



USAID
FROM THE AMERICAN PEOPLE

LIBYA – LEGISLATING PROPERTY RESTITUTION: THE DRAFT LAW CONCERNING PROPERTIES TRANSFERRED TO THE STATE, PER LAW NO. 4 OF 1978

JUNE 2013

This publication was produced for review by the United States Agency for International Development. It was produced by Tetra Tech and Landesa.

Prepared for the United States Agency for International Development, USAID Contract Number EPP-I-00-06-00008-00, Task 6.9, Supporting the Justice and Security Sector through Property Rights in Libya, under the Property Rights and Resource Governance Program (PRRGP) Task Order, under the Prosperity, Livelihoods, and Conserving Ecosystems (PLACE) Indefinite Quantity Contract.

Implemented by:

Tetra Tech
P.O. Box 1397
Burlington, VT 05402

Contact Persons:

Sebastien Pennes
Senior Technical Advisor/Manager
sebastien.pennes@tetrattech.com

Kristin Blodgett
Project Manager
kristin.blodgett@tetrattech.com

Authors: Renée Giovarelli, Deborah Espinosa, and Reem Gaafar, Landesa

LIBYA – LEGISLATING PROPERTY RESTITUTION AND THE DRAFT LAW CONCERNING PROPERTIES TRANSFERRED TO THE STATE, PER LAW NO. 4 OF 1978

JULY 2013

DISCLAIMER

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

TABLE OF CONTENTS

TABLE OF CONTENTS	I
ACRONYMS AND ABBREVIATIONS	II
EXECUTIVE SUMMARY	I
1.0 INTRODUCTION	6
2.0 BACKGROUND	7
2.1 POLICY AND LEGAL FRAMEWORK	7
3.0 OVERVIEW OF GLOBAL EXPERIENCE ON RESTITUTION	9
3.1 UNITED NATIONS “PINHEIRO PRINCIPLES”	9
3.2 CENTRAL & EASTERN EUROPE (CEE)	10
3.3 SOUTH AFRICA.....	12
3.4 IRAQ 13	
3.5 COLOMBIA 15	
3.6 GENDER EQUALITY IN RESTITUTION PROGRAMS.....	16
4.0 THE DRAFT LAW & KEY CONSIDERATIONS FOR PROPERTY RESTITUTION LAWS	18
4.1 GENERAL COMMENTS ON LIBYA’S DRAFT LAW	18
4.2 COMMENTS RELATED TO FUNDAMENTAL RESTITUTION PRINCIPLES	20
4.2.1 Identifying or Creating Institutions Responsible for the Restitution Program ...	20
4.2.2 Compensation vs. restitution	21
4.2.3 IDENTIFICATION OF time period (during which seizure occurred)	22
4.2.4 eligible restitution claimants	22
4.2.4 Form of compensation	23
4.2.5 Limits on amount of land AND OTHER PROPERTY eligible for compensation/ restitution	24
4.2.6 land remaining in state ownership	24
4.3 COMMENTS RELATED TO RESTITUTION PROCESSES.....	25
4.3.1 Public awareness of and participation in restitution program	25
4.3.2 Prescribing a Window of Time to Lodge Claims	26
4.3.3 Principles and procedure for lodging claims	26
4.3.4 Processing of claims.....	27
4.3.5 Valuation of seized property and determination of compensation	29
4.3.6 Dispute Resolution and Enforcement	29
4.3.7 Timely registration and documentation of new ownership	31
4.4 ADDITIONAL CONSIDERATIONS FOR LIBYA.....	31
4.4.1 Current Occupants.....	31
4.4.2 Equal Treatment for Men and Women	33
4.4.3 Restitution of Communal Property	34
NEXT STEPS	35
REFERENCES	37
ANNEX 1: DRAFT LAW NO. () OF 2013 DETERMINING CERTAIN PROVISIONS CONCERNING THE PROPERTIES TRANSFERRED TO THE STATE PER LAW NO. 4 OF 1978 AS AMENDED	43
ANNEX 2: PINHEIRO PRINCIPLES	46

ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
CEDAW	Convention on the Elimination of Discrimination Against Women
CEE	Central and Eastern Europe
CPA	Iraq Coalition Provisional Authority
CRPC	Bosnia and Herzegovina Commission on Real Property Claims
CRRPD	Iraq Commission for the Resolution of Real Property Disputes
CSO	Civil Society Organization
DRL	Democracy Rights and Labor
GoL	Government of Libya
HLP	Housing, Land Tenure, and Property Rights
INL	Bureau of International Narcotics and Law Enforcement
PCC	Iraq Property Claims Commission
PLACE	Prosperity, Livelihoods, and Conserving Ecosystems
PRRGP	Property Rights and Resource Governance Program
SOW	Statement of Work
SJSSPR	Supporting the Justice and Security Sector through Property Rights
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

This report provides a legal review of “Draft Law No. [no number] determining certain provisions concerning properties transferred to the state, per Law No. 4 of 1978” (“Draft Law”), which the Ministry of Justice of the Government of Libya (GoL) issued in March 2013. This report is not limited to a discussion of the Draft Law, but also highlights key issues that any restitution the Law would need to address, based on social equity and international best practices related to property restitution, including compensation. The report was drafted by a team of attorneys from Landesa, a sub-contractor of Tetra Tech, for a USAID-supported program titled, “Supporting the Justice and Security Sector through Property Rights” (SJSSPR) under the Property Rights and Resource Governance Program (PRRGP) Task Order, under the Prosperity, Livelihoods, and Conserving Ecosystems (PLACE) Indefinite Quantity Contract.

Libyans have experienced a series of property reforms dating back to Qadhafi’s initial rise to power in 1969. The promulgation of several property laws over the following two decades placed significant limitations on the amount of property to which Libyans could hold rights and led to waves of seizures and redistribution, culminating in the legal abolishment of private property ownership in 1986. Libyans were left with transferable use rights to property.

Law No. 4 of 1978 is frequently cited as the legal basis for property redistribution during the Qadhafi era. That law reduced property ownership to a single dwelling per family, declared housing a right of every Libyan citizen, and allowed expropriations of property by the state for the public good, providing a legal basis for the widespread seizure of private property that followed. Although much of the seized property was distributed to the politically connected or used for state enterprises, a significant amount was redistributed to the poor and landless for housing as well as commercial use. The rights of these current occupants, who would become displaced if the Draft Law strictly favored restitution of lost property, must be addressed in the restitution process; one Libyan lawyer estimates that restitution of all seized property would lead to the displacement of up to three-fourths of Tripoli’s population.

Consistent with the Statement of Work (SOW), this analysis is limited in depth for two reasons: (1) the report is based solely on desk research; and (2) the narrow timeframe in which the report had to be completed. This report presents background on events that led the GoL to consider a property restitution program, followed by an overview of global experiences with property restitution in regions and countries such as Central and Eastern Europe as well as South Africa, Iraq, and Colombia. The report then provides general comments on the Draft Law in its current state, before providing comments and recommendations specific to restitution principles and processes, summarized at the end of this section. The report concludes with policy recommendations and suggested next steps to increase adherence to relevant U.N. Pinheiro Principles.

DRAFT LAW LIMITATIONS

The analysis of the Draft Law identified a number of opportunities for it to be strengthened through further clarification and additions to the current text. Omissions include:

1. Guiding principles and overall objectives
2. A legal framework to ensure efficient and timely registration of documents
3. Provisions to ensure that women are not disadvantaged by the restitution process and are able to participate equally; identify the institutions that will be responsible for the management and implementation of the restitution program

4. Sufficient provisions to protect the rights of the current occupants of seized property.
5. A clear valuation methodology and specifics regarding the necessary level of compensation.
6. Clarity regarding whether compensation or restitution will be available for lost property under a variety of different circumstances. Although the Draft Law recognizes the need for compensation rather than restitution in limited instances, in its current form it omits consideration of the range of circumstances under which compensation may be preferable.
7. A process for filing and processing restitution claims

Recommendations for strengthening the Draft Law are outlined in accordance with relevant Pinheiro Principles below. Approved in 2005 by the UN Sub-Commission on the Protection and Promotion of Human Rights, the Pinheiro Principles represent the international community's most recent effort to create international standards for the restitution of property rights (See Section 3.1).

POLICY RECOMMENDATIONS

to ensure that law assists all relevant actors (Principle 1):

1. Integrate provisions to protect the rights of the current occupants of seized property.

to protect right to housing and property institution (Principle 2):

2. Specify whether compensation or restitution will be available for lost property under a variety of different circumstances.
3. Clarify the process for filing restitution claims, including the process the responsible government agencies will follow in processing claims.
4. Add a statement to the Draft Law articulating the specific government objectives that the restitution program is designed to achieve
5. Add an article clarifying that the law is limited to restitution for seizures that occurred under Law No. 4 of 1978, including specific dates, as amended;

to protect the right to equality between men and women (Principle 4)

6. Include provisions guaranteeing women's rights to participate in and benefit from the restitution program, including recognizing their eligibility as heirs. Prioritize claims of women-headed households. Consider including language in the law requiring joint titling, including both men's names and women's names on new documents, recognizing that this may be a cultural shift.
7. Amend Article 14, which provides for criminal and civil penalties when a person violates Article 13 related to disposal or taxation of properties to be restituted, to include acts of fraud and obstruction of the performance of official duties consistent with the law; and

National procedures, institutions and mechanisms (12)

8. Add an article that provides the responsible institutions a sufficient budget to fulfill their statutory mandates.
9. Include in the law the basic steps for the relevant government institutions to follow upon receipt of a claim. This might include notice provisions, investigation steps, burden of proof, and provisions for receiving claims from Libyans living abroad and periodic monitoring, review, and public reporting of the results as opportunities to make mid-course adjustments.

