donors that to compensate the displaced would have served to consolidate ethnic cleansing. On the other hand, the Iraqi Commission for the Resolution of Real Property Disputes which was established to address the large-scale unlawful confiscation and seizure of land, houses and properties under the Ba'athist regime of Saddam Hussein, claimants were given the choice between requesting restitution or compensation. Where victims opted for the latter option, compensation had to be of equal value to the original house, land or property at the time the claim is submitted. The law further identifies the Iraqi State as responsible for paying out this compensation.

66. As is evidenced by the previous overview, *some* of the fundamental ingredients for a successful nationwide restitution process in Myanmar are *already* in place. The government, military, ministries and civil society all deserve praise for bringing the restitution journey as far as it has come to date. The seismic policy shift from rampant land acquisition/grabbing to a prevailing political climate where structural efforts are underway to end these practices, and achieve fair and just restitution remedies for those who suffered HLP losses in the past is highly commendable and deserves the support of all who hope to build a better Myanmar. And yet, much remains to be done if the ultimate aim of creating a Myanmar where everyone with a legitimate restitution claim can submit these claims to an independent body, be provided with legal assistance if needed, receive a fair and unbiased consideration of their claim and, if accepted, ultimately be enabled to return to and reclaim their former homes, lands and properties or be provided by compensation of a sufficient degree that new land and/or housing is made realistically accessible. For despite all of the progress, far too many people in Myanmar do not yet have access to such a reality. What can be done, therefore, to create a system that enables everyone with a legitimate restitution claim to have access to a successful restitution programme in Myanmar?

*Image: Children in Dawei,
Taninthary (José Arraiza/NRC)*



“...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 honorable and courageous people in many countries...”⁹⁵

IV. COMPLETING THE RESTITUTION PUZZLE: RECOMMENDED STEPS TO ENSURE RESTITUTION FOR EVERYONE

67. That Myanmar has evolved significantly in terms of grappling with the question of restitution cannot be denied, and indeed, deserves recognition even if the work is not yet complete. While a small portion of formerly confiscated land has been given back to its rightful occupants, at the moment this is a minute proportion of all potentially restitutable land, and as such, we now face a situation where still a large majority of all possible restitution claims remain unresolved. The various bodies established since 2012 to examine and reinspect land confiscation cases have received some 30,000 complaints and have resolved some of these (though the precise figures in this regard remain difficult to access), which is a remarkable start for any country, particularly one with the sensitivities around land issues that are prevalent in Myanmar.⁹⁶

68. However, many claims have yet to be submitted, many that have previously been submitted remain without actual remedy and as a result, (though no one knows precise figures in this respect), given the scale of land confiscation and displacement during past decades very large numbers of people for whom the government of Myanmar has responsibility today do not have access to a restitution remedy that will provide an enforceable means of reclaiming land that they see as legitimately theirs. Moreover, while it is the clear and laudable intention of the present government to both prevent further unjust land confiscation and to return previously confiscated land to those from whom it was taken in the past, in practice this is proving a difficult proposition.

⁹⁵ Stuart Eizenstat, Former United States Under Secretary for Economic, Business and Agricultural Affairs in the Clinton Administration (1999). For more on some elements of the not altogether equitable US position on restitution during the Clinton Years, see Eizenstat's book *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II*, Public Affairs, New York (2003).

⁹⁶ Namati, *Returns of Grabbed Land in Myanmar: Progress After 2 Years*, December 2015.

69. How then can these hurdles to comprehensive restitution best be overcome? Based on our extensive work in an array of countries designing, constructing and implementing restitution programmes for people demanding to return to and recover their places of habitual residence, as well as many years of experience working on relevant HLP issues in Myanmar, Displacement Solutions and the Norwegian Refugee Council would like to constructively offer the following recommendations which are designed to create a restitution reality in Myanmar where *every* restitution claim can be provided with an equitable remedy as a key aspect of the search for long-term peace, reconciliation and economic prosperity:

RECOMMENDATION 1: THE ESTABLISHMENT OF A MYANMAR RESTITUTION ORGANISATION WILL INCREASE THE LIKELIHOOD OF RESTITUTION FOR EVERYONE

70. Despite important progress in the restitution quest at so many levels, a distinct minority of those with valid HLP restitution claims have received true redress for their various land grievances, and thus much remains to be done to achieve restitution for all, an objective that can only be reached through the establishment of a new nationwide restitution law and programme.

Establishing a comprehensive restitution programme in Myanmar will be a considerable challenge, but by no means an insurmountable one. A growing number of people and organisations in Myanmar are beginning to focus on the need for greater attention to restitution, and the imperative of redressing past land grievances as a fundamental prerequisite of longer-term peace, reconciliation and the entrenchment of the rule of law.⁹⁷

Several organisations are already engaged with communities seeking to restore their rights over land they consider to be theirs, while other groups are directly engaged with government, assisting it in their land reform and other efforts.⁹⁸ As interest and work in support of restitution grows in the country, a shared vision of what restitution means in today's Myanmar needs to emerge, and this can perhaps best be achieved with the establishment of a well-coordinated Myanmar Restitution

⁹⁷ See, for instance, Tin Htet Paing, Civil Society Groups Demand National Land Restitution Policy for Displaced Communities, The Irrawaddy, June 9, 2016, which notes the aim of establishing "a national platform for displaced communities to be able to claim land and property rights, review international standards and increase joint advocacy".

