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Restitution of Property to Displaced Persons in Post-conflict Situations

1. Introduction

“Gross violations of human rights, war crimes, and mass violence have characterised modernization. Over the last two centuries, most countries inflicted violence on foreign and domestic population leading to uprooting and the mass movement of people. As many as two hundred million refugees have crossed borders in the course of domestic and international political violence. Of those, many millions were repatriated, many millions were not. Most of those who could not return remained displaced for years, at times for decades and generations.”\(^1\)

According to the information available to UN High Commissioner on Refugees at the end of the 2010 “population of concern” amounted to 33.9 million.\(^2\) It is estimated that Georgia, Armenia and Azerbaijan have around one million of displaced persons.

At the core of finding not only a solution that would help displaced persons but also to overcome a part of the conflicts as well, is property restitution. The right to property is recognised as a human right by the international community through a number of treaties. There is a close relationship between property rights and conflicts. “Housing, land and real property issues are often origins of, or results from, conflict and are therefore inextricably linked to the achievement and consolidation of lasting peace and prevention of future violence”.\(^3\) Pantuliano and Elhawary define four types of relationship between property and conflict: “1. grievances that trigger the conflict; 2. land and property issues that emerge during war due to the breakdown in rule of law, the policies of those in control during the conflict and, especially forced displacement; 3. property issues that arise or are exacerbated because of the poorly managed peace; 4. inequitable property relations, especially in agrarian societies, which risk causing further violence if left unresolved”.\(^4\)

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\(^1\) Adelman/ Barkan, No return, no refuge: rites and rights in minority repatriation (2011) 3.
As for the EU’s position on property restitution, on the one hand, the issue is not covered by the *acquis*, as the competences of the EU are based on the doctrine of delegated powers as stated by Art 13 para 2 TEU. In addition Art 345 TFEU states that the Treaties shall in no way prejudice the rules in MS governing the system of property ownership. On the other hand, Art 2 TEU states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the MS. The EU is to respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the MS, as general principles of Union law (Art 6 para 2, 3 TEU). Fundamental rights, a notion originally developed by ECJ jurisprudence as early as in 1969, have been given by means of Art 6 para 1 TEU the same legal value as the Treaties. The Charter of Fundamental Human Rights contains a catalogue of basic rights and fundamental freedoms, which reflect the constitutional traditions and international obligations common to the MS, one of the rights contained being the right to property.

“From the political criteria point of view, the EU considers property rights as part of the socio-economic rights” and “we expect a country aspiring to join the EU to pay due attention to this issue as we expect the values of the Union such as the ‘respect for human rights’ to be duly taken into account also in matters which belong to the sphere of national competence.” As from the point of view of EU the property rights and therefore property restitution are regarded as human rights. “The EU guidelines on human rights dialogues with third countries” need to be taken into account as well. The dialogues referred to in the Guidelines include amongst others “dialogues or discussions of a rather general nature based on regional or bilateral treaties, agreements or conventions or strategic partnerships dealing systematically with the issue of human rights. These include in particular: ...and the neighbourhood policy (countries of the Caucasus in particular”). The Guidelines provide that “the European Union undertakes to intensify the process of integrating human rights and democratisation objectives ("mainstreaming") into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels”. Therefore, the EU has a legitimacy to discuss the question of property restitution in all its dialogues with third countries. Indeed, the 2011 Report on Implementation of European Neighbourhood Policy in Georgia deals both with the question of the position of IDP and the property rights problems. In the Council conclu-

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sions on the South Caucasus from 27 February 2012 it is stated that “the EU reiterates its commitment to help improve the situation of Internally Displaced Persons in Georgia and refugees from the conflicts and their unconditional right to safe and dignified return, while underlining also the need to enhance efforts to provide livelihood options and to provide conditions allowing those Internally Displaced Persons who choose to stay in Tbilisi administered territory to integrate fully into society.” So far the role of the EU in the Southern Caucasus was mostly limited to providing help in the housing solutions to IDP which amounted to EUR 43.5 million in the period under review by the 2011 ENP report on Georgia and did not cover property restitution. However, should the actual return of property take place it might be possible that the EU would play the role it played in the Balkans. Namely, in BiH the EU was involved in the restitution process through the OHR who acted as EU Special Representative as well since February 2002 and “furthermore, from 1994-1996 the EC even led the administration in the Municipality of Mostar (Arts 1 and 4 of Memorandum of Understanding) signed in Geneva on 18 March 1994) and exercised comprehensive powers of governance.”