10. Include in the law the specific entity that is responsible for deciding claims, whether that entity(ies) is newly created or an existing institution and administrative only or a combination of administrative and judicial.

to ensure accessibility of restitution claims procedures (Principle 13)

11. Specify a time period or category of seizures to which it will apply unless the Libyan government intends to address restitution claims arising from any and all contexts
12. Clarify the categories of heirs who qualify for restitution, whether and how multiple heirs must divide rights to restored property or compensation
13. Define limits on the amount of land and property eligible for restitution. If a limit is instituted, the law will also need to include an enforcement mechanism to ensure compliance. A size limit is generally less complicated than a limit based on the value of the property, as it avoids the issue of valuation. However, there may also be some benefit to a value limit, depending on the property market and price disparities in different regions/areas.
14. Specify claims. Include in the law the length of the claims window, balancing the government's need to expedite the process with the degree of difficulty claimants may experience in accessing information about their restitution rights, accessing the necessary forms and institutions, finding any relevant evidence to support their claim, etc.
15. Include provisions addressing the rights of current occupants of property when former owners do not apply for restitution, which may include processes for the conversion of use rights into ownership.
16. Provide greater detail and specificity regarding the institution responsible for managing the restitution process
17. Set a deadline in the law (i.e., within a specific amount of time from an unappealed decision to reconstitute property) by which the government must register restituted property. Guarantee that such registration and issuance of documents is at no cost to newly restituted owners.
18. Specify a period of time or category of seizures for which former owners will be able to make claims for restitution under this law.
19. Consider whether to institute limits on the amount of land and other property for which one owner can submit a claim for restitution and, if they decide to do so, include the limit in the law.

to clarify legislative matters (Principle 18)

20. Specifically delineate the rights of heirs
21. Address "special categories" of former owners whose rights and process may differ, such as non-citizens and the former owners and users of communal land.
22. Clarify whether only physical persons are eligible or whether legal entities such as businesses that owned seized property are also eligible.
23. Clearly define the categories of claimants, including defining "former owners", "heirs", and "current occupants," and articulate their restitution rights.
24. Clarify the meaning of Article 12 in the Draft Law.
25. Add an article that defines all key terms
26. Narrow the scope of Article 8 on "Easements" to allow for continuation of easements that are necessary for ingress and egress and for public utilities and other public rights of way
27. Include in the law rights to claim communal land and other property and the related eligibility requirements, principles, and processes.

to promote enforcement of restitution decisions and judgments (Principle 20)

28. Include the right to appeal a decision of both administrative and judicial bodies. If applicable, include in the law requirements for other government entities to enforce decisions of these newly established bodies.
29. Specify and include provisions for dispute resolution and enforcement
30. Include a framework for the resolution of competing claims from multiple rights-holders, to include some form of restitution for all parties determined to have legitimate rights.

to protect the right to compensation (Principle 21)

31. Include a clear compensation framework, which includes the type of compensation that will be available as well as the time frame in which compensation will be paid and how the amount of compensation will be determined.
32. Provide a greater amount of detail and a higher level of specificity with regard to the properties that will be retained by the state, including how such properties will be determined and a compensation framework for the former owners of such property.
33. Specify a process for monetary or in-kind compensation where return is not feasible or where the owner prefers compensation.
34. The amount of land to be restituted, and the amount of land controlled by the GoL that will not be restituted must be considered as well for in-kind compensation. If the government chooses restitution and in kind compensation, a key consideration will be the availability of a sufficient amount of property to satisfy the potential claims. If property is retained by the government, they may need to make available enough property of similar value for claimants.

RECOMMENDED ACTIONS

1. **Promote public awareness of and participation in the restitution program through public awareness campaigns.** Identifying the government agency or agencies responsible for developing and implementing robust public information campaigns, utilizing existing religious, civil society and other networks, in languages the population will understand, with particular attention to ensuring that women and vulnerable groups have the appropriate means and information to participate effectively
2. **Determine the legal status and rights of the varying categories of current occupants of property,** such as those who obtained directly from the state, including those who paid mortgages to the state, and those who acquired the property from the government-assigned occupant, such as third-party purchasers and tenants.
3. **Consider developing a standardized valuation methodology and include as a member of the sub-committee a valuation expert.** The valuation of property seized is a critical step in the restitution process. If valuation is done poorly and without transparency, the legitimacy of the program is jeopardized.
4. **Consider specialized or expert judges assigned to deal only with restitution cases.**
5. **Make available a portion of land in exchange for the actual claimed land** and provide incentives for voluntarily accepting that land in the case of conflicting-law issues. The details are best left to regulations, but the law could direct the creation of those regulations and include a general policy statement to this effect.
6. **Identify legal experts who understand the larger context of women's land and property rights in Libya,** and consult with them on possible legislative provisions that can provide for equal rights for men and women.

7. **Train judges.** Many judges are unfamiliar with complicated restitution laws and with related provisions in other laws, such as the inheritance laws. The training of judges to specialize in the adjudication of such cases can speed the process.

1.0 INTRODUCTION

This report is a deliverable under the USAID-supported program with the Government of Libya (GoL) called, “Supporting the Justice and Security Sector through Property Rights” (SJSSPR) under the Property Rights and Resource Governance Program (PRRGP) Task Order, under the Prosperity, Livelihoods, and Conserving Ecosystems (PLACE) Indefinite Quantity Contract. SJSSPR has four objectives:

1. Gain a better understanding of the local security and justice dynamics related to property rights, and on possible interventions in order to inform Libyan efforts and United States Government (USG) programming;
2. Support the efforts of local actors to understand and respond better to housing, land, and property disputes. In addition, support dispute resolution in a manner that could facilitate its legalization/formalization, clarify the role of various formal and informal justice and security actors, and help strengthen the legitimacy of and support provided by various levels of the Government of Libya (GoL);
3. Work with Libyan actors to identify and analyze critical and systematic housing, land, and property issues and other related critical grievances, including potential solutions that require discussion and/or action at the local, regional, and national levels; and
4. Ensure significant issues uncovered during the work of the project, including those related to gender and minorities, are discussed, debated, and are brought to requisite level of government, including through coordination with related USAID Democracy, Rights and Labor and Bureau of International Narcotics and Law Enforcement programming.

To advance these objectives, SJSSPR has two components: (1) conflict prevention and management; and (2) land policy dialogue process. This report is an activity under the second component.

During the early decades of Colonel Muammar Qadhafi’s 42-year rule, uncompensated expropriations and seizures were common followed by the implementation of land redistribution programs. A series of successive property laws beginning in 1978 culminated in the abolishment of the right to private property ownership in 1986.

Following Qadhafi’s overthrow, tens of thousands of Libyans whose land had been confiscated by the government began calling for its return. In March 2013, the Ministry of Justice of the GoL issued a “Draft Law No. [no number] determining certain provisions concerning properties transferred to the state, per Law No. 4 of 1978” (Draft Law) aimed at returning confiscated land to former owners.

Consistent with the SOW, this report provides a review of the Draft Law based on social equity and international best practices related to land restitution, including compensation. Rather than an article by article analysis of the Draft Law, the scope of this report is as follows:

- Review of the Draft Law from a social equity standpoint. The review will focus on compensation and restitution issues arising from earlier government seizures of property in Libya.
- Review of the Draft Law for consistency with international best practices regarding compensation and restitution of land and property rights, and related gender considerations.
- General recommendations based on international best practices. The report will draw examples from countries which have undergone similar transitions to that currently taking place in Libya, as well as countries with a similar plurality of legal regimes (tribal, religious/shari’a, and formal law).

2.0 BACKGROUND

Together with other transitional justice processes, the restitution of property expropriated or otherwise seized¹ by the state is a means by which a political community takes responsibility for its past misdeeds, and establishes the legitimacy of the new democracy (Stan 2006).

The need for restitution in Libya arises from the implementation of a series of legislative reforms that resulted in mass dispossession of property and culminated in the abolition of all private property ownership. Central to the Qadhafi regime’s “socialist” policies was the nationalization of key industries and the redistribution of property as a means of limiting the accumulation of private wealth and creating more equitable income distribution. In addition to the declared objective of economic justice, the regime’s selective enforcement of the laws served to strengthen Qadhafi’s power as the state was legally empowered to seize the property of political opponents while the regime could reward loyalists with the seized property.

2.1 POLICY AND LEGAL FRAMEWORK

Libya’s 1969 Constitutional Declaration, the country’s governing legal document throughout Qadhafi’s rule, declares public property the basis of development in society and protects private property rights only to the extent that they are deemed non-exploitative (art. 8).

The Government directed its first wave of seizures at foreign-owned farms. Shortly after the 1969 revolution that brought Qadhafi to power, the Government confiscated all Italian-owned farms, which were then redistributed in smaller plots to Libyans, although some land was retained for state farming enterprises. Shortly after, the Government declared all unregistered or unused land public property by Law No. 142 of 1970, which limited the authority of some tribal leaders by bringing their land under the ownership of the state (UNHCR 2012).

Three pieces of legislation passed between 1977 and 1986 significantly restricted private property rights. Law No. 38 of 1977 set strict limits on the amount of property each Libyan could own, allowing only ownership of (art. 3):

- The residential property on which he or she resided;
- The commercial property used for a business, which was the owner’s primary source of income provided he or she personally worked on the property; and
- An amount of agricultural land to be determined by the Minister of Agriculture.

Shift in Policy towards Private Property

The 2011 Draft Constitutional Declaration, Libya’s governing legal document in the interim period until the promulgation of a new constitution, guarantees the right of private property, declares property inviolable, and prohibits the prevention of an owner’s disposal of his or her property, within the limits of the law. (Art. 8, 16).

Law No. 38 was soon followed by Law No. 4 of 1978, also known as the “Real Estate Law,” which limited

¹ Although it is clear that the Qadhafi regime “expropriated” property, this report uses the more general term “seized” because the literature is unclear regarding whether the expropriation power was invoked in all instances. In addition, property was nationalized, which likely was based on a separate legal authority.

private ownership to one dwelling per family. That law also declared housing a right of every Libyan, abolished tenancy, and allowed expropriations for the public good, providing a legal basis for the widespread seizures of private property that would take place in the following years. Finally, Law No. 8 of 1986 abolished private property ownership, leaving Libyans with only transferable use rights to the property that they occupied (UNHCR 2012; ECA 2010).