⁹⁸ See, for instance: Land in Our Hands Network, Destroying People's Lives: The Impact of Land Grabbing on Communities in Myanmar, December 2015: "Injustices are left to fester, even as more injustices are committed and get added to the pile. In this way the story of land in Myanmar can be seen as pile that grows ever larger as time wears on, where the injustices continue to accumulate, and nothing is ever done to try to stop the pile from growing, much less reduce its size", 16; "Restitution – Villagers who lost their land and who were relocated unfairly and by force should get back their land to work on it. Confiscated land should be returned to the original occupants. This should be carried out with dignity and in a transparent way in front of the local communities, with strong and proper documents. Land restitution should be done in such a way that it does not cause more conflict; restitution of land to the original farmer-occupants should not proceed directly where that land is now occupied by other farmer-occupants who are working on it. Additional processes will be needed to determine how restitution could be done in such cases, so that the human rights of both the original and other farmer-occupants are respected and protected, and both are able to acquire land that is good quality, near the village where they can live and work peacefully and with dignity; Compensation – Villagers who had their land confiscated a long time ago should be provided with funds to enable them to restart their lives on the land. In this case, the compensation should be calculated since the time the villagers lost their land and were unable to work on it. In cases where the original land cannot be returned back to the original farmer occupants, for example in the case of a dam, then affected farmers should be given land in another place. However, there should be good and clear process to ensure that the restituted land is not already occupied and used by the other farmer occupants, and that it is good quality land near the village where the relocated farmers could rebuild their lives and livelihoods in peace and with dignity, 34.

Organisation, perhaps at least partially modeled on the successful restitution movements formed following World War II.⁹⁹ Once established, a Myanmar Restitution Organisation could act as a national clearinghouse of information, advocacy and advancement of the restitution cause in the country.

Such a platform would enable consistent and consolidated strategies in support of restitution to emerge, and would constitute a key actor entrusted with building a national movement in support of further action on restitution comprised of non-conflict and conflict-based land grievances and restitution claims.

The first public action of the Myanmar Restitution Organisation could be the hosting of a national restitution conference to bring together all relevant actors and to develop a common framework for pushing the restitution boundaries ever further, actions which could also include the development of a public database on resolved and outstanding restitution claims, combined with a national assessment map revealing the precise locations and current uses of land parcels subject to restitution claims.

RECOMMENDATION 2: INCLUDE RESTITUTION PROVISIONS AND MECHANISMS WITHIN THE PEACE PROCESS AND EVENTUAL PEACE AGREEMENTS

71. No conflict, notwithstanding its nature, or how small or short in duration it may be, is without some degree of crisis within the housing, land and property spheres, and Myanmar is no exception.¹⁰⁰ International experience has consistently shown that restitution is a valuable path to

⁹⁹ Indeed, the Jewish restitution experience shows that the growth of movements and institutions seeking restitution for past violations of human rights has clearly had a positive impact on the actual provision of restitution to these victims. Arguably, without these well-organized, well-funded and well-connected groups, Jewish restitution efforts would not have been as successful as they have been to date. Despite the (eventual) good faith shown by the many Governments and companies which were responsible for or complicit with human rights violations suffered by Jews during the Second World War in providing restitution, it is highly unlikely that they would have accepted their role and provided restitution, without considerable and sustained outside pressure by the victims and their powerful supporters. This is an important lesson for those still seeking to reclaim their former homes. While the scale of suffering incurred and a largely sympathetic political environment surely had some role to play, the success of Jewish efforts to be afforded restitution rights came about primarily due to the efforts of the exceptionally well-organized restitution movement. In the immediate aftermath of the War, the Council for the Protection of Rights and Interests of Jews from Germany formulated plans involving comprehensive claims for restitution and indemnity for all property no matter how it was lost (including the loss of profits) and demanded that Jewish restitution be given priority. The World Jewish Congress soon adopted these ideas. There was agreement that three types of lost property should be claimed: private property (property belonging to victims or their heirs who survived); heirless private property (property belonging to “absentee” and “missing” owners) and communal properties. Realizing the chances for restitution would grow through a unified and structured approach to solving the problem, the Conference of Jewish Material Claims Against Germany was subsequently formed as an umbrella body to speak for all Jewish Organizations during the negotiations with Germany over restitution and compensation. During the same period, the Jewish Agency, in the immediate post-war period officially presented its demand for eight billion dollars, which was to compensate for everything from real estate to plundered art and lost careers. In addition, the Jewish Restitution Successor Organization (JRSO) petitioned more than a hundred thousand claims, about three-quarters of which were settled within a few years. During the 1990s, a time during which numerous Jewish restitution issues re-emerged in several countries, most notably Switzerland, the World Jewish Restitution Organization (WJRO) was established to research restitution cases, national laws and to organize negotiations on behalf of the Jewish victims and various governments. The WJRO was founded in 1992 as an umbrella organization following an agreement between the state of Israel and various Jewish organizations. In time it signed agreements with the Jewish organizations in the various countries to operate on their behalf in negotiating restitution. See: E. Barkan, *The Guilt of Nations: History and Injustices*, W.W. Norton & Co., New York, 2000, 143.

¹⁰⁰ See, for instance: Scott Leckie and Chris Huggins (ed) *Conflict and Housing, Land and Property Rights – A Handbook on Issues, Frameworks and Solutions*, (Cambridge University Press, 2011) and Scott Leckie (ed) *Housing, Land and Property Rights and UN Peace Operations – A Comparative Survey and Proposals for Reform* (Cambridge University Press, 2008).

pursue to overcome such challenges, and consequently these concerns must find a central place within the ongoing peace process, and within the eventual peace agreement(s).