As this paper focuses on UN Principles on Housing and Property Restitution for Refugees and IDPs (Pinheiro Principles) it is also important to note that the EU has not formulated its position on these principles when dealing with the property restitution. Since the ECJ has referred in its jurisprudence to the relevant rights of ECHR, e.g. in the case Regione autonoma Friuli-Venezia Giulia and ERSA, it has stated that in determining the scope of the right to property, Art 1 of Protocol 1 to ECHR must be taken into account, it is clear that the provisions of the ECHR and their interpretation by the ECtHR fall within the notion of fundamental rights. The ECtHR in its jurisprudence on the interpretation of Art 1 of Protocol 1 to ECHR, made implicit and explicit references to the Pinheiro Principles as “a relevant international document” e.g. in Đokić v. Bosnia. Furthermore, the Council of Europe to which all MS of the EU are members, in its Solving property issues of refugees and displaced persons Report “calls on member states to resolve post-conflict housing, land and property rights issues of refugees and IDPs, taking into account the Pinheiro Principles, the relevant Council of Europe instruments, and Recommendations for Action Accompanying the document Joint Communication to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions Delivering on a New European Neighbourhood Policy, SWD (2012) 114 final, 3.


Council conclusions on the South Caucasus 3149th FOREIGN AFFAIRS Council meeting Brussels, 27 February 2012, paragraph 23.


tion Rec(2006)6 of the Committee of Ministers.” Therefore, the EU will be expected to apply the Pinheiro Principles when discussing and providing help in property restitution processes.

2. Political conditions

In order for the property restitution to take place it is necessary that some political prerequisites are fulfilled. As experience from BiH and other parts of the world show it is generally necessary to conclude some sort of peace agreement before the restitution can take place. In BiH Annex VII of the Dayton Peace Agreement referred expressly to property restitution. It is important that practical issues such as property disputes are also addressed. It is also possible that the return of the displaced persons will take place even before the conclusion of a peace treaty if there is a lasting cease-fire agreement. In case of Armenia, Azerbaijan and the Nagorno-Karabakh region a cease-fire agreement exists since July 1994, but a peace agreement is yet to be agreed upon although the Minsk group presented several drafts, and conflicts on the “contact line” never ceased to happen. However, in cases such as the one involving Georgia and Abkhazia and South Ossetia, where not only the cease-fire agreements were in force and broken on several occasions but the agreements on the return of refugees and displaced persons were also broken, it is doubtful that anything less than a lasting peace agreement would encourage the return of displaced persons. It is also a good incentive for the displaced persons to return when the international community is involved in a process since it gives returnees a reassurance that the return will be properly conducted, which is especially important for the return of members of a minority group. In the case of Southern Caucasus the trouble of the returnees can be described on the case of the return of Georgians to Gali region where after the period of return in 1997 a new wave of violence took place in 1998 forcing returnees to once again leave their homes. Including provisions in a peace treaty such as those which were part of Annex VII of the Dayton Peace Agreement which laid down specific obligations of the parties in regards to the property restitution and gave mandate to UNHCR to assist in the process sends a signal that restitution is one of the priorities.

Furthermore, it is necessary that the question of the return of displaced persons is regarded as a humanitarian issue. In this way the possibility of misuse of the difficult position of displaced persons for political aims should be avoided. It is crucial that their position is not contingent on agreements such as those about the status of disputed territories. A recent case between Georgia and South Ossetia showed that any politicisation of the question of the refugee

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return might have a counter-effect as South Ossetia refused to discuss the issue after the “Georgian-sponsored” resolution on the return of displaced persons and refugees was approved by the UN General Assembly in September 2010. In the case of Nagorno-Karabakh, where the international community is strongly promoting the conclusion of the peace treaty it should be insisted that if not the whole draft treaty is accepted then parties should agree upon the part relating to the restitution of property and return of refugees and displaced persons.

3. International norms

There are a number of international documents that grant refugees and displaced persons a right to return. The first recognition of this right happened by the UN as early as in 1948 when the right was granted by Art 13 (2) of the Universal Declaration of Human Rights stating: “Everyone has the right to leave any country, including his own, and to return to his country.”

The ICESCR contains the most significant articulation of the right to adequate housing. The right is found in Art 11(1). Although the ICESCR recognises the right to housing as a part of the larger right to adequate standard of living, under international human rights law, the right to adequate housing is understood as an independent or free-standing right.

The ICCPR has increasingly been used to enforce housing rights, e.g. homelessness has been found to threaten violations of the right to life (Art 4), and forced evictions have been found to contravene the right to be free from arbitrary or unlawful interference with the home (Art 17). Further on, the Convention on Elimination of all Forms of Racial Discrimination expressly prohibits discrimination in the housing sector (Art 5). Other Conventions dealing with discrimination provide the same right to women, especially those in rural areas, and children, and to persons with disabilities.

Another set of international conventions deals with the prohibition of destruction of property. That is the case with the First Geneva Convention for the Amelioration of the Condi-

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4. Pinheiro Principles

The importance of the restitution of property to refugees and IDPs has been recognised as an important issue by a number of UN bodies. The General Assembly, following the footsteps of the Commission on Human Rights and the Economic and Social Council, on December 16th 2005 during its 64th Plenary Meeting adopted 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. These principles state: “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.” The principles stand out among the international documents that recognise restitution of property as a “basic, self-standing human right” and as the only effective solution to the problem of displaced persons.