The full extent of the Qadhafi regime's property seizures remains unknown and the task of restituting or compensating former owners is made more complicated by the destruction of many of the original records in a 1982 fire. Further complicating matters in Libya, much of the seized property, particularly housing, was redistributed to landless Libyans who have now been living on the property for decades and may also have a legal claim to the property given their lawfully acquired, and sometimes even formally registered, use rights. Some of the current occupants reportedly made regular payments, frequently referred to as "mortgages" in the existing literature, to the government during their time of occupation, while others are third parties who legally acquired use rights to the property, through purchase, gift, or otherwise, from the secondary user (UNHCR 2012). One Libyan lawyer estimates that as much of three-fourths of Tripoli's population is currently living in or using seized property, meaning as many as 1.5 million people could be displaced in Tripoli alone if all property was simply returned to former owners. The rights and needs of lawful occupants cannot be overlooked in an effort to remedy the damage to the original owners (Worth 2012; UNHCR 2012).

Further complicating the situation, measures to compensate those whose property was taken as a result of the implementation of the 1978 Real Estate law, government expropriations, and the nationalization of certain industries were underway at the time of the revolution, although those who received compensation were frequently unsatisfied with the amount, reported to be 25% of market value on average (Williams 2012; UNHCR 2012).

The 2011 Draft Constitutional Declaration, Libya's governing legal document in the interim period until the promulgation of a new constitution, guarantees the right of private property, declares property inviolable, and prohibits the prevention of an owner's disposal of his or her property, within the limits of the law (arts. 8, 16).

3.0 OVERVIEW OF GLOBAL EXPERIENCE ON RESTITUTION

This section provides an overview of the global experience on land restitution. It starts with a brief introduction to the United Nations “Pinheiro Principles,” which are restitution program guidelines for country implementers based on international law. The section next turns to regions and countries with significant experience returning land and property seized by governments for various purposes. The experience of countries in Central and Eastern Europe are highlighted as well as those of South Africa and Iraq. Colombia recently began the process of restituting land and also is included. This section concludes with a discussion of gender differences that need to be considered so that women and men equally participate in and benefit from land restitution programs.

3.1 UNITED NATIONS “PINHEIRO PRINCIPLES”

Approved in 2005 by the UN Sub-Commission on the Protection and Promotion of Human Rights, the Pinheiro Principles represent the international community’s most recent effort to create international standards for the restitution of property rights. Though they are based on existing international law, the Principles serve only as guidelines for the development of policy and legal frameworks and are not legally binding on countries (Handbook 2007).

Sections I and II of the Principles set out their broad scope and application and establish strong rights for refugees and displaced persons to restitution of property of which they have been arbitrarily or unlawfully deprived. Sections III and IV describe the guiding principles and rights, which should be incorporated into the development and implementation of any restitution program, namely: the right to non-discrimination; the right to equality between men and women; the right to be protected from displacement; the right to privacy and respect for the home; the right to peaceful enjoyment of possessions; the right to adequate housing; the right to freedom of movement; and the right to voluntary return in safety and dignity. Section V establishes legal, policy, procedural and institutional implementation mechanisms, providing guidelines on the development of national institutions, appropriate consultation in decision-making, development of legislative measures, and addressing the rights of secondary occupants. Section VI describes the role of the international community in supporting and facilitating restitution programs (Principles 3-10, 12, 14, 17, 18).

The Pinheiro Principles strongly support restitution, defined as “the return to and re-assertion of control over one’s *original home, land or property*”, over compensation for lost property in most cases, reflecting a shift in the approach to displacement on the part of governments and NGOs in recent decades (Handbook 2007). However, the Principles acknowledge that under some circumstances, “a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice” (Principle 21.2). Compensation may be monetary or in-kind, but is generally discouraged under the Principles; compensation should only be used when restitution is not factually possible, when the injured party accepts compensation in lieu of restitution, or when it is provided for under the terms of a negotiated peace agreement. (Principle 21.1, 21.2).

This approach has been criticized for its assumption that restitution is always preferable to compensation, with some critics noting the danger that even “well-intentioned efforts by Western actors to transplant a uniform vision of law to promote development and the rule of law can have unforeseen, deleterious effects” (Ballard 2010), particularly as such an approach to restitution fails to consider pertinent political, social, and economic considerations that may render compensation more beneficial or effective. For example, where restitution would require claimants to return to regions where their families have not lived for an extended period of time, and where they may face hostility from their neighbors, compensation in the form of alternative land may be preferable to restitution. Restitution also has the potential to intensify social instability and upheaval as it requires the displacement of any current occupants, who often played no role in the displacement of the original owners and are occupying the property in good faith (Ballard 2010).

See Annex 2 for a chart of the Pinheiro Principles, brief elaborations, and country examples.

3.2 CENTRAL & EASTERN EUROPE (CEE)

Hungary, Bulgaria, Estonia, Lithuania, the former Czechoslovakia, East Germany, and much later Romania (2001) adopted legislation to reconstitute small businesses and housing² that had been nationalized by the former communist governments. The main common problems related to this restitution were:

- Belated adoption of property restitution policies;
- Unclear and/or unpredictable policy on property restitution;
- Weak institutional capacity to implement the policy;
- The emergence of conflicting rights in the same property; and
- Ineffective compensation systems (Stefan et. al., 2010).

The process for restitution, and the difficulty, varied by country and within countries depending on what had occurred in the interim. The 1990 Czechoslovak Law on Relieving the Consequences of Property Injustice returned 70,000 small businesses and houses nationalized from 1955 to 1961. Confiscated property could be returned in its original form (restitution) or, instead of the original property, claimants could accept financial compensation or shares in enterprises intended for privatization (Stan 2006).

The German unification treaty specified that property claims by East German home owners were solved under the principle “return instead of compensation.” The principle was criticized because residents of single-family houses were evicted as former owners and their descendants had their rights reinstated. Critics alleged that often claimants were descendants of original owners and had never actually lived in those properties but sought to renovate and resell them (Stan 2006).

For agricultural land, all of the CEE countries that eventually joined the European Union,³ except Poland and Hungary, engaged in some form of restitution of land rights to former owners. The restitution programs can be divided into three categories: (1) those that re-established the ownership rights of individuals whose land had not been expropriated and also restituted a much smaller portion of land that had been expropriated by the State (2) countries that compensated former owners and provided or sold land to former farm workers; and (3) countries that only restituted land to former owners (Giovarelli and Bledsoe 2001).

In the Czech Republic, individual land ownership was not generally abolished, but the use rights were given to the state and cooperative farms. Rather than restituting land (transfer of ownership) the primacy of

² As well as agricultural land, which is addressed separately.

³ Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.

ownership rights over users' rights was re-established. Where the State had expropriated land, they attempted to reconstitute it to its former owner, or the owner could receive compensation. All restitution was made from state property and governed by the Land Fund Agency (Giovarelli and Bledsoe 2001).

Hungary's post-communist land reform process was based on compensation of former owners, rather than restitution, with landless workers on state farms and cooperatives also receiving small land grants. Fifty percent of the country's land area was subject to compensation claims, and over 2.1 million new land units were created during this process (FAO 2013).

Estonia, Latvia, Lithuania, Romania, and Bulgaria restituted land to former owners where physically possible. Where not physically possible, replacement land was provided or monetary compensation. In these countries, land had been formally expropriated from its existing owners during the collectivization process. Most of the owners who received land through restitution did not farm the land (i.e., did not work on the collectives farming the land) restituted to them (Giovarelli and Bledsoe 2001).

Multiple heirs in all of the CEE countries that have chosen to reconstitute land have created a serious co-owner problem, which in many cases further divided the pre-1940 farming structure into very small land units, sometimes without access, except through another's private property. The process was complicated due to the large number of claims filed. Additionally, the rural infrastructure became derelict during communism: new boundaries had to be drawn and roads, electric and water services restructured, all of which dragged out the restitution process. Further complicating matters, during the reform process many initial claims were withdrawn when city dwellers realized that farming necessitated moving to the countryside, and taking up what at the time appeared to be an unprofitable enterprise. No functioning land market would allow land recipients to sell the land (Giovarelli and Bledsoe 2001).

In five of the seven countries of the Balkans (Slovenia, Croatia, Serbia, Montenegro and Macedonia), former owners and their heirs could receive, through restitution, the state agricultural land that was nationalized without payment of compensation to the landowners between 1945 and 1991. Where restitution was not possible, compensation was paid. In Slovenia and Macedonia the land restitution process has been almost finalized while it is still ongoing in Croatia, Serbia and Montenegro (FAO 2013).

Serbia restituted land in stages. In the 1992 Law on Land Restitution, agricultural land expropriated after 1953 was restituted to the previous owners. When not possible to reconstitute land, claimants were able to take unclaimed state land as compensation. In 2006, the Law on Restitution of Property to Churches came into force. In 2011, the Law on Restitution of Property and Compensation was adopted. The new restitution law addressed land confiscated from private owners during 1945-53. According to the law, nationalized property must be restituted to the former owners or their heirs. Where this is not possible, they have a right to compensation (FAO 2013).

In Kosovo, state agricultural land was privatized at auctions without a parallel option for restitution (FAO 2013).

In Bosnia and Herzegovina, no steps have so far been taken towards either restitution or privatization through sale, and state agricultural land remains under the management of the state entities and is often leased out to corporate farms (FAO 2013).