The October 2015 *Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations* contains some important overtures to various HLP concerns¹⁰¹, but does not address restitution directly, nor develop proposals in this regard, but the central nature of land issues is clearly well-known on all sides. As the peace process continues to evolve, it will be vital to promote a unified approach to restitution by all of the ethnic actors involved in the negotiations. This will ensure the strongest possible recognition of restitution rights within any eventual peace agreements, and will ensure a consolidated approach to restitution that is fully consistent with restitution initiatives in the country outside the context of the peace process.¹⁰² Finding mutually acceptable answers to these and numerous other HLP challenges - that are fully in compliance with international law - will be an important aspect of the ongoing peace processes between the Government and ethnic groups.¹⁰³ Failing to address these concerns will leave everyone worse off. All sides to the various conflicts will be best served by a robust, open and clear discussion of HLP restitution issues and the development of proposals and agreements that address these issues in all of their complex manifestations.

RECOMMENDATION 3: DESIGN AND IMPLEMENT A MULTI-STAKEHOLDER 'WIN-WIN-WIN' MYANMAR NATIONAL RESTITUTION PROGRAMME

72. There are strong and very compelling grounds for the drafting of a new national restitution law which builds on the existing legal regime and practices on land (including customary land regulations), but which is simultaneously grounded in international standards of relevance, basic human rights guarantees and the best practices of other countries which have also made the transition to expanded democratic rule. At present, the multi-layered nature of many restitution claims due to the complexities of past land confiscation, the still unclear prevailing legal framework relevant to restitution claims and the lack of clarity surrounding official governmental practices in this regard, means in practice that negotiation and arbitration may often yield better results than legal or administrative channels. There is neither any consolidated land law nor

¹⁰¹ See, for instance: Protection of Civilians - 9. The Tatmadaw and the Ethnic Armed Organizations shall abide by the following provisions regarding the protection of civilians: a. Provide necessary support in coordination with each other to improve livelihoods, health, education, and regional development for the people....c. Avoid forcible displacement or relocation of local populations. d. Avoid forcibly taking money, property, food, labor or services from civilians....f. Avoid forcible confiscation and transfer of land from local populations....g. Avoid the destruction of public property, looting, theft, or the taking of property without permission. Provision of humanitarian assistance - 10. The Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations shall abide by the following provisions regarding the provision of humanitarian assistance: a. Relevant Government ministries, the Ethnic Armed Organizations and local organizations shall coordinate with each other when implementing delivery of humanitarian assistance by the NGOs and INGOs to Internally Displaced Persons (IDPs) and conflict victims with the approval of the Government of the Republic of the Union of Myanmar. b. Ensure the safety and dignity of the IDPs when undertaking a prioritized voluntary return of IDPs to their places of origin or resettlement of IDPs into new villages in suitable areas. c. Collaborate on the resettlement process including verification of IDPs and refugees.

¹⁰² See: International Crisis Group, Myanmar's Peace Process: Getting to a Political Dialogue. Crisis Group Asia Briefing No. 149, Yangon/Brussels, 19 October 2016.

¹⁰³ See, for instance: USAID - Office of Conflict Management and Mitigation (2004). Land and Conflict - A Toolkit for Intervention, Washington DC, USAID. "People have fought over land since the beginning of recorded history. Population growth and environmental stresses have exacerbated the perception of land as a dwindling resource, tightening the connection between land and violent conflict. Land is often a significant factor in widespread violence and is also a critical element in peace-building and economic reconstruction in post-conflict situations", 2.

a restitution law linked to current land laws. Institutional and procedural arrangements to administer and manage land questions and potential restitution are highly scattered with more than ten different ministries maintaining HLP responsibilities¹⁰⁴. In addition, those bodies that do exist do not have sufficient powers to determine HLP restitution claims and enforce them. Customary land laws are also still not adequately recognized¹⁰⁵ within the domestic legislative framework of the country. A restitution law and programme is needed to address these lacunae and facilitate the emergence of a win-win-win approach that benefits (1) all restitution claimants; (2) all government organs; and (3) those entities responsible for previous land confiscation. Ultimately, Myanmar needs a restitution programme that is based on the following 12 attributes of successful restitution programmes: Restitution claims procedures must be free, accessible and enforceable; Claims forms and directives of how to fill in the forms should be available in required languages, claims processing centres located in easily accessible areas or deployment of mobile teams; Restitution mechanisms should be able to assist potential claimants in filling out forms, answer questions and/or provide legal counsel or direct representation; Restitution bodies must have access to all property records and evidence; Restitution remedies must be independent, impartial, diverse, flexible and effective; Institutions should have at their disposal an array of flexible remedies that can be deployed in adjudicating restitution claims, all options should be examined; Restitution decisions must be enforced by an effective enforcement arm within any restitution institution; Restitution bodies should be given powers necessary to enforce their decisions and ensure that Governments and other relevant parties comply; Homelessness should be prevented in the processes leading to the recovery of refugee and IDP housing; De-link the immediate availability of alternative accommodation from the determination of restitution rights; Holders of legitimate rights should not be prevented from re-possessing their homes because of failure of the State concerned to find alternative accommodation to current occupants; and Compensation should be addressed reasonably; not as an alternative to restitution but as a remedy when restitution is not materially possible.