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However, the most important international document regarding this issue are the Principles on Housing and Property Restitution for Refugees and Displaced Persons, the so called Pinheiro Principles, which were adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on August 15th 2005. Adoption of this document was a final stage of a process that started with the Sub-Commission’s resolution 1998/28 on Housing and Property Restitution in the context of return of refugees and IDPs. A study was conducted from 2002-2005, and finally Special Rapporteur on Housing and Property Restitution Paulo Sérgio Pinheiro proposed the principles. The Principles “provide specific policy guidance regarding how to ensure the right to housing and property restitution in practice and for the implementation of restitution laws, programmes and policies, based on existing international human rights, humanitarian, refugee and national standards.”

Although they are not legally binding as they do not represent a treaty they represent a persuasive authority as they are based on existing treaties and national laws and were adopted by a body held responsive to all the members of the UN. Furthermore, the Principles were recognised by the ECtHR as a relevant document and were even quoted in some of the Court’s decisions. The African Commission on Human and People’s Rights referred to the Pinheiro Principles as “emerging principles in human rights jurisprudence” that “read together with the decisions of regional bodies such as the cited European Court decisions provide great persuasive value”.

Since the Principles are based on experience gathered from a number of countries that have dealt with large-scale restitution they certainly represent a document that should be taken into consideration when dealing with the restitution of the property to displaced persons in the Southern Caucasus.

The scope of application of the principles is rather broad. They refer to any situation where displacement occurred involuntarily giving no importance to the causes. Situations will be covered by the Principles no matter if displacement occurred because of an armed conflict, international or national, natural and manmade disasters, human rights violations etc. The fact that the Principles make no distinction between international and national conflicts is especially useful in cases where the conflict parties have a different view on the nature of the conflict. In terms of personal scope of application, the Principles use the term “refugees and displaced persons” which differs from the formulation usually used “refugees and internally displaced persons”. Although the difference might seem small, this actually allows a wider protection as it covers three groups: refugees, IDPs and displaced persons who fled across national boundaries but who do not fall within the definition of refugees. This is in line with the contemporary

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understanding that restitution is rights-based and not return-based and as it is one of the human rights it should not be limited to just some categories of displaced persons. This principle was applied by the ECtHR in case Đokić v. Bosnia26 where the applicant did not qualify as a refugee due to the fact that he had Serbian citizenship and could not be regarded as an IDP because he fled across the international border, from BiH to Serbia, but the Court held that he should nevertheless enjoy protection. Further, for the Principles to be applicable it is necessary to have an arbitrary or unlawful deprivation of homes, lands, properties or habitual places of residence. Whether there was arbitrary or unlawful deprivation has to be determined by taking into account both national (including municipal) and international laws.

The Principles give priority to restitution over compensation. The idea behind this is that the purpose of property restitution and the reason for recognising it as an important tool in solving the problem of refugees and displaced persons is that restitution enables the return to situations which existed before the injury happened. The same approach was adopted for example in BiH which will be elaborated further on. Also, since post-conflict restitution is likely to be conducted as soon as the peace is negotiated, it is expected that one or all sides might try to prevent displaced persons from returning in an attempt to preserve the situation created during the conflict. This was the case both in BiH and in Croatia. Compensation should only take place when the persons concerned express that they would prefer the compensation or when it is factually impossible to conduct the restitution. It is also clearly stated that the return or non-return of refugees shall in no circumstances play any role in influencing the right to restitution. However, some authors point out that “one of the flaws underlying all of the theoretical claims regarding the value of restitution is the possibility that restitution schemes are geared to address the concerns of Western states and as such, may render return not entirely voluntary. Just as the return of refugees to their countries of origin became a priority after the Cold War when Western nations no longer wanted to provide asylum, so too might the remedy of restitution now be in vogue to meet the needs primarily of Western nations that are not interested in providing asylum to refugees. The return of refugees and emphasis on property restitution is fuelled, at least in part, by the political and economic concerns of asylum countries.”27

The Principles go on to promote non-discrimination in terms of the right to restitution of property, demanding that all people are given the same rights irrespective of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status. Taking into account the characteristics of the wars of the late 20th century it is especially important to point out this principle as there are still intolerances between peo-

26 European Court of Human Rights, Judgment on the Merits delivered by the Chamber: Đokić v. Bosnia and Herzegovina, no. 6518/04 (2010) paragraph 44.
ple of different racial, ethnic, national and religious origin. Prohibition of discrimination refers both to *de jure* and *de facto* discrimination which is important since the principle of non-discrimination is required under a number of international treaties which are legally binding on the countries so it is extremely unlikely that one country would adopt a law that explicitly discriminates. It is more likely that the discrimination will take place in application of the law which clearly favours the rights of one ethnic group over another. This was originally the case in Republic of Srpska, the Federation Bosnia-Herzegovina, Croatia, Georgia and elsewhere, where ethnic and other motivations clearly guided the content and degree of enforcement of relevant law.\(^{28}\) Time-limits for restitution claims may be such that they indirectly, but intentionally, discriminate against certain groups to the benefit of another group. On the other hand, strict compliance with the non-discrimination principle should ensure that no one or no group entitled to housing and property restitution is prevented, on the basis of discrimination or inequitable treatment, from securing these rights in practice. The same *de facto* and *de jure* protection is granted to the equal treatment of men and women and boys and girls especially in regards 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,\(^{29}\) the joint ownership rights of both male and female heads of the household.\(^{30}\)