However, in Bosnia, since around 2000, the majority of displaced people have managed to reclaim their pre-war homes, even in previously hard-line areas. Because the process was so delayed, in the meantime many displaced Bosnians integrated in their new places of residence, in Bosnia or abroad. In these cases, return, for many IDPs, would be tantamount to a "new displacement," and the result is that many reclaimed houses are sold, exchanged, let out, or not used. In fact, the return of younger, middleclass minority people to urban areas is quite rare. Critics claim that the success and failure of restitution is measured in terms of numbers of returnees only, without consideration of the quality of return. In addition, some argue that the political

emphasis on and the resources invested in the process of property restitution have taken place at the expense of the importance of fostering the socio-economic conditions that could make return sustainable. Those who have been unable or unwilling to return to their places of origin sometimes have difficulty in securing new permanent housing and employment solutions in their places of exile and receive little support (Stefansson 2006).

In sum, although approaches in Central and Eastern Europe were quite varied, political decisions in all countries were driven by considerations of equity and justice. Outcomes in these countries varied considerably, some resulting in continued consolidation of agricultural land in large-scale corporate farms and others resulted in the complete breakup of such farms, leading to some concerns about land fragmentation (FAO 2013). There are a few lessons that can be learned from this region's experience:

1. Restitution is always a political decision, necessarily with winners and losers. Clearly stating the policy on property restitution from the outset is critical for "buy in."
2. Restitution laws and regulations need to be clear, predictable, accessible, and capable of being implemented efficiently and fairly.
3. Restitution laws need to clearly and predictably address conflicting rights to the same property

3.3 SOUTH AFRICA

South Africa's land restitution program sought to support the post-apartheid process of reconciliation, reconstruction, and development by returning historical lands or providing equivalent compensation to individuals and communities who were dispossessed of their lands under racially discriminatory laws and practices. In acknowledgement that the South Africa land reform program did not meet all of its goals, in February 2013 the President of South Africa proposed in his *State of the Nation Address* amendments to the Restitution of Land Rights Act, 1994 to re-open the window for lodging restitution claims by people who missed the deadline of 31 December 1998. As of May 2013, those proposed amendments were approved by Cabinet and available on a government website for public comment (Stickler 2012; Jansen 2013; GoSA 2013).

The Restitution of Rights Act of 1994 granted restitution rights for any land dispossession that occurred after 1913, the year of enactment of the racially discriminatory Natives Land Act. Not only did owners have the right of restitution but so did tenants, sharecroppers, trust beneficiaries, and occupants for a continuous period not less than ten years. In addition, the Act also recognized a right to restitution of dispossessed customary property interests, consistent with South Africa's Constitution, which recognizes customary law as one of the "foundation[s] of the South African legal system" (Stickler 2012; GoSA 1994; Sibanda 2010).

Although the Act did not include within its scope non-land property, in policy and practice the loss of housing and other improvements was included as part of the claims (Stickler 2012).

The Act provided three types of relief: (1) restoration of the land lost; (2) compensation in the form of alternative land; or (3) compensation in cash. Although the government was authorized to use its power of expropriation to acquire validly claimed land, it instead opted to use voluntary purchase agreements with current owners at a negotiated price. The government started with urban claimants because they were considered more likely to opt for cash compensation (Stickler 2012).

The Act established a Commission on Restitution of Land Rights, comprised of a chief commissioner and seven regional commissioners. The Act also established a Land Claims Court to adjudicate claims and other land-related issues. Later, to expedite the process, an administrative process was introduced to settle claims,

and referral to the Court was only where there was a contested claim. Of note is that the South African process did not rely on customary or religious institutions to achieve its goals (Stickler 2012).

Results of the program have been mixed. Less than 2% of the estimated number of apartheid evictees filed claims for restitution or compensation, despite an inclusive legal definition of eligible claimants. The great majority of claimants (who totaled approximately 80,000 individuals, families, and community groups) accepted cash compensation, in the amount of an estimated \$596 million USD in lieu of receiving land (Stickler 2012; Lahiff 2010).

A minority of claimants received their land back. Between 1994 and 2011, approximately 2.76 million hectares were transferred from white owners to black claimants (Stickler 2012). Because of the particular challenges of restituting claimants' original lands, fifteen years after the closing date for filing new claims, there are still 2,000 unresolved claims. Many of those outstanding claims are for high-value conservation or agricultural land with political and budgetary challenges (Lahiff 2010; Mavuso 2013; Stickler 2012).

3.4 IRAQ

During the ongoing conflict in Iraq, where tribal customary law plays an important role in resolving blood feuds and tribal warfare and the state maintains only a limited capacity to resolve criminal and civil disputes, Iraq's Property Claims Commission (PCC) (and its predecessors⁴) has been implementing the country's restitution program. And yet, like South Africa, this legally pluralistic society in no way relied on its customary institutions or laws for this program (IOM 2008; Asfura-Heim N.D.).

Since 2004, the PCC has been returning land or providing compensation to persons whose land and other property was seized by the prior Ba'athist regime between 17 July 1968 and 9 April 2003 – corresponding to the period from the date the Ba'athist party seized power to the fall of Baghdad during the US-led invasion.⁵ The Ba'athist regime routinely confiscated, expropriated, or destroyed homes, businesses, and agricultural land to maintain and expand its control over the country. The Shiite, Kurdish, Turkmen, and Assyrian communities were targeted as well as anyone perceived to be an opponent or threat to the regime. Although no undisputed estimates exist for the number of dispossessed and displaced people, “there can be little doubt that displacement was a mass phenomenon during the Ba'athist era” (Van der Auweraert 2007; Asfura-Heim N.D.).

Within the jurisdiction of the PCC is redress for three types of property rights violations: (1) confiscation or seizure of property for political, religious, or ethnic reasons or in relation to ethnic, sectarian or nationalistic displacement; (2) appropriation or seizure of property without consideration, with manifest injustice or in violation of applicable legal rules; and (3) state property confiscated and then allocated to the members of the previous regime without consideration. Redress for destruction of property is not within the PCC's jurisdiction. Enforcement of restitution decisions also are absent from its mandate (Van der Auweraert 2007; IOM 2008).

Persons or their heirs and businesses that were subjected to one of the three types of violations above, regardless of their nationality, religion or ethnicity, have the right to restitution of their former property if the

⁴ Note that first Iraq's Coalition Provisional Authority (CPA) decided in early 2004 to establish the Iraq Property Claims Commission (IPCC) to address the property seizures that arose during the Ba'athist era. After sovereignty transferred to an Iraqi interim government, the Iraqi National Assembly decided in early 2006 to replace the IPCC with the Commission for the Resolution of Real Property Disputes (CRRPD). In 2010, Iraq again changed the name of the responsible institution to “Property Claims Commission,” which inherited all of the CRRPD's mandates, processes, and personnel (Van der Auweraert 2007; Van der Auweraert 2010).

⁵ Information about the program's progress from 2011 onward appears to be unavailable.

property is still in the hands of the Iraqi state, a senior member of the former regime, or “anyone who took advantage of their powers” at the time. Where one or more sales or transfers occurred after the illegal seizure, the claimant can request either restitution or compensation. Eligibility extends to those with ownership and use rights (Van der Auweraert 2007; IOM 2008; Van der Auweraert 2009).

The determination of heirs for purposes of the restitution program is governed by Iraqi civil law, which invokes Shari’a law: “(1) an heir will acquire by inheritance the movable and immovable property of and the rights which exist in the estate; (2) determining the heirs and fixing their shares of the inheritance and the conveyance of the property of the estate will be governed by the provisions of the Islamic Shari’a and the specific laws.” (IOM 2008; Iraqi Civil Code 1990).

Although the security situation in Iraq has hindered PCC’s work, PCC also has been criticized for its narrow jurisdiction (excluding major property disputes in the north and south), lengthy procedures, and delays in enforcement of decisions. One of the biggest challenges for the program has been enforcement of both restitution and compensation decisions in part due to the unwillingness of certain Property Registration Offices to re-register the property and the difficulties faced by the Enforcement Department of the Ministry of Justice in evicting unwilling current occupants. The security situation and lack of capacity contributed to the latter issues. Compensation decisions have been difficult to enforce because it took much time to agree on a procedure for paying successful claimants and because although the Ministry of Finance had the statutory obligation to pay compensation, that obligation was assumed by the PCC (Van der Auweraert 2007).

Other concerns include lack of adequate compensation guidelines, financial viability of the program, backlog of appeals and appeal processes varying in different regions, and the lack of safeguards to ensure that property restitution did not generate new displacement. As of October 2009, the PCC had resolved less than 43,000 cases out the 152,000 claims lodged and as of May 2008, the PCC had awarded compensation to over 1,800 beneficiaries amounting to almost \$150 million USD (IOM 2008; IDMC 2011).

Iraq is one of the few countries from which a few “lessons learned” have been generated, which are below:

- **Lesson Learned 1: Large-scale property restitution should be addressed within a larger transitional justice framework.** “Neither the IPCC nor the CRRPD emerged as part of a larger transitional justice effort addressing the question of redress for all victims of the former regime. They were not the outcome of an inclusive political debate or reflection on how Iraqi society could best come to terms with a legacy of brutal and violent oppression or what was needed to facilitate a transition from decades of authoritarian rule to a democratic society living under the rule of law. Not addressing post-conflict property restitution from a wider transitional justice perspective raises at least three problematic issues. . . . The first issue has to do with the fact that an isolated approach is more likely to lead to an unequal treatment of victims. . . . The second issue an isolated approach raises has to do with the need for a property restitution effort to have external coherence with other government policies. . . . Finally, there is also a more pragmatic, but nevertheless very real reason why approaching large-scale property restitution in isolation is not a good thing. In any context, the overall resources that the state has available for transitional justice will not be unlimited as transitional justice will always have to compete with other, equally pressing needs and priorities. Hence the political decision of how much the state can allocate for a large-scale property restitution effort should best be made within the context of the decision how much the state can allocate for redress to all victims of, as in the example of Iraq, the former regime. Otherwise there is risk that the over-generous provisions of the partial effort will consume so many resources that there remains little financial or political space for reparations efforts in respect of other, equally deserving categories of victims” (Van der Auweraert 2007).
- **Lesson Learned 2: The type of reparation process chosen should be adapted to the expected size of the claim load.** “It is doubtful whether a quasi-judicial process will ever be well-suited to deal with tens of thousands of property restitution cases (the CRRPD has so far receive[d] over 130,000 claims).