73. How, then, can this list be implemented in today's Myanmar? While much can be proposed in this regard, this process must commence with discussions on what a design for an all-inclusive Myanmar National Restitution Programme (MNRP) would look like in practice. In designing such a MNRP, the ultimate objective of which must be an all-inclusive restitution process in the country, some of the key issues to be examined would include:

- How most effectively to link existing government committees to a larger MNRP?
- What cut-off date to select for a restitution claims procedure?, eg. how far back in time can restitution claims under a MNRP go? Discussions could begin around proposals for a 1988 possible cut-off date.
- Under which time frame the MNRP should ideally operate? Discussions could begin around proposals to have all outstanding restitution claims submitted by the end of 2018, with all relevant decisions issued by the end of 2022.
- How to streamline and strengthen administrative decision-making on restitution claims by maximising collaborative dispute resolution and local-level mediated settlements to any disputed claims.

¹⁰⁴ A variety of bodies are potentially involved resolving land disputes, including village ward administrator, township administrator, Central Land Management Body, Village Land Management Body, SLRD Office, Farmland Investigation Commission and the Township Land Management. A consolidated MNRP would assist in streamlining and simplifying what is in practice an often complicated system for dispute resolution.

¹⁰⁵ Kirsten Ewers Andersen, 'Institutional Models for a Future Recognition and Registration of Customary (Communal) Tenure in Myanmar' (2016).

- What form a possible MNRP Claims Commission might take. Such a body could be entrusted to examine claims that were not resolvable using non-judicial means, and serve to shield courts from an inundation of restitution claims. One model could envisage a five-person Commission comprised of independent restitution experts and entrusted with judicial powers.
- How best to ensure that the end result of each successful restitution claim is either a recognised right in law, recorded in the appropriate land registration system, and accompanied by the fullest possible recognition under prevailing law of security of tenure rights and other necessary protections, and/or a compensation arrangement that is fully compatible with basic international norms of just, satisfactory and mutually acceptable compensation in lieu of *restitutio in integrum*.

RECOMMENDATION 4: PROVIDE TECHNICAL ASSISTANCE TO THE REINSPECTION COMMITTEE AS AN INTERIM MEASURE

74. In the period prior to the eventual expansion of restitution efforts in the country, the *Reinspection Committee* should be assisted. Specifically, this body should be provided with support to augment its capacities through the provision of intensive training on the international legal framework as it relates to restitution, and discussions on how these bodies would best be integrated into a broader Myanmar National Restitution Programme. Three particular areas that could also be explored, include:

- Developing a programme to reward and incentivize land restitution by entities responsible for previous acts of land confiscation;
- How to expand access to legal aid and assistance to potential restitution claimants; and
- How to expand access to financial compensation when material restitution is independently determined to be factually impossible.

RECOMMENDATION 5: STRENGTHEN THE TECHNICAL ASPECTS OF THE LAND LAW AMENDMENT PROCESS

75. Efforts should be made to closely monitor and strengthen technically the land law amendment process currently underway in the country to ensure that these legal reforms are consistent with an eventual national restitution programme. The National Land Use Policy provides important terms for, inter alia, ensuring the land rights of ethnic nationalities, and these too should find appropriate recognition within any new and/or amended land laws.¹⁰⁶

¹⁰⁶ National Land Use Policy (2016) Part (VIII) - Land Use Rights of the Ethnic Nationalities - 63. Customary land use tenure systems shall be recognized in the National Land Law in order to ensure awareness, compliance and application of traditional land use practices of ethnic nationalities, formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms; 64. Duties shall be assigned for the preparation and revision of land use maps and records through public consultation processes by the ward or village tract land use committees under the supervision of the township land use committee, in order to: (a) Have accurate understanding of information related to land possession, land use, land availability and allocation in the area where ethnic nationalities live or traditionally use land resources for their livelihoods; (b) Conduct land use planning that considers social, environmental and economic issues; (c) Make correct decisions in accordance with law related to land use, settlement of disputes and encroachment; 65. When preparing and revising customary land use maps and records of ethnic nationalities, the responsible government departments and organizations shall do the following: (a) Consult with, and allow participation of, representatives and leaders of ethnic groups with knowledge of customary land use practices; (b) Formally recognize and protect the customary land tenure rights and related local customary land management practices of ethnic groups, whether or not existing land use is registered, recorded or mapped; (c) Recognize the rights of stakeholders who are members of ethnic nationality organizations, and recognize in existing laws in order to register their land use. 66. Ethnic leaders, elders and women shall be involved in decision making processes related to land tenure rights of individual stakeholders or groups practicing traditional cultivation methods on customary lands, monitoring, and dispute resolution mechanisms; 67. The customary lands of ethnic groups used traditionally that fall under current forest land or farmland or vacant, fallow and virgin land classifications shall be transparently reviewed, registered, and protected as "customary land", in accordance with the Constitution of the Republic of the Union of Myanmar, and land allocation to any land user, other than for public purposes, shall be temporarily suspended until these lands are reviewed, recognized and registered as customary lands; 68. Provision in the new National Land Law relating to reclassification of customary land and land tenure right of ethnic groups shall be the protection against grants or leasing of land at the disposal of government allowed under any existing law; 69. Reclassification, formal recognition and registration of customary land use rights relating to rotating and shifting cultivation that exists in farmland, forestland, vacant land, fallow land, or virgin land shall be recognized in the new National Land Law; 70. Technical, financial and infrastructure support shall be made available to improve the land tenure security and agricultural practices of ethnic nationalities, in order to protect the environment, increase climate change resilience, and improve their food security; 71. Civil society and other organizations shall be encouraged to provide support indicated in paragraph; 72. In order to resolve disputes related to land use of ethnic groups, ethnic customary land dispute resolution procedures currently used shall be defined in the new National Land Law, and the respected influential representatives from the ethnic groups shall participate in dispute resolution decision making processes; and 73. For ethnic nationals who lost their land resources where they lived or worked due to civil war, land confiscation, natural disasters or other causes, that desire to resettle to their original lands, adequate land use rights and housing rights shall be systematically provided in accordance with international best practices and human rights standards.