Another important principle is granting the right to peaceful enjoyment of possessions.\(^{31}\) It is very important that the text of Principles recognised the right to peaceful enjoyment of possession rather than the right to property. In this way the right is granted to a much bigger category of people which is especially important for the displaced persons coming from ex-socialist countries where the private property did not or hardly existed, and where other types of property such as social property, collective, customary and common ownership were predominant. In some socialist countries people had a tenancy rights rather than ownership rights over their homes. Therefore, in case that it was the right to property that was granted and not the right to peaceful enjoyment of possession, many people would not have a chance to return to their homes of origin.

The Pinheiro Principles also include the right to free movement, a right that is granted by all relevant human rights treaties. However, it is also very closely connected to the housing rights. Restitution cannot effectively take place if the freedom of movement is restricted. For example it was the freedom of movement that allowed Georgian nationals who fled Gali region

to conduct effective control over their property left behind since they were allowed to cross the river and visit their property. However, once the freedom of movement had been restricted, they lost every control over their property. In the case of Loizidou v. Turkey before the ECHR, which involved the impossibility of return to one’s property, the European Court noted that: “...the complaint is not limited to access to property but is much wider and concerns a factual situation: because of the continuous denial of access the applicant had effectively lost all control, as well as all possibilities to use, to sell, to bequeath, to mortgage, to develop and to enjoy her land....The continuous denial of access must therefore be regarded as an interference with her rights under Art 1 of Protocol No 1.” 32

The Principles also include a right to voluntary return in safety and dignity 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.33 This follows the practice of numerous international treaties.

In Section V, the Principles deal with ensuring restitution in practice. States are required to establish and support equitable, timely, independent, transparent and non discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims as well as to provide financial, human and other resources.34 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 especially so in the case of post-conflict restitution. In Croatia, for example, the process of restitution of property was largely biased against ethnical Serbs. The Principles also invite states to ask for help of the relevant international agencies when they are not capable of conducting the process by themselves and to include restitution procedures, mechanisms and institution into peace agreements. This was done in case of BiH and proved to be successful as it is hardly imaginable that large scale restitution could have been successfully conducted by the local authorities on their own since the tensions between the parties were on a high level. However, some authors find that the involvement of the international community in this manner “may undermine the development of democracy”.35 To be effective, these institutions must also have external support in order to meet their heavy caseloads and to overcome the many formidable challenges encountered during the restitution

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32 European Court of Human Rights, Judgment on the Merits delivered by the Chamber: Loizidou v. Turkey, No. 15318/89, 1996/VI.
35 Ballard, BJIL 2010, 492.
process. Resolving restitution claims requires the institutions concerned to have at their disposal an array of flexible remedies that can be deployed, and the equally important need for refugees to have the right to choose the remedy that is best suited for them and consistent with their rights and wishes. One challenge involved in the establishment of a national, local or international special purpose body is to ensure that its procedures are adapted to deal with a large number of property restitution and compensation cases from refugees and IDPs, who will very often have limited access to evidence to support their claims. This may require, for example, allowing for more relaxed standards of evidence than are usual before civil courts.36

Access to restitution procedures should be given to everybody who was deprived of his/her property. The Principles lay down a number of ways in which the procedures should be made accessible to everybody with a claim. First of all, it is required from the states not to make any preconditions that would exclude someone from the process, to make the procedure just, timely, accessible, free of charge, age and gender sensitive, to take care of the interests of children, to make it accessible to people wherever they might be; in addition it is recommend to establish a mobile unit so that it would be truly accessible to everyone and filing claims by post, proxy and in person should all be possible. These provisions are very significant in practice since many people have left their country of origin and are unable to return until their restitution claim is decided upon. It is also required that procedures are simplified as much as possible and if not, a State should make available specialist consulting services. Another requirement is that the time periods for filing the claim should be such to allow people considering their circumstances to be able to gather all the necessary document, proofs, etc. Finally no one should be persecuted or punished for making a restitution claim. The accessibility is vital in cases of post-conflict restitution where any unjust provision might exclude a number of people from filing their restitution claim.

The Principles also recognise the importance of records and documentation on property and proclaim that States should do all that is necessary to protect the records which often get destroyed during the conflicts. In Kosovo, for instance, more than half of these records disappeared. Also any decision made in the restitution proceedings should be registered in these records.