For such a claim load, an administrative process may be the only viable option, even more so in countries where the available human and/or material resources are scarce” (Van der Auweraert 2007).

- **Lesson Learned 3: A lack of capacity in existing state institutions needs to be taken into account at the outset.** “One common reason to establish special-purpose property restitution commissions is that the other state institutions lack capacity to deal with a large property claim load in a fair and expedient manner. . . . The establishment of a property restitution commission in a weak or partially functioning state will thus raise a number of sometimes very complex issues. . . . Another, even more difficult problem is posed by the situation where existing state institutions are politicized or corrupt and the rule of law and good governance culture is weak or non-existence. . . . In this area no quick fix solutions exist” (Van der Auweraert 2007).

3.5 COLOMBIA

Colombia is the latest country to undertake a property restitution process, and the first to apply the Pinheiro Principles. In June 2011, the country passed the Victims and Land Restitution Law 1448, the objective of which is to provide redress for human rights violations that occurred during Colombia’s forty-year internal armed conflict. Several commentators note that the law takes the positive step of formally recognizing the existence of the armed conflict in Colombia, since previous governments had refused to do so (Attanasio & Sánchez 2012; ABColombia 2012; Amnesty International 2012).

Restitution of the victim’s original property is the preferred remedy under the law. Compensation may be granted only at the request of the victim. Once the property is returned to the original owner, there is a two-year restriction on the transfer of the land, except via inheritance, without a court order (Attanasio & Sanchez 2012).

Given that much of the land is under customary tenure, the restitution process is structured in a way they could technically identify and individualize the claimed plots of land. It appears, however, that neither customary law nor institutions play a role in the restitution program (Pardo & Victornino 2013).

The volume of land to be restituted is unclear. The government has set the goal of restituting a minimum of 500,000 hectares per year until 2014, although some estimate that five million people were forced to leave their land during the conflict, abandoning four to six-plus million hectares. Rural areas are the most affected (Pardo & Victornin 2013; ABColombia 2012).

As of February 2013, the newly created Special Administrative Unit for the Process of Restitution of Dispossessed Lands within the Ministry of Agriculture had received more than 30,000 restitution claims. Specialized judges in the newly created Land Restitution Tribunals had issued 16 rulings ordering the return of approximately 500 hectares of land (HRW 2013; ABColombia 2012).

In some cases, returnees face significant security concerns, receiving threats and subject to acts of intimidation by perpetrators as they try to reclaim their land (HRW 2013; ABColombia 2012).

Given how recent Colombia’s efforts are, it is too soon to draw lessons from the experience. Commentators note, however, that implementing a restitution program in the context of continuing conflict and thus continuing dispossession, weak rule of law, and commercial pressures on land (legal and illegal), particularly for oil, gold, and timber, is complex and difficult (HRW 2013; ABColombia 2012; FAO 2013).

3.6 GENDER EQUALITY IN RESTITUTION PROGRAMS

This sub-section discusses the property restitution programs discussed above from a gender perspective but, unfortunately, there is little literature upon which to rely for examples of best practices.

Gender equality refers to the equal enjoyment by women, men, girls and boys of rights, socially valued goods, and opportunities. The right to equality is widely recognized at the international and national level, and has been consistently interpreted to require the implementation of positive measures designed to eliminate the effects of *de facto* or *de jure* discrimination on the basis of sex. Consequently, under Pinheiro Principle 4, housing, land, and property restitution laws and processes must not discriminate, and they must also ensure the right to equality of men and women, as well as equality between boys and girls (Handbook 2007).

Principle 4.1 calls for equal rights of men and women, boys and girls, to restituted land, property, and housing. Principle 4.2 states that housing, land and property restitution programs, policies and practices should recognize joint ownership of both male and female heads of household, encouraging documentation of women's rights to land and property when those women are not in female-headed households. Finally, principle 4.3 calls for implementation of positive measures to ensure that restitution efforts are based on equal treatment of men and women, including restitution programs, policies and practices (Handbook 2007).

The issues that influence gender equity in land, housing and property restitution are the same issues that influence whether there is gender equity in any land reform, land documentation, or land registration program. Legal restrictions to women or girls' land rights, including legal regulations related to process and content of the program; women's inclusion in program implementation as staff or participants; and women's ability to know, understand, and enforce their rights all require focused attention to create a gender equitable environment and outcome.

The *Implementing the Pinheiro Principles* Handbook addresses the issue of unequal inheritance customs or laws in relation to restitution. In many cases, land, housing, and property are restituted to heirs, and in countries where Shari'a law exists or where customary law is codified, unequal inheritance practices for men and women may be legally mandated. The Handbook suggests carrying out training programs designed to promote the application of the Pinheiro Principles, to uphold the Principles as an impartial normative standard based upon existing human rights law, and to carry out advocacy efforts designed to achieve equality in the area of inheritance rights.

In Central and Eastern Europe, gender equality is mandated by law. Although by law, the restitution process did not discriminate against women, and by law, land was distributed evenly to male and female heirs, most of the data related to documentation and registration of land rights has not been gender disaggregated. Many countries took positive steps to be gender inclusive, but still anecdotal evidence indicates that in many cases only the male head of household's name was registered, or women heirs gave up their rights to land. The Gender Equality Office in Montenegro conducted a survey on Gender in 2009. Among the results, 50 % of the owners of a house are men, only 8 % of the owners are women. Specific activities targeted toward educating and supporting women in the restitution process are required (Stanley and Martino 2012).

In Colombia, women have more precarious property rights than men, and displaced widows and female heads of households are much more vulnerable to losing their land. Informal marriages do not give women a share in the ownership of household land, inheritance practices favor men, and informal rules and social practices favor men's participation in land markets and access to credit. Women often struggle to be heard at community or town meetings. As a result, women are largely uninformed about land ownership and tenancy, and are unaware of how property was acquired, or the existence or lack of documents and titles. When displaced women declare their situation to the government's IDP register, they rarely have information about their land, and in some cases do not consider themselves owners (Albuja 2010).

In South Africa, the Restitution of Land Rights Act of 1994 is non-discriminatory on its face. However, there is little literature on South Africa's experience from a gender perspective. Restitution was unlikely to substantially benefit women, as it was men who owned and were dispossessed of most land, and who thus had claims under the Act. Moreover, land claims under the Restitution Act could also be filed by communities, often ignoring differentiated interests along gender lines, with decisions being made by men. Remedies were available from the Commission on Restitution of Land Rights or a Land Claims Court, but those institutions tended to not be accessible to women and in the event a remedy was provided, it was difficult for women to enforce within the social context (Cotula 2002).

Socio-cultural practices often prevent rural women from holding land titles. In the former homelands, customary land tenure is applied. Under these rules, women are rarely allocated plots by chiefs, and usually gain access to land only through their fathers and husbands. Land cultivated by women is often the poorest and most inaccessible. Widows have no right to remain on their deceased husband's land. However, there is considerable variation, depending on the region and the political alignment of the chiefs (Cotula 2002).

The Pinheiro Principles and the Handbook broadly lay out best practices for reaching gender equality in land restitution programs, including, training programs designed to promote the application of the Pinheiro Principles and carrying out advocacy efforts designed to achieve equality in the area of inheritance rights. Certainly a first step is mandating equality in the restitution law itself. However, as seen above, even where the law is clear, the steps needed to ensure gender equality, i.e., information distribution, education, and training specifically for women, are rarely, if ever, included in restitution programs. Moreover, documentation of efforts to promote gender equality and their outcomes is scarce leaving us with anecdotal evidence at best. It is, however, possible to draw out some general best practices on gender inclusiveness from other land-focused programs (see box, below).

Gender Inclusive Programs: Land Reform in Afghanistan

The USAID/Afghanistan Land Reform in Afghanistan (LARA) project, though not focused on restitution, provides a good example of a land reform program that has been gender inclusive. The project, which seeks in part to develop a robust, Afghan-owned and managed land market framework that encourages investment and productivity growth and supports the resolution/mitigation of land-based conflicts has included an emphasis on preserving and promoting women's land rights. The project established a Women's Land Rights Task Force to identify customary, religious, legal, and regulatory constraints affecting land ownership by women and work to address issues supporting women's land rights, increase awareness on women's inheritance and land rights, and provide assistance with legal reforms. Activities have included a series of workshops on women's inheritance and property rights, as well as a strong public information campaign around women's land rights issues. The LARA project has also worked closely with government agencies and civil society to increase awareness of women's land rights and build their capacity to act as advocates for women. The project has generally been well-received and demonstrates some key practices and activities that can improve women's engagement in land-related programs:

- Study of existing customary practices that can affect women's ability to access and own land, to inform program development.
- Public consultation
- Awareness-raising activities specifically targeting women (public information campaigns, trainings, workshops etc...).
- Advocacy for women's property rights to the broader community.

See Section 4.4.2 for a discussion of gender issues in the context of Libya's property restitution program.

4.0 THE DRAFT LAW & KEY CONSIDERATIONS FOR PROPERTY RESTITUTION LAWS

This section provides general comments on the Draft Law and discusses and makes recommendations related to key considerations for any national law governing a property restitution process, including fundamental principles and basic processes. It also briefly considers issues specific to the Libyan context.

4.1 GENERAL COMMENTS ON LIBYA'S DRAFT LAW

The Ministry of Justice published the Draft Law online for public comment in March 2013. The Draft Law intends to address restitution for properties transferred to the state under Law No. 4 of 1978, although only the title of the law clarifies that restitution rights are limited to seizures that took place under the authority of that law; the draft language does not include that reference. The Draft Law focuses primarily on restitution of lost property, although it acknowledges certain categories of property, such as property used for a public project, as ineligible for return and therefore subject to compensation (GoL 2013a; GoL 2013b).