V. CONCLUSIONS

76. The prevailing absence of enforceable and effective remedies for violations of housing, land and property rights, including displaced persons and refugees, hampers peace and reconciliation efforts, and the quest for economic development. Given the inseparable linkages between housing, land and property restitution, conflict prevention and national reconciliation, building a lasting peace and the future economic and social stability of Myanmar, there is a growing realization in the country that viewing, conceiving and executing a restitution process is not merely a tool to promote justice and the recovery of lands by those from whom they were confiscated, but also part of a larger process of national development that will contribute greatly to the rule of law and overall stability. The promise of restitution in Myanmar is increasingly seen as indispensable for bringing together a country that has long been fragmented. Restitution will facilitate economic development and investment, and the emergence of well-functioning housing, land and property markets that are fair, equitable and ultimately beneficial to all by guaranteeing that everyone in the country has a safe, secure and decent place to live. There is also a growing sense that failing to deal adequately with the issue of arbitrary deprivation of property through restitution or other equitable remedies can become a source of instability, tension and a continuing sense of injustice among those who have restitution claims that have either not yet been assessed or for whom no remedy has yet been provided. And yet, despite progress unimaginable during past decades, Myanmar's restitution journey has only just begun; commenced with small steps on a much longer trajectory that will require years of additional effort by all in the reasonable quest of restitution for everyone who seeks it.

77. Undertaking restitution is always complex. By its very nature, it is infinitely more complicated to attempt to push time backwards than it is to let things stand, and allow what is ultimately perceived to be the theft of land to go unchallenged. For most Governments and other entities to accept the principle of restitution also means they concede facts and accept official views of history that their State bears responsibility for creating the conditions that led to the initial displacement and land confiscation in the first place. This, obviously, is not something that all Governments are prepared to do, even if law, logic and wisdom demands that they should. Nevertheless, for restitution to succeed in any of its manifestations, those in power need to acknowledge past wrongs and openly express a willingness to restore a sense of *residential justice*. What this implies, naturally, is that new Governments representing old States, such as the democratically elected Governments in the formerly communist States of central and eastern Europe, have proven quite willing to recognize the injustice of the policies of former, and ideologically opposed, regimes and seek to restore residential justice to those who experienced the confiscation or expropriation of their homes and lands in the context of nationalization and skewed attempts at redistributive justice. In the context of the restitution programs carried out in virtually all the countries of central and eastern Europe, the post-Cold War realities of the 1990s enabled citizen movements and broader political causes to emerge, which, coupled with the new Governments in the region, combined forces to make the restitution of former homes and lands a reality for many hundreds of thousands of people.

78. There is growing awareness that although often difficult and time-consuming, the price to be paid of not addressing restitution, can prove a far too heavy one. If the rights of refugees or internally displaced persons to return to their original homes after conflict are not fully recognized, the residual impact of the conflict concerned may never entirely dissipate, with unresolved HLP rights and claims forming the basis for renewed conflicts. On the other hand, when double-standards demand that some refugee/IDP groups be entitled to return home and recover their former homes and lands, while other refugee/IDP groups (perhaps from a different ethnic or religious group with less political influence) are not accorded these same rights, this may also threaten the prospects of long-term peace. If long-term, pre-conflict grievances relating to HLP abuses are not addressed, this too can lead to growing tensions and the outbreak of new conflict. When members of a certain ethnic group are encouraged to enter the area of rival ethnic groups with the intention of confiscating land and resources, once again, the path to conflict has been laid. When peace agreements designed to build viable frameworks ending often decades-long conflict ignore the HLP crises that invariably exist in any post-conflict country, peacebuilding is likely to only ever be partially successful. This is true everywhere, including Myanmar.

79. Embarking on a path leading to a comprehensive restitution programme provides a way forward; a tried and tested way to fairly address past HLP grievances, provide redress for these and enable the page of history to be turned towards a future grounded in the knowledge that there will be no repetition of the actions of the past, that there will no more arbitrary taking of land or properties or homes, and that there will no longer be a perpetual sense of endless injustice felt by millions because residential justice remained forever out of reach. A modern nation is built on the foundations of trust, equality, justice, fairness, compassion and mutual respect. Implementing a comprehensive restitution process in Myanmar will be one vital step in making such a vision a reality.