The rights of tenants and other non-owners are also addressed. This is especially important in cases of countries with socialist tradition and in which many people would lose the rights to restitution if such provisions did not exist. In the Republic of Georgia, the legacy of discriminatory application of the 1983 Housing Code by the judiciary against Ossetians who fled their homes during the 1990-1992 has prevented large-scale return for several years. Georgian courts have routinely argued that the abandonment of an apartment by a refugee did not con-

stitute a ‘valid reason’ for departure, and thus many flats belonging to Ossetians were subse-
quently allocated to ethnic Georgians. Similarly, in Kosovo as a result of the application of the
Law on Changes and Supplements on the Limitations of Real-Estate Transactions\(^{37}\) the housing
and occupancy rights of the ethnic Albanian population were arbitrarily annulled and housing
and property transactions were severely restricted. When housing was bought or sold between
1989-1999, this was generally carried out on an irregular basis and was never officially regis-
tered thus complicating an already difficult restitution process. Similar processes played out in
Croatia where over 30,000 occupancy rights overwhelmingly affecting Croatian Serbs were an-
nulled.\(^{38}\)

Another practically and legally important issue is that of secondary occupants, people
who have taken residence in the property of displaced persons. Therefore, their rights might in
some way be in conflict with the right to restitution. The secondary occupants have to be given
the right to participate in the restitution process because any decision made will certainly influ-
ence their position. Furthermore, they have to be granted the right to adequate housing. That
means that in case that the secondary occupants, who are themselves in most cases displaced
persons, do not have an alternative housing it falls upon the State to provide it to them. How-
ever, in practice this can be used in order to slow down or even completely obstruct the return.
This was the case, for instance, in Croatia where the secondary occupants were even given the
right to refuse the alternative housing provided for them and since the returnees, especially in
cases of Croatian Serbs, were not allowed to repossess their property until the secondary occu-
pant’s status is solved, this led to obstruction of return of a number of displaced persons. So
while it is undoubtedly the right of secondary occupants to have adequate housing, the inability
to solve their position should not in any case influence the return.

The Principles further state that legislative measures should be taken to recognise restit-
tution as an essential component of the rule of law. That means that a state should adopted the
laws necessary to conduct the restitution and refrain from adopting any laws that might be dis-
criminatory, or in any way obstruct the restitution. Also in case that any discriminatory law ex-
ists it should be overturned.

Even if all above conditions are met, there cannot be a successful restitution if the deci-
sions of the relevant bodies are not enforced. Therefore, it is an obligation of any State that
deals with large scale restitution to adopt an adequate enforcement system which should in-
clude designation of specific public bodies entrusted with enforcement,\(^{39}\) placing a legal obliga-
tion on local and national authorities to respect, implement and enforce decisions on restitu-

\(^{39}\) UN Sub-Commission on Promotion and Protection of Human Rights, Principles (E/CN.4/Sub.2/2005/17, 28 June
2005), Principle 20.1.
tion. Since, as seen in numerous countries, it is likely that return and restitution will face opposition and an escalation of violence is always possible, it is necessary to take steps to discourage any such behaviour. This can be done by imposing severe punishments to those disrupting the process and protecting the disputed property from being looted.

Finally, if restitution is factually not possible because the property was destroyed, or does not exist anymore or if the injured party has voluntarily and knowingly accepted compensation in lieu of restitution, then compensation in money or kind should be given. The Principles take the position that the relation between restitution and compensation is not that of “either...or” but that the compensation is a subsidiary means of restorative justice. The same position was taken by the international community in restitution cases in BiH.

The Principles also recognise the importance of international involvement in restitution processes. Therefore, Principle 22 deals with the role of the international community. It proposes that the international community should promote and respect the right to restitution, and that all international bodies and organisations should respect the prohibition of forceful displacement. Also international organisations and international peace operations should work with the governments involved in restitution processes. This has proved to be very successful in many cases, such as BiH and Kosovo, where the complicated relations between the members of different ethnic groups gave no hope that the restitution could be successfully completed, but the involvement of the international community helped to a great extent in overcoming this issues. However, this position is not without criticism. Ballard claims that “while international support for post-conflict restitution seems benign, if not laudable, it can lead to significant international influence over domestic legal affairs. Bosnia’s experience in creating and implementing its property restitution scheme illustrates that international actors can be involved in drafting, adjudicating, and enforcing local property laws. In this manner, property restitution to remedy mass forced displacement gives rise to potential law exportation.” On the other hand, Moratti claims that in the case of BiH “it was a ‘Western’ concept like the right to the enjoyment of possession that was reinterpreted to ensure the protection of individual rights arising from a socialist type of tenure”. Furthermore, he states “critiques of law and development seem ill suited to describe a property restitution process. While law and development implies a change in the type of tenure, property restitution implies a return to the status quo ante. Fundamental changes in the type of tenure, as seen in BiH with the privatization of socially owned

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41 Ballard, BJIL 2010, 470.
apartments, occur only after the *status quo ante* has been restored." Back on the negative side, *Ballard* points out that “the level of international support that will be available following future conflicts is not clear. For example, where dispossession has been caused primarily by a government’s inability or unwillingness to maintain the rule of law throughout its territory, and the need to establish restitution is not supported by gross violations of human rights law, international agencies may lack sufficient incentive or political will to lend technical or financial assistance”. 44