The Draft Law represents an important first step to the resolution of long-standing conflicts over housing, land, and other property in Libya. It sets forth many of the difficult policy decisions that need to be made for any restitution program. For example, current occupants of shops convert to lessees for six months after which the shops revert back to the owner, and houses are returned to former owners subject to certain exceptions. It also acknowledges that it does not affect prior government efforts to reconstitute property, and provides for the reregistration of ownership interests in the names of the former owners. It also invalidates laws that contravene its objectives.

A threshold issue, however, is that the Draft Law does not currently state its objective(s), making it challenging to design an appropriate approach to the Libyan restitution process. Multiple objectives may exist but they should be clearly identified within the text of the law, preferably at the outset, and restitution provisions should reflect the stated objectives.

Property restitution is typically a means to an end, rather than an end in itself, in the sense that countries generally have broader objectives for which restitution is a necessary step or tool. These objectives can include return to a previously existing property regime (Estonia, Lithuania, Latvia), improving economic and/or social stability (South Africa, Colombia), creation or enhancement of a private property market (CEE), and social justice (South Africa, Iraq, Colombia). The contents of the law will necessarily be tied to the state's chosen objective(s) in undertaking the formidable task of restitution, making the objectives critical to both legitimacy and understanding of the law (Paglione 2008; FAO 2013; Stickler 2012; Amnesty 2012).

Compare the objectives provided in South Africa's *Restitution of Land Rights Act* to those in Lithuania's *Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property*:

South Africa's *Restitution of Land Rights Act*:

To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith." (*Restitution of Land Rights Act* 1994, preamble).

Lithuania's *Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property*:

This law shall legislate the procedures and conditions of the restoration of the right of ownership to the citizens of the Republic of Lithuania to the property which was nationalized under the laws of the USSR (Lithuanian SSR), or which was otherwise unlawfully made public, and which, on the day of enactment of this law, is considered the property of the state, of the public, of cooperative organizations (enterprises), or of collective farms.

The right of real property ownership shall be restored:

- 1) by giving over either the actual property, or the equivalent of such property; or
- 2) in the event that it is impossible to grant the actual property or the equivalent of such property, or if the former owner does not desire the actual property, by financially compensating the persons specified in Article 2 of this law, thereby enabling them to purchase an appropriate amount of state (public) property subject to privatization." (*Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property* 1991, preamble).

Note that each law identifies the specific context that has created the need for a restitution process – apartheid in South Africa and Soviet policies in Lithuania. Accordingly, the laws present different objectives – while the South African law seeks to restore land to those who were unjustly dispossessed, the Lithuanian law looks to reform land rights in a broader sense by re-establishing the right to private ownership and moving land from the public to the private sphere. As a result of their different contexts and objectives, South Africa and Lithuania's laws have taken different approaches to restitution. While South Africa's restitution process focused on providing redress to those who had been unjustly dispossessed as a result of over 80 years of racially discriminatory policies, Lithuania's law and programs were designed to reverse Soviet property policies by restoring rights as they were in 1940 (Stickler 2012; FAO 2013).

In developing objectives, particular attention must be paid to the potentially harmful effects on the poor, women, and vulnerable groups, who may have benefited from property redistribution and may be forced into homelessness and poverty by a restitution program that seeks to simply restore all property to its original owners, regardless of circumstance. To the extent that the poor were beneficiaries of property redistribution programs under the prior regime, and in the interests of social equity and stability, the state ought to endeavor to maintain the status of the poor beneficiaries who are current occupants of both houses and commercial property. Although former owners may prefer restitution to compensation for lost property, the state must consider the potential social unrest that could result from displacing large numbers of current occupants from their homes and reinstating the wealthy to the detriment of the poor (UNHCR 2012).

In addition to stating objectives, below are a few general recommendations to improve the clarity of the law and prevent unintended consequences.

1. Add an article clarifying that the law is limited to restitution for seizures that occurred under Law No. 4 of 1978, as amended;
2. Add an article that defines all key terms;

3. Narrow the scope of Article 8 on “Easements” to allow for continuation of easements that are necessary for ingress and egress and for public utilities and other public rights of way;
4. Amend Article 14, which provides for criminal and civil penalties when a person violates Article 13 related to disposal or taxation of properties to be restituted, to include acts of fraud and obstruction of the performance of official duties consistent with the law; and
5. Add an article that provides the responsible government agencies sufficient budget to fulfill their statutory mandates.

The Draft Law is broad with insufficient detail to accomplish restitution, to create certainty and land tenure security for Libyans, and to protect, as much as possible, all innocent parties. To help address these gaps, sub-sections 4.2 thru 4.4 of this report provide guidance and recommendations on fundamental principles and processes that a restitution law needs for the creation of a durable solution for the country.

4.2 COMMENTS RELATED TO FUNDAMENTAL RESTITUTION PRINCIPLES

4.2.1 IDENTIFYING OR CREATING INSTITUTIONS RESPONSIBLE FOR THE RESTITUTION PROGRAM

Pinheiro principle 12.1 recommends that governments, “establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms,” to assess property restitution claims. Other principles recommend taking appropriate administrative, legislative and judicial measures to support the restitution process and ensure that procedures, institutions and mechanisms are age and gender sensitive (Principles 12.2-12.4).

Under the Draft Law, the Council of Ministers is charged with developing the bases and regulations for restitution and compensation (art. 4). The Council is also responsible for forming a Supreme Committee and associated subcommittees to consider applications for return of houses and determine the amount and method of compensation (art. 9). No other responsible institution is referenced, and the Draft Law is the best place to identify the institution(s) that will be taking on the massive task of restitution. If the Supreme Committee and the subcommittees are the institutions that will be created to handle restitution, more detail about the composition of the committees, including criteria for appointment of members, and how they will function, needs to be stated in the law. Institutional capacity is a critical area of concern in the restitution process.

Restitution is a slow and complex process and ensuring that whatever institution(s) is chosen or created to manage the restitution process has the capacity and training to do so is critical. An understanding of the law and an ability to deal with existing records and maps is essential. Furthermore, the institution must be respected and seen as unbiased, and their processes transparent. To the extent that they exist and are considered socially legitimate, customary institutions should be engaged in the development and implementation of the restitution process, provided sufficient oversight can be maintained to ensure consistency, accessibility, and legality.

Some countries have opted to create specialized bodies to handle restitution claims while others have utilized existing institutions, with the choice based in part on the scale and complexity of the restitution program, as well as the capacity of existing institutions to manage the restitution process. Specialized commissions were established in South Africa and Colombia in order to establish frameworks and process restitution claims,

while in Estonia restitution was managed by the Land Board, an existing body within the Ministry of Environment (Stickler 2012; ABColombia 2012; FAO 2013).

RECOMMENDATION: Whether Libya chooses to utilize an existing institution or create a specialized restitution commission, the restitution law requires a greater degree of detail and specificity regarding the institution responsible for managing the restitution process. The importance of the early establishment of clear legal frameworks around restitution has been a key lesson from earlier efforts (Handbook 2007).

4.2.2 COMPENSATION VS. RESTITUTION

Restitution refers to the return of original housing, land and other property. Compensation, on the other hand, can take many forms, including property deemed to be of comparable value, a one-time lump sum payment for the loss, vouchers for a new piece of land, and profit-sharing agreements with the current occupants. Multiple approaches were often used in former restitution programs to maximize the benefits to claimants while balancing their rights against the rights of others. Restitution of an exact piece of land or property is very often not possible due to changes in the environment over time or loss of documentation of former rights (Handbook 2007; Principle 21.1; ILC 2001; Virgo 1999).

Under the Pinheiro Principles, restitution is both a right and the preferred remedy for displacement. Principle 2.1 states that the restoration of any housing, land, or property that was unlawfully or arbitrarily seized is a right, with compensation acceptable as a substitute only when it is “factually impossible” to restore the property. However, the Principles also protect all people from arbitrary displacement from their homes and require countries to take steps to incorporate protections against displacement. Principle 17 specifically discusses the rights of secondary occupants, who must be protected against eviction unless it is deemed both justifiable and unavoidable (Principles 5.1, 5.2, 5.3, and 5.4).

In the Czech Republic, restitution was the preferred remedy except in limited cases, such as where restitution was physically impossible or the claimant chose compensation over restitution. Similarly, Serbia’s 2011 restitution law allows compensation only when restitution is not possible. In contrast, Hungary opted to compensate citizens for all assets that had been nationalized, while South Africa’s restitution program allowed for both restitution and compensation with no apparent preference given to either. (FAO 2013).

The current Draft Law allows for the restitution of craft, professional and commercial shops, vacant lands within the approved plans, and agricultural lands upon which no installations were built, unless the owner has received compensation for those installations (art. 1). Residential property may be subject to restitution unless the former owner was compensated or reconciled with the current occupant of the property (art. 2). Residential property is not subject to restitution where the property was taken for a public purpose and the public project commences prior to the effective date of the restitution law or where the value of the property is not appropriate to the value of installations built in good faith on the property after the state seizure (art. 3). Former owners who received compensation previously may apply for reconsideration of the amount of compensation (art. 4). Compensation is available to former owners for the period of time the owner was deprived of the property (art. 5).

The Draft Law focuses almost exclusively on the return of property to former owners (with exceptions for property previously expropriated by the State for public purpose and houses for which compensation was received or where the former owner has reconciled with the subsequent occupant), which may be impossible or impractical in many cases. In Central and Eastern Europe, in every instance, there had to be some combination of return of property and compensation due to changes in the environment or other instances where return is not feasible. Libya could draw from Iraq’s restitution process, under which claimants are eligible for restitution of their former property if the property is still held by the Iraqi state, a senior member of the former regime, or “anyone who took advantage of their powers” to gain the property while claimants

may choose between restitution and compensation in all other cases. In the interests of social and economic stability, the Libyan government may want to consider limiting restitution of former property to only those cases where the current occupants did not acquire the property in good faith.