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ANNEX:

UN PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS (2005)(THE ‘PINHEIRO PRINCIPLES’)¹⁰⁷

PREAMBLE

Recognizing that millions of refugees and displaced persons worldwide continue to live in precarious and uncertain situations, and that all refugees and displaced persons have a right to voluntary return, in safety and dignity, to their original or former habitual homes and lands,

Underscoring that voluntary return in safety and dignity must be based on a free, informed, individual choice and that 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,

Reaffirming the rights of refugee and displaced women and girls, and recognizing the need to undertake positive measures to ensure that their rights to housing, land and property restitution are guaranteed,

Welcoming the many national and international institutions that have been established in recent years to ensure the restitution rights of refugees and displaced persons, as well as the many national and international laws, standards, policy statements, agreements and guidelines that have recognized and reaffirmed the right to housing, land and property restitution,

Convinced that the right to housing, land and property restitution is essential to the resolution of conflict and to post-conflict peace-building, safe and sustainable return and the establishment of the rule of law, and that careful monitoring of restitution programmes, on the part of international organizations and affected States, is indispensable to ensuring their effective implementation,

Convinced also that the implementation of successful housing, land and property restitution programmes, as a key element of restorative justice, contributes to effectively deterring future situations of displacement and building sustainable peace.

¹⁰⁷ 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.

SECTION I. SCOPE AND APPLICATION

1. SCOPE AND APPLICATION

1.1 The Principles on housing and property restitution for refugees and displaced persons articulated herein are designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.

1.2 The Principles on housing and property restitution for refugees and displaced persons apply equally to all refugees, internally displaced persons and to other similarly situated displaced persons who fled across national borders but who may not meet the legal definition of refugee (hereinafter “refugees and displaced persons”) who were arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence, regardless of the nature or circumstances by which displacement originally occurred.

SECTION II. THE RIGHT TO HOUSING AND PROPERTY RESTITUTION

2 THE RIGHT TO HOUSING AND PROPERTY RESTITUTION

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

2.2 States shall demonstrably 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.

SECTION III. OVERARCHING PRINCIPLES

3. THE RIGHT TO NON-DISCRIMINATION

3.1 Everyone has the right to be protected from discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status.

3.2 States shall ensure that de facto and de jure discrimination on the above grounds is prohibited and that all persons, including refugees and displaced persons, are considered equal before the law.

4. THE RIGHT TO EQUALITY BETWEEN MEN AND WOMEN

4.1 States shall ensure the equal right of men and women, and the equal right of boys and girls, to housing, land and property restitution. States shall ensure the equal right of men and women, and the equal right of boys and girls, inter alia, to voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property.

4.2 States should ensure that housing, land and property restitution programmes, policies and practices recognize the joint ownership rights of both male and female heads of the household as an explicit component of the restitution process, and that restitution programmes, policies and practices reflect a gender-sensitive approach.

4.3 States shall ensure that housing, land and property restitution programmes, policies and practices do not disadvantage women and girls. States should adopt positive measures to ensure gender equality in this regard.

5. THE RIGHT TO BE PROTECTED FROM DISPLACEMENT

5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.

5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control.

5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.

5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

6. THE RIGHT TO PRIVACY AND RESPECT FOR THE HOME

6.1 Everyone has the right to be protected against arbitrary or unlawful interference with his or her privacy and his or her home.

6.2 States shall ensure that everyone is provided with safeguards of due process against arbitrary or unlawful interference with his or her privacy and his or her home.

7. THE RIGHT TO PEACEFUL ENJOYMENT OF POSSESSIONS

7.1 Everyone has the right to the peaceful enjoyment of his or her possessions.

7.2 States shall only subordinate the use and enjoyment of possessions in the public interest and subject to the conditions provided for by law and by the general principles of international law. Whenever possible, the “interest of society” should be read restrictively, so as to mean only a temporary or limited interference with the right to peaceful enjoyment of possessions.

8. THE RIGHT TO ADEQUATE HOUSING

8.1 Everyone has the right to adequate housing.

8.2 States should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing.

9. THE RIGHT TO FREEDOM OF MOVEMENT

9.1 Everyone has the right to freedom of movement and the right to choose his or her residence. No one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one shall be arbitrarily or unlawfully forced to leave a certain territory, area or region.

9.2 States shall ensure that freedom of movement and the right to choose one’s residence are not subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with international human rights, refugee and humanitarian law and related standards.

SECTION IV. THE RIGHT TO VOLUNTARY RETURN IN SAFETY AND DIGNITY

10. THE RIGHT TO VOLUNTARY RETURN IN SAFETY AND DIGNITY

10.1 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.

10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

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

10.4 States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons.

SECTION V. LEGAL, POLICY, PROCEDURAL AND INSTITUTIONAL IMPLEMENTATION MECHANISMS

11. COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS, REFUGEE AND HUMANITARIAN LAW AND RELATED STANDARDS

11.1 States should ensure that all housing, land and property restitution procedures, institutions, mechanisms and legal frameworks are fully compatible with international human rights, refugee and humanitarian law and related standards, and that the right to voluntary return in safety and dignity is recognized therein.

12. NATIONAL PROCEDURES, INSTITUTIONS AND MECHANISMS

12.1 States should establish and support equitable, timely, independent, transparent and nondiscriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner.

12.2 States should ensure that housing, land and property restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women, as well as the equal rights of boys and girls, and reflect the overarching principle of the “best interests of the child”.

12.3 States should take all appropriate administrative, legislative and judicial measures to support and facilitate the housing, land and property restitution process. States should provide all relevant agencies with adequate financial, human and other resources to successfully complete their work in a just and timely manner.

12.4 States should establish guidelines that ensure the effectiveness of all relevant housing, land and property restitution procedures, institutions and mechanisms, including guidelines pertaining to institutional organization, staff training and caseloads, investigation and complaints procedures, verification of property ownership or other rights of possession, as well as decisionmaking, enforcement and appeals mechanisms. States may integrate alternative or informal dispute resolution mechanisms into these processes, insofar as all such mechanisms act in accordance with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

12.5 Where there has been a general breakdown in the rule of law, or where States are unable to implement the procedures, institutions and mechanisms necessary to facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.