5. **Bosnia and Herzegovina Lessons Learned**

5.1. **Legal Framework of Property Restitution in BiH**

In discussing large-scale restitutions of property it is necessary to mention the case of BiH which was the first time that a restitution of such scale took place following the wars of 1990s. “Of course, every situation of displacement is unique and context-specific, such that direct comparisons are difficult. However, certain universal principles do apply; most notably, the right of refugees and of internally displaced persons to voluntary return in safety and dignity to their area of origin or to find a solution elsewhere, which for IDPs would mean integrating elsewhere in their country. The case of BiH sheds important light on what supporting realization of these rights and resolving displacement crises requires in practice.”45 Bosnia has become the leading model for achieving post-conflict property restitution, positioning restitution as both a *per se* right and a means of promoting refugee return. In the years since the war ended, Bosnia has been held up as a model for resolving property disputes in scenarios as disparate as Palestine and Iraq by bodies ranging from national NGOs to the recently appointed U.N. Special Rapporteur examining this topic.46

Restitution of property to the refugees and IDPs in BiH was based on two legal sources: international norms regulating restitution on the one hand, and provisions of the General Framework Agreement on Peace in Bosnia and Herzegovina, so called Dayton Peace Agreement, on the other. It is clear that restitution in BiH was possible due to the Dayton Peace Agreement whose Annex VII established a number of principles relating to property restitution. However, it is also worth noting that even before the signing of the Dayton Peace Agreement

44 Ballard, BJIL 2010, 494.
45 Mooney, Paper presented to the Conference Conflict and Migration the Georgian-Abkhazian Case in a European Context, 1.
several international documents regarding BiH insisted on the right of refugees and displaced persons to have their properties restored.\footnote{Directorate-General for Internal Policies, Private Properties Issues following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo, Study, (2010) 71.} This was the case with UN resolution and the Washington Agreement of 1994 concluded between the Bosnian Croats and the Bosnian Government.\footnote{Washington Agreement signed on 18 March 1994. available at \url{http://www.usip.org/files/file/resources/collections/peace_agreements/washagree_03011994.pdf}.}

Annex VII granted the following rights to the refugees and displaced persons: “the right to freely return to the homes of origin, the right to have property restored which was deprived during the hostilities and a right to compensation for any property which cannot be restored to them.”\footnote{General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Paris, Annex VII, Art. 1 (1).} This is the first time that a right of return was not defined broadly as return to the country of origin as it was practice before, but specifically as return to the home of origin. Nowadays it is widely accepted that a right to return refers to the home of origin. However, the drafters of the treaty correctly presumed that there would be an opposition to the return of displaced persons, especially in the case of minority return, so Annex VII also included a number of provisions designed to protect the returnees, a practice that should be employed in each case where there is a prolonged dispute, and especially in case of frozen disputes such as those existing in the SC. Many provisions of Annex VII appear to favour actual return over local resettlement, beginning with the statement that “the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.”\footnote{General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Paris, Annex VII, Art. 1 (3).} The Bosnian authorities are obliged to “accept the return of . . . persons who have left their territory”\footnote{General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Paris, Annex VII, Art. 1 (3).} and create “conditions suitable for return” by repealing discriminatory laws and preventing or punishing incitement of ethnic hostility.\footnote{General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, Paris, Annex VII, Art. 1 (3).}

It was the role of the international community to persuade the parties to include Annex VII in the Peace Agreement, and subsequent documents such as Property Legislation Implementation Plan (PLIP) and Strategy Plan for South East Europe that enabled a large scale return to BiH. Namely, it is estimated that some 2 million people have returned to their home of origin. However, the international community did not stop its involvement on passing the documents that would enable the return but took active part in the return itself. UNHCR sponsored a number of programmes some of which were support for local legal-aid centres, large-scale
shelter programmes, employment creation, microcredit and community development schemes, pilot return projects, bus services, Open Cities initiatives, etc.

UNHCR, OHR and a number of other institutions played a crucial role in adopting the legal framework which would enable restitution of property to take place and achieve the goals which are the general idea behind it. “The leading role in the implementation of Annex VII belongs to the UNHCR. The UNHCR was directly involved in the development of the strategy for safe return, repatriation and refugees. Particularly at the beginning of the implementation of Annex VII the UNHCR concentrated its efforts on targeted housing reconstruction and on confidence-building measures. Important tasks of the UNHCR were minority returns, returns in the Zone of Separation, effective realisation of the right to return and the right to property. In 2001 the State Commission for Refugees was established and co-chaired by the UNHCR.”

Their part in making the appropriate legal framework has been conception, drafting and eventual adoption of the series of laws that overturned wartime laws on abandoned property. The laws that were adopted brought local law in conformity with international standards such as the Law on Cessation of Application of the Law on Abandoned Apartments (BiH), Law on Cessation of the Application of the Law on Abandoned Apartments (Republic of Srpska), Law on Cessation of Application of the Law on Temporary Abandoned Real Property Owned by the Citizens (Bosnia and Herzegovina). These laws were adopted only 3 years after Dayton, and it is clear that it was the international community’s involvement that enabled their passing and established the legal framework that did not obstruct the restitution. However, the case of BiH shows how the legal provision although seemingly neutral can impede the restitution process.