RECOMMENDATION: Although the Draft Law recognizes the need for compensation rather than restitution in limited instances, in its current form it omits consideration of the range of circumstances under which compensation may be preferable. The law needs to specify a process for monetary or in-kind compensation where return is not feasible or where the owner prefers compensation. The drafters should also consider a lessened emphasis on restitution and a heightened focus on developing a restitution program that considers the rights of both former owners and current occupants and attempts to reconcile these in the manner most appropriate for the Libyan context.

4.2.3 IDENTIFICATION OF TIME PERIOD (DURING WHICH SEIZURE OCCURRED)

As mentioned above, the Draft Law does not address the period of seizure for which claims can be made for restitution within the text, although the title of the Law refers to “properties transferred to the state per Law No. 4 of 1978”, indicating an intention to limit the property that will be eligible for restitution.

This issue can be particularly difficult to resolve as there have often been multiple waves of property seizures, requiring policymakers to make decisions as to how far back in time to reach in terms of eligibility for property restitution. For example, Lithuania, Estonia and Latvia underwent significant land reforms between 1920 and 1940, which redistributed large estates to the landless, returning soldiers, and smallholder farmers. Following World War II and the incorporation of the Baltic states into the USSR, agricultural land was taken by the state and large-scale collective farms were formed. The goal of land reform efforts beginning in 1991 was to re-establish the pre-World War II farming structures, based on commercial family farms, and so in all three countries restitution was limited to the land seized after 1940, excluding those who had lost land during the pre-war reforms (FAO 2013).

State seizures of property in Libya occurred over an extended period of time, and the Draft Law will need to specify the period of time or category of seizures to which the law applies. The chosen time period will depend on the government’s specific objectives, but close attention needs to be paid to the potential consequences of providing restitution for broader or narrower windows of seizures. A narrow window may unjustly exclude claimants, while a broad window could open the door to unending claims that may drain state resources.

RECOMMENDATION: Defining the time period or category of seizures for which restitution is available under the Law is a foundational issue as Libya experienced successive waves of property seizures over several decades. The Law must specify, within its text, a time period or category of seizures to which it will apply.

4.2.4 ELIGIBLE RESTITUTION CLAIMANTS

In addition to specifying the types of seizures which qualify for restitution, a restitution law must also identify the persons entitled to make claims. The Draft Law speaks to the rights of “former owners” of property but is not clear as to whether others, such as heirs, are also entitled to make claims for restitution in cases where the former owner has died.

The Pinheiro Principles are clear on this point:

States should ensure that all relevant laws clearly delineate every person and 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 the primary claimant (Principle 18.2).

Under Pinheiro, heirs should retain the right to restitution in cases where the original property owner has died if they have not accessed other remedies (Handbook 2007). Careful consideration needs to be given to the issue of heirs as under Shari'a law, women receive less property than their male counterparts. If at all possible, the restitution law should clarify that men and women will receive equal shares to property, consistent with Pinheiro.

Past restitution efforts have generally favored allowing the successors of former owners to apply for restitution, with limited exceptions. In the Czech Republic, where restitution was heavily favored over compensation, successors were not eligible to receive monetary compensation for lost property although they were eligible for restitution (Faber 2013).

The Draft may also address the question of whether non-citizens are entitled to restitution for lost properties. The explanatory memo attached to the Draft Law states a concern that a restitution program would open the Libyan government to claims from outside the country. Some countries, including the Czech Republic and Hungary, have excluded non-citizens from their restitution programs (FAO 2013). Although the Pinheiro Principles include the right to be protected from discrimination on the basis of national origin and implore states to ensure that displaced persons are treated equally by the law, they do not require equal treatment of citizens and non-citizens (Principles 3.1, 3.2).

Finally, the Draft Law should address rights to restitution for communal land, housing, and other property, to the extent that they were seized in Libya. Pinheiro Principle 13.6 notes the need to allow for collective restitution claims in some cases and encourages states to ensure that housing, land, and property users, in addition to owners, have the right to participate in the restitution process. If communal property was seized, the law must include a process for identifying eligible claimants as well as the desired approach to restitution.

RECOMMENDATION: As it is likely that a significant number of former owners will have passed away between the time of seizure and the implementation of the restitution process, the question of the rights of their heirs will have to be addressed in the restitution law. The law should specifically delineate the rights of heirs, as recommended in the Pinheiro Principles. The law must be clear as to the categories of heirs who qualify for restitution, whether and how multiple heirs must divide rights to restored property or compensation, among others. In addition, the law should address “special categories” of former owners whose rights and process may differ, such as non-citizens and the former owners and users of communal land. Finally, the law needs to clarify whether only physical persons are eligible or whether legal entities such as businesses that owned seized property are also eligible.

4.2.4 FORM OF COMPENSATION

The Draft Law does not address the form of compensation for lost property in cases where restitution is unavailable or rejected, although the explanatory memo attached to the Draft notes that compensation may have to be paid in installments for practical reasons.

Pinheiro Principle 21 specifies that compensation should be either monetary or in-kind. However, where the state has insufficient cash funds to pay full compensation, alternatives may be found. Such alternatives include the construction or subsidization of new housing for the displaced, tax reductions for a fixed period, or payment via government bonds (Handbook 2007).

In Hungary, where compensation was the primary approach to restitution, compensation took the form of coupons and vouchers. The value of these vouchers was based on the estimated value of the lost property

and they could be used to purchase state property, agricultural property, or shares in state enterprises. Land acquired by the farming cooperatives after 1949 was auctioned, giving former owners the opportunity to “purchase” their land if they so desired. The vouchers could also be traded freely on the market, although agricultural land could only be purchased by the original recipient of the voucher (FAO 2013).

The form of compensation chosen in Libya will depend on the financial viability of various models. Although full, immediate compensation is preferable, the state may consider developing a different model if this method is not economically viable.

RECOMMENDATION: The law needs to include a clear compensation framework, which includes the type of compensation that will be available as well as the time frame in which compensation will be paid and how the amount of compensation will be determined. The amount of land to be restituted, and the amount of land controlled by the GoL that will not be restituted must be considered as well for in-kind compensation.

4.2.5 LIMITS ON AMOUNT OF LAND AND OTHER PROPERTY ELIGIBLE FOR COMPENSATION/ RESTITUTION

The Draft Law does not contain limits on the amount of land and other property that may be eligible for restitution. Such limits can serve as a tool to prevent the accumulation of large amounts by a small group of elites.

During Latvia’s restitution process, a maximum of 100 hectares of agricultural land could be restituted to a single person. There, despite the limit on amounts of land, claims for restitution exceeded the amount of available land by 25% (FAO 2013).

In Libya, the decision to include a limit on the amount of land and other property to be restituted will depend on the government’s reform objectives and require the consideration of several factors, including the concentration of land and property prior to the Qadhafi regime’s reforms and the economic and social implications of a potential return to that level of concentration.

RECOMMENDATION: The drafters of the restitution law ought to consider whether to institute limits on the amount of land and other property for which one owner can submit a claim for restitution and, if they decide to do so, include the limit in the law. If a limit is instituted, the law will also need to include an enforcement mechanism to ensure compliance.

4.2.6 LAND REMAINING IN STATE OWNERSHIP

The Draft Law recognizes the need for some property to remain in state ownership, specifically property which was taken “for the public interest” and on which a public project has commenced (art. 3).

The Pinheiro Principles do not specifically address the issue of restitution for property that is being used for a public purpose. The Principles recommend the restitution of all property except that which is, “factually impossible in exceptional circumstances [to return], namely when housing, land and/or property is destroyed or when it no longer exists,” however, they also note that “in some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice” (Principle 21.2).

The Libyan Draft Law has made some provisions for the retention of property by the state when the property is in use for a public purpose. It does not, however, define the terms “public interest” or “public project,” details which will be necessary in the determination of the rights of former owners over such property. The

law also does not consider other circumstances in which it may be necessary to retain property under state ownership. Many of the countries in Central and Eastern Europe used state-retained land to compensate parties who could not have their exact land restituted. This option also could be considered.

RECOMMENDATION: The law ought to provide a greater amount of detail and a higher level of specificity with regard to the properties that will be retained by the state, including how such properties will be determined and a compensation framework for the former owners of such property.

4.3 COMMENTS RELATED TO RESTITUTION PROCESSES

A restitution law needs to include basic principles and procedures for lodging claims and for determining the validity of claims. It also needs to include provisions for resolving related disputes and registering rights to restituted land. The Draft Law addresses some of these important issues but lacks other provisions.

Pinheiro Principle 12 sets a standard for restitution processes: countries should “establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims” (Handbook 2007). The Pinheiro Handbook expands upon those principles, providing further guidance on a restitution process. Unfortunately, this report can only address the issues summarily.

The restitution law needs to include principles to govern procedure as well as include the basic rights and obligations of all involved in the restitution process. While the procedures will be elucidated in implementing regulations and guidelines, administrative regulations are typically easier to amend with less transparency, are less accessible (and even unknown) to the public, and are more susceptible to arbitrary administrative action and undue influence. Therefore, it is critical that the basic rights and obligations of interested persons and government be specified in the law. At a minimum, the law ought to include the parameters described in this section.

4.3.1 PUBLIC AWARENESS OF AND PARTICIPATION IN RESTITUTION PROGRAM

For restitution programs to be successful and their outcomes considered legitimate, the public needs to be empowered to participate meaningfully. Doing so requires an awareness of their rights and the process for asserting those rights. Pinheiro Principle 14 specifically calls out the need to ensure that there is adequate consultation and participation with affected persons, groups and communities. In particular, women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled, and children must have the appropriate means and information to participate effectively. Principle 20.5 also specifically calls out the need to inform secondary occupants and other relevant parties of their rights and of the legal consequences of non-compliance. In many cases there is a need for separate outreach campaigns and additional assistance for out-of-country claimants who lack access to evidence (Handbook 2007).

Even though South Africa’s “Stake Your Claim” public campaign involved television, radio, newspapers, visits to NGOs and churches, public meetings in relocation areas, door-to-door visits, distribution of posters, pamphlets and claim forms, and even a national toll-free information telephone line, only approximately 10% of potentially eligible claimants submitted claims for restitution. Those who missed the deadline in 1998 claimed they were unaware of the process or mistrusted it (Hall 2007).

In Bulgaria, bankers, real estate brokers, lawyers, and other market participants did not have sufficient confidence in title to restituted property to be comfortable engaging in transactions. They were not familiar with the law and were uncertain of its impact (Gaynor and Giovarelli 2000).

RECOMMENDATION: Include in the law a provision identifying the government agency or agencies responsible for developing and implementing robust public information campaigns, utilizing existing religious, civil society and other networks, in languages the population will understand, with particular attention to ensuring that women and vulnerable groups have the appropriate means and information to participate effectively. The law ought to require that awareness campaigns be designed to meet the needs of specific populations and the implementing agency should be held accountable for reaching women, ethnic minorities, and other vulnerable groups. The campaign should also reach all members of the community who are engaged in property transactions.

4.3.2 PRESCRIBING A WINDOW OF TIME TO LODGE CLAIMS

One of the most critical provisions to include regarding process is the window of time during which claimants must lodge a claim, and after which any right to restitution will expire.

The Draft Law currently does not include such a window. With no cut-off date for lodging claims, the land tenure of existing owners and occupants will be perpetually insecure, impacting the ability to participate in the land market and lowering land values.

All of the countries discussed above provide useful examples. In many of the countries, the deadline changed several times through legislative amendments (FAO 2013). The cut-off for South Africa’s restitution program, which began in 1994, was set administratively to end in 1998: “A person shall be entitled to enforce restitution of a right in law if . . . the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the Gazette” (GoSA 1994, art. 2(1)(b)).

Countries have tended to establish initial claims windows of less than five years. *See e.g.*, Bulgaria (17 months); Colombia (4 years); South Africa (4 years); Latvia (4 years). Note that most of these were extended and restitution programs continue much longer in processing the claims and resolving disputes.

Pinheiro 13.9: Claims Window

“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.”

RECOMMENDATION: Include in the law the length of the claims window, balancing the government’s need to expedite the process with the degree of difficulty claimants may experience in accessing information about their restitution rights, accessing the necessary forms and institutions, finding any relevant evidence to support their claim, etc.

4.3.3 PRINCIPLES AND PROCEDURE FOR LODGING CLAIMS

Pinheiro 13.2: Claims Process

“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.”

Principle 13.11: “States should ensure that adequate legal aid is provided, if possible free of charge.”

In addition to prescribing the window of time people have to lodge claims, there needs to be clarity on *how a person lodges a claim*, including the types of evidence they need to assert a claim. Pinheiro 13.2 advises that the restitution process must be: “just, timely, accessible, free of charge, and are age and gender sensitive.”

South Africa is instructive. Its restitution law provides that any person or representative of any community “who is of the opinion that he or she or the community he or she represents is entitled to claim restitution of a right in land as contemplated in section 121 of the Constitution, may lodge such claim, which

shall include a description of the land in question and the nature of the right being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16” (art. 10(1)). It further requires that the Commission make claim forms available at all of its offices (art. 10(2)). Principle 13 provides that states create 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.” That principle also provides that states ensure that assistance in filling out those forms is available in a manner that is both age- and gender-sensitive (Principles 2005).

To begin the restitution process in Colombia, a person adds their allegedly lost property rights to the Registry of Dispossessed Lands, which then triggers an administrative process and eventually the participation of the judiciary, who makes the final determination of a claim’s validity (Attanasio & Sanchez 2012).

Formal records are the preferred evidence but in their absence, other written evidence is allowed such as: verified sales contracts, building permits, mortgage documents or other credit agreements, utility bills, etc. (Handbook 2007). In many contexts, such documents are also unavailable. Because of that, restitution programs often have a lesser standard of proof, discussed below in Section 4.3.4.

Different processes may be appropriate for different types of property such as urban land and agricultural land. Consideration should also be given to what proof will be required by law when someone’s name is not on the document, but that person was a member of the household or part-owner of the shop. This is particularly important for women whose names may not be documented or registered because only names of the heads of household were required at the time.

Given the complexity of most restitution processes, some countries provide assistance to claimants. In Bosnia and Herzegovina, in addition to an Executive Public Information Unit’s claimant information hotline, Bosnia and Herzegovina also created a Claimant Info Unit, the objective of which is to provide claimants with comprehensive, specific, and consistent answers on the substance of their claim in the shortest feasible time. The Unit is comprised of three lawyers solely dedicated to: (1) answering claimants’ telephone calls; (2) responding to written queries from claimants; and (3) conducting in-person meetings (IOM 2008).

RECOMMENDATION: Include in the law the basic principles that govern filing claims as well as basic procedures to the extent possible, keeping in mind that the process and applicable forms need to be as simple and understandable as possible. It also is important to provide reliable information and competent assistance to claimants.

4.3.4 PROCESSING OF CLAIMS

There must be clear steps for the government to follow upon receipt of a claim. The government must be familiar with those steps, typically requiring an initial investment in building the capacity of implementing institutions. Steps in the process include: provide notice of the claim to interested parties; investigate the validity of the claim; assign a burden of proof to the claimant or the current owner/occupant; decide whether the claim is valid; if the original land is not returned, determine the appropriate value of the seized land to identify equivalent land or the amount and form of compensation.

In South Africa, upon receipt of a claim, the Commission determines whether it complies with the submission requirements, including that the claim not be “frivolous or vexatious,” among other requirements. The Commission must then ensure that the claim is published in the Official Gazette, “take steps to make it known in the district in which the land in question is situated,” and “advise any other party which, in his or her opinion, might have an interest in the claim” (art. 11). The Commission also must inform the relevant land registrar to record that a restitution claim has been made for the particular parcel (art. 11).

In South Africa, claims were made against the state with the Minister of Land Affairs as the respondent, on behalf of the state. One commentator notes, “By placing the state at the center, South Africa’s restitution process has limited the evidentiary burden on claimants. . . . This has the advantage of buffering further conflict between owners and claimants” (Hall 2007). Also, South Africa started with a process much like Colombia’s – with extensive engagement of the judiciary. It later changed the process, however, to be solely administrative except when a challenged claim could not be resolved.

In Colombia, the “Special Administrative Unit for the Management of Dispossessed Lands” (Administrative Unit) within the Ministry of Agriculture, coordinates the various stages of the process, coordinates the transfer of land, pays compensation to claimants and secondary occupants, and subsidizes the payment of taxes on restored lands. It also maintains the Registry of Dispossessed Lands and oversees the fund set aside to cover the costs of the program, including compensation. (In the 2012 annual budget, the government set aside \$500m USD for the program.) And finally, the Administrative Unit assists claimants in finding evidence to support their claims (ABColumbia 2012).

The Administrative Unit submits the claims to a judge with specialized expertise in restitution proceedings. The judges determine whether a particular property can be restituted in the face of opposing claims of good faith and, if not, what alternative remedy is available. The judge also takes into consideration claims for compensation made by a good faith subsequent owner or occupant. The process is supposed to take four months (Attanasio & Sanchez 2012).

In the absence of formal records, producing evidence in support of a claim is difficult. As such, restitution programs often use a lesser standard of proof than used by the judiciary, such as “credible” or “plausible.” For example, in addition to written documentation, Bulgaria allowed oral testimony on the identity of former owners of parcels consolidated into collective farms (Handbook 2007; Giovarelli & Bledsoe 2001).

Post-conflict Colombia went so far as to create a legal presumption that people who transferred property in an area of generalized violence did so because of the violence; a current occupant opposing restitution has the burden to prove that he or she acquired the property in good faith and without fault (Attanasio & Sánchez 2012 (citing Victims Law, arts. 77-78)).

Note that some consideration must be given to creating a process for claimants living outside the country to participate. In Iraq, the PCC has been unable to process the approximately 5,000 claims it received from Iraqis living outside the country because of a lack of specific rules and procedures for engaging with claimants who live abroad (Van der Auweraert 2012).

Finally, it is important to monitor the equities and efficiencies of implementation, particularly focusing on accessibility and ease and effectiveness of the process, the extent to which there is unequal access, treatment of particular claimants, and its outcomes, particularly for women and vulnerable groups, and financial sustainability. In Iraq, the PCC is subject to the audit provisions applicable to government bodies under Iraqi national law. For example, the Iraqi Ministry of Finance oversees all financial matters of the CRRPD (IOM 2008). Monitoring reports need to be made available to the public and press to ensure transparency and accountability and the government ought to be required to submit such reports to the legislature on at least an annual basis. Based on findings from the monitoring, the government may want to make mid-course adjustments to ensure durable restitution.

RECOMMENDATION: Include in the law the basic steps for the relevant government institutions to follow upon receipt of a claim, including notice provisions, investigation steps, burden of proof, and provisions for receiving claims from Libyans living abroad, and periodic monitoring, review, and public reporting of the results as opportunities to make mid-course adjustments.

4.3.5 VALUATION OF SEIZED PROPERTY AND DETERMINATION OF COMPENSATION

When addressing the issue of compensation for real property, it is useful to include some standard that would generally guide the sum of compensation, such as, “fair,” “just,” and/or “equitable” compensation. The Pinheiro Principles indicate a standard of “full and effective” compensation (Pinheiro Principle 2.1).

Article 9 of the Draft Law provides reasonable safeguards in that it provides the outline for compensation considerations and calls for more detail when the subcommittee dealing with these issues is formed. Under Article 9, a supreme committee and a subcommittee, both chaired by a legal person, will be formed to consider the applications for the return of houses or estimate the compensation to be paid and the method of payment in lieu of return. Under the law, the subcommittee will consider “the status and location of the property, heavies and installations thereupon and improvements made thereto on a case-to-case basis.” Further instruction is to be given in the resolution that forms the