12.6 States should include housing, land and property restitution procedures, institutions and mechanisms in peace agreements and voluntary repatriation agreements. Peace agreements should include specific undertakings by the parties to appropriately address any housing, land and property issues that require remedies under international law or threaten to undermine the peace process if left unaddressed, while demonstrably prioritizing the right to restitution as the preferred remedy in this regard.

13. ACCESSIBILITY OF RESTITUTION CLAIMS PROCEDURES

13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim and to receive notice of such determination. States should not establish any preconditions for filing a restitution claim.

13.2 States should ensure that all aspects of the restitution claims process, including appeals procedures, are just, timely, accessible, free of charge, and are age and gender sensitive. States should adopt positive measures to ensure that women are able to participate on a fully equal basis in this process.

13.3 States should ensure that separated and unaccompanied children are able to participate and are fully represented in the restitution claims process, and that any decision in relation to the restitution claim of separated and unaccompanied children is in compliance with the overarching principle of the “best interests of the child”.

13.4 States should ensure that the restitution claims process is accessible for refugees and other displaced persons regardless of their place of residence during the period of displacement, including in countries of origin, countries of asylum or countries to which they have fled. States should ensure that all affected persons are made aware of the restitution claims process, and that information about this process is made readily available, including in countries of origin, countries of asylum or countries to which they have fled.

13.5 States should seek to establish restitution claims-processing centres and offices throughout affected areas where potential claimants currently reside. In order to facilitate the greatest access to those affected, it should be possible to submit restitution claims by post or by proxy, as well as in person. States should also consider establishing mobile units in order to ensure accessibility to all potential claimants.

13.6 States should ensure that users of housing, land and/or property, including tenants, have the right to participate in the restitution claims process, including through the filing of collective restitution claims.

13.7 States should develop restitution claims forms that are simple and easy to understand and use and make them available in the main language or languages of the groups affected. Competent assistance should be made available to help persons complete and file any necessary restitution claims forms, and such assistance should be provided in a manner that is age and gender sensitive.

13.8 Where restitution claims forms cannot be sufficiently simplified owing to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner that is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf.

13.9 States should establish a clear time period for filing restitution claims. This information should be widely disseminated and should be sufficiently long to ensure that all those affected have an adequate opportunity to file a restitution claim, bearing in mind the number of potential claimants, potential difficulties of collecting information and access, the extent of displacement, the accessibility of the process for potentially disadvantaged groups and vulnerable individuals, and the political situation in the country or region of origin.

13.10 States should ensure that persons needing special assistance, including illiterate and disabled persons, are provided with such assistance in order to ensure that they are not denied access to the restitution claims process.

13.11 States should ensure that adequate legal aid is provided, if possible free of charge, to those seeking to make a restitution claim. While legal aid may be provided by either governmental or non-governmental sources (whether national or international), such legal aid should meet adequate standards of quality, non-discrimination, fairness and impartiality so as not to prejudice the restitution claims process.

13.12 States should ensure that no one is persecuted or punished for making a restitution claim.

14. ADEQUATE CONSULTATION AND PARTICIPATION IN DECISION-MAKING

14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution programmes are carried out with adequate consultation and participation with the affected persons, groups and communities.

14.2 States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively. The needs of vulnerable individuals including the elderly, single female heads of households, separated and unaccompanied children, and the disabled should be given particular attention.

15. HOUSING, LAND AND PROPERTY RECORDS AND DOCUMENTATION

15.1 States should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution programme, respecting the rights of refugees and displaced persons when doing so.

15.2 States should ensure that any judicial, quasi-judicial, administrative or customary pronouncement regarding the rightful ownership of, or rights to, housing, land and/or property is accompanied by measures to ensure registration or demarcation of that housing, land and/or property as is necessary to ensure legal security of tenure. These determinations shall comply with international human rights, refugee and humanitarian law and related standards, including the right to be protected from discrimination.

15.3 States should ensure, where appropriate, that registration systems record and/or recognize the rights of possession of traditional and indigenous communities to collective lands.

15.4 States and other responsible authorities or institutions should ensure that existing registration systems are not destroyed in times of conflict or post-conflict. Measures to prevent the destruction of housing, land and property records could include protection in situ or, if necessary, short-term removal to a safe location or custody. If removed, the records should be returned as soon as possible after the end of hostilities. States and other responsible authorities may also consider establishing procedures for copying records (including in digital format), transferring them securely and recognizing the authenticity of said copies.

15.5 States and other responsible authorities or institutions should provide, at the request of a claimant or his or her proxy, copies of any documentary evidence in their possession required to make and/or support a restitution claim. Such documentary evidence should be provided free of charge, or for a minimal fee.

15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property or place of habitual residence. Such information should be sought whenever information is gathered from refugees and displaced persons, including at the time of flight.

15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.

15.8 States shall not recognize as valid any housing, land and/or property transaction, including any transfer that was made under duress, or which was otherwise coerced or forced, either directly or indirectly, or which was carried out contrary to international human rights standards.

16. THE RIGHTS OF TENANTS AND OTHER NON-OWNERS

16.1 States should ensure that the rights of tenants, social occupancy rights holders and other legitimate occupants or users of housing, land and property are recognized within restitution programmes. To the maximum extent possible, States should ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.