5.2. Enforcement of Property Restitution in BiH

In the next part some attempts of the local authorities to prevent minority return and the importance of the international community’s role will be explored.

After the signing of the Dayton Accords the authorities in BiH passed the Abandonment Laws and Apartment Purchase Law which in combination would almost immediately lead to the pre-emption of the rights of pre-war holders, as the first law enabled reallocation to new occupancy rights holders and the second allowed the purchase of the apartments. The BiH Human Rights Chamber noted that the effect of the abandoned property regulations was “to rein-

53 Law on Abandoned Apartments, Official Gazette of Federation of Bosnia and Herzegovina no. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95, 33/95 and Law on the Use of Abandoned Property, Official Gazette of Republic of Srpska no. 3/96.
force the ethnic cleansing that occurred during the war.”

Following this in 1998 the aforementioned Laws on Cessation were adopted. The influence of the international community was strengthened by the provisions of Annex IV which provided for the direct applicability of the ECHR and Bonn powers given to the OHR.

The right to apartment restitution in the Federation was restricted in two ways. First, refugees and displaced persons, for the purposes of the right to return under Annex VII, were defined as those who could prove that they had left their apartment for reasons related to the conflict. Failure to prove this disqualified claimants from refugee or displaced person status, excluding them from the Annex VII right to return to their apartments. This left broad discretion to the local housing authorities throughout the Federation, who were quickly accused of abusing it to block restitution of apartments. Second, in the case of apartments previously declared abandoned under the Law on Abandoned Apartments, the property laws balanced the rights of any claimant against the property interests acquired by subsequent users. While claimants were entitled to reinstatement of their occupancy rights, their claims to the specific apartments they occupied before the war were not automatically superior and they could be left with a right only to other unspecified apartments and the decision was once again left to the discretion of the housing authorities. The conditions were abandoned by the international community through the OHR since it was clear that they would prevent the return of a number of refugees and displaced persons. The OHR adopted provisions that cancelled all new occupancy rights to abandoned apartments ex lege and demoted their holders to temporary occupants as well as by establishing a conclusive presumption that all occupancy right holders who left their apartments between the outbreak of hostilities and the entry into force of the property laws were refugees and displaced persons under Annex VII and, therefore, entitled to return to their homes.

The procedure established in BiH was as follows: local housing authorities were given the responsibility to receive the claims, establish the relevant facts and render a decision within

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57 Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No. CH/98/659: Pletilić et al. against Republika Srpska 204 (Sept. 10, 1999).
59 Law on Cessation of Application of the Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, Art. 3 (2).
60 Law on Cessation of Application of the Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, Art. 3 (5).
a 30-days period. The authorities needed first to establish whether the claimants had the right to restitution which in case of BiH was not a problem since records were mostly preserved. Then they needed to determine the status and rights of any temporary occupant. Temporary occupants without formal allocation decisions were considered illegal users and required to vacate the property within fifteen days with no right to alternative accommodation. The rights of legal users in possession of allocation decisions depended on whether they had independent means of providing for their own housing needs, in accordance with criteria set out in the property laws. If so, they were considered double or multiple occupants and also given fifteen days to vacate the property with no right to alternative accommodation. Temporary occupants unable to meet their own housing needs were given ninety days to vacate the property and had the right to look to the housing authorities in the municipality where they were displaced for alternative accommodation.

Upon issuance of a positive decision, an appeal did not suspend enforcement. As a rule, enforcement could not proceed until the deadline to vacate the property voluntarily had expired and the claimant subsequently requested enforcement. Exceptionally, the housing authorities were required to initiate enforcement proceedings ex officio against multiple occupants.

Another measure used by Entities, but especially by the Federation, that was aimed at obstructing the minority return was that of physical return condition. Although virtually all pre-war occupancy right holders were now eligible to claim restitution of their apartments as a matter of right, the preservation of both their claim and all their subsequent rights to the apartment (including purchase in the Federation) remained contingent upon the condition of physical return. Claimants who did not actively exercise the right of return by physically reoccupying and using their apartments had thereby forfeited both the right and the apartment. The terms of this requirement closely tracked the pre-conflict procedures for cancelling occupancy rights under the use requirement, specifying a nearly identical list of grounds justifying inaction and providing for cancellation through judicial proceedings. A restriction made by the OHR, the

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63 Law on Cessation of Application of the Law on Abandoned Apartments, Official Gazette FBiH, No. 11/98, Art. 3 (3).
64 Law on Cessation of Application of the Law on Abandoned Apartments, Official Gazette of FBiH, No. 11/98, Art. 3 (3) 11.
65 Law on Cessation of Application of the Law on Abandoned Apartments, Official Gazette of FBiH, No. 11/98, Art. 3 (5).
69 Williams, NYU JILP2006, Volume 37 No. 3, 513.
so called two-year rule, applicable only in Federation, was envisioned to close the restitution gap between Entities as it was believed that displaced persons were recovering their pre-war rights in Federation while at the same time retaining their temporary holder rights on property in Republic of Srpska. However, the rule proved to work against the minority return as their houses were primarily targeted for unannounced inspections. Furthermore, “by linking the right to restitution to the actual use of the apartment, these conditions can be assessed as discriminatory and as contradictory to the right to voluntary return.”