17. SECONDARY OCCUPANTS

17.1 States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, that evictions are carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.

17.2 States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.

17.3 In cases where evictions of secondary occupants are justifiable and unavoidable, States should take positive measures to protect those who do not have the means to access any other adequate housing other than that which they are currently occupying from homelessness and other violations of their right to adequate housing. States should undertake to identify and provide alternative housing and/or land for such occupants, including on a temporary basis, as a means of facilitating the timely restitution of refugee and displaced persons' housing, land and property. Lack of such alternatives, however, should not unnecessarily delay the implementation and enforcement of decisions by relevant bodies regarding housing, land and property restitution.

17.4 In cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, States may consider establishing mechanisms to provide compensation to injured third parties. The egregiousness of the underlying displacement, however, may arguably give rise to constructive notice of the illegality of purchasing abandoned property, pre-empting the formation of bona fide property interests in such cases.

18. LEGISLATIVE MEASURES

18.1 States should ensure that the right of refugees and displaced persons to housing, land and property restitution is recognized as an essential component of the rule of law. States should ensure the right to housing, land and property restitution through all necessary legislative means, including through the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices. States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law.

18.2 States should ensure that all relevant laws clearly delineate every person and/or affected group that is legally entitled to the restitution of their housing, land and property, most notably refugees and displaced persons. Subsidiary claimants should similarly be recognized, including resident family members at the time of displacement, spouses, domestic partners, dependents, legal heirs and others who should be entitled to claim on the same basis as primary claimants.

18.3 States should ensure that national legislation related to housing, land and property restitution is internally consistent, as well as compatible with pre-existing relevant agreements, such as peace agreements and voluntary repatriation agreements, so long as these agreements are themselves compatible with international human rights, refugee and humanitarian law and related standards.

19. PROHIBITION OF ARBITRARY AND DISCRIMINATORY LAWS

19.1 States should neither adopt nor apply laws that prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations.

19.2 States should take immediate steps to repeal unjust or arbitrary laws and laws that otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution, and should ensure remedies for those wrongfully harmed by the prior application of such laws.

19.3 States should ensure that all national policies related to the right to housing, land and property restitution fully guarantee the rights of women and girls to be protected from discrimination and to equality in both law and practice.

20. ENFORCEMENT OF RESTITUTION DECISIONS AND JUDGEMENTS

20.1 States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgements.

20.2 States should ensure, through law and other appropriate means, that local and national authorities are legally obligated to respect, implement and enforce decisions and judgements made by relevant bodies regarding housing, land and property restitution.

20.3 States should adopt specific measures to prevent the public obstruction of enforcement of housing, land and property restitution decisions and judgements. Threats or attacks against officials and agencies carrying out restitution programmes should be fully investigated and prosecuted.

20.4 States should adopt specific measures to prevent the destruction or looting of contested or abandoned housing, land and property. In order to minimize destruction and looting, States should develop procedures to inventory the contents of claimed housing, land and property within the context of housing, land and property restitution programmes.

20.5 States should implement public information campaigns aimed at informing secondary occupants and other relevant parties of their rights and of the legal consequences of noncompliance with housing, land and property restitution decisions and judgements, including failing to vacate occupied housing, land and property voluntarily and damaging and/or looting of occupied housing, land and property.

21. COMPENSATION

21.1 All refugees and displaced persons have the right to full and effective compensation as an integral component of the restitution process. Compensation may be monetary or in kind. States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation.

21.2 States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.

SECTION VI. THE ROLE OF THE INTERNATIONAL COMMUNITY, INCLUDING INTERNATIONAL ORGANIZATIONS

22. RESPONSIBILITY OF THE INTERNATIONAL COMMUNITY

22.1 The international community should promote and protect the right to housing, land and property restitution, as well as the right to voluntary return in safety and dignity.

22.2 International financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, should take fully into account the prohibition against unlawful or arbitrary displacement and, in particular, the prohibition under international human rights law and related standards on the practice of forced evictions.

22.3 International organizations should work with national Governments and share expertise on the development of national housing, land and property restitution policies and programmes and help ensure their compatibility with international human rights, refugee and humanitarian law and related standards. International organizations should also support the monitoring of their implementation.

22.4 International organizations, including the United Nations, should strive to ensure that peace agreements and voluntary repatriation agreements contain provisions related to housing, land and property restitution, including through the establishment of national procedures, institutions, mechanisms and legal frameworks.

22.5 International peace operations, in pursuing their overall mandate, should help to maintain a secure and stable environment wherein appropriate housing, land and property restitution policies and programmes may be successfully implemented and enforced.

22.6 International peace operations, depending on the mission context, should be requested to support the protection of the right to housing, land and property restitution, including through the enforcement of restitution decisions and judgements. Members of the Security Council should consider including this role in the mandate of peace operations.

22.7 International organizations and peace operations should avoid occupying, renting or purchasing housing, land and property over which the rights holder does not currently have access or control, and should require that their staff do the same. Similarly, international organizations and peace operations should ensure that bodies or processes under their control or supervision do not obstruct, directly or indirectly, the restitution of housing, land and property.

SECTION VII. INTERPRETATION

23. INTERPRETATION

23.1 The Principles on housing and property restitution for refugees and displaced persons shall not be interpreted as limiting, altering or otherwise prejudicing the rights recognized under international human rights, refugee and humanitarian law and related standards, or rights consistent with these laws and standards as recognized under national law.

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