Under the influence of the international community the practice of inspections was abandoned and the two-year rule followed.

The illegal practice that managed to evade the international community was that of failure to provide alternative accommodation. The primary obligation was on the local authorities. When it became clear that they were not dealing with the problem the international community took it upon itself to provide alternative accommodation, while the funding was supposed to be left to local authorities. However, in the end, it proved the best solution to provide the holders of this right with the lump sums necessary for finding an alternative accommodation. Once it became an express legal obligation to conduct all evictions within the legal deadlines, housing authorities managed to almost overnight find a solution to alternative accommodation.\footnote{Directorate-General for Internal Policies, Private Properties Issues following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo, Study, (2010) 74.}

Finally, under the New Strategic Direction (NSD), “a new policy direction for the Property Law Implementation Plan” a deadline for completing the restitution process was set by December 2003.\footnote{Williams, NYU JILP 2006, Volume 37 No. 3, 539.} This was a departure from the previous avoidance of committing to a strict date. Implementation rates rose rapidly throughout Bosnia in the wake of the NSD, and lagging municipalities and regions raced to catch up with those further ahead. The most striking progress was made in the Republic of Srpska, which overtook the Federation in August 2003. This achievement resulted from improvement in Republic of Srpska municipalities previously seen as obstructionist black holes, such as Bijeljina, which leapt from 49 percent implementation at the end of 2002 to 91 percent one year later, achieving about twice the average national rate during this time period. A number of previously hard-line Croat-controlled municipalities also experienced rapid progress during the same period. As a result, the bulk of municipalities had largely completed PLIP, which “was conceived in October 1999 as a means of gathering the whole range of property-related activities of the different agencies into a coherent, goal-
oriented strategy for securing implementation of the new laws, designed to ensure that all citizens of Bosnia and Herzegovina who were dispossessed of their property in the course of the conflict can repossess it”73 by late 2003. The remaining laggard municipalities could not be ascribed to any single ethnic group in Bosnia.74

The international community now follows an exit strategy in BiH, which is highly dangerous. The responsibility for these issues was transferred to the national authorities of BiH. In 2004 in his 25th Report the High Representative stated that the principal targets for the transition to domestic leadership according to Annex VII have been achieved and the transfer of its Annex VII responsibilities to BiH authorities was prepared, which demanded an institutional reorganisation.75 In September 2003 the Ministry for Human Rights and Refugees was indicated as the main policy-making and supervisory body for Annex VII issues. However, after 2003 statistics show a decline in the number of returns. The exit strategy is also applied to the financing of these issues. It is very questionable whether the national institutions are able to play the same successful role in the process of returns and restitution. The Union of Associations of refugees, displaced persons and returnees calls for a more intensive involvement of the international community, estimating that the local authorities are not capable of fulfilling this commitment. This assessment is based on the practice of the several past years. Albeit the questions of competences, organisational preconditions or political will of the national authorities being in charge of this issue, it is evident that the state BiH is not able to finance the return and restitution, i.e. the compensation. The national authorities will continue to depend on international financial support in terms of donations, grants or debts towards international financial institutions, the latter resulting in consequences for the national economy.76

Experience in BiH shows a variety of problems that may arise from the minority return and that even the policies that were envisioned to promote return can be misused for actually discouraging the return. It also shows the importance of involvement of international community and the variety and extent to which it must be involved in cases of complex relations between the members of different ethnic groups. In the case of BiH the constant involvement and broad range of authorities given to the international community enabled the successful completion of the restitution process. Even if in the settlement of similar disputes in other regions the international community is not given the mandate to act in the process, as seems to be likely in the case of the Southern Caucasus states where the international community is not united enough or does not have enough leverage on all sides, some sort of independent body

74 Williams, NYU ILP 2006, Volume 37 No. 3, 540-541.
75 Available at http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=32024.
that would supervise the restitution process, especially in the cases regarding the respective minorities, should be established.

6. Summary

The right to restitution of property is now widely accepted as an independent human right, it has found its place in a vast number of international treaties. Although it was previously considered that restitution is linked to return, nowadays it is accepted that it is in fact a separate right and is not contingent on the return. However, the right to restitution cannot be exercised until some political conditions are met. It is first and foremost necessary that peace is established. But as seen in numerous cases peace itself is not enough as the restitution might trigger new conflicts. Restitution of the property must be agreed upon by all sides of the conflict. Furthermore, it is recommended that in settling the issue of property restitution the Pinheiro Principles are applied, if not directly then by incorporation of some of the most important principles into the legal document regarding the issue, since the practice has shown that without these basic principles restitution cannot be successfully conducted. Finally, it is useful to keep the experience from BiH in mind when regulating the restitution process, especially in cases of minority return as it shows the extent and possibility of obstacles that may appear in the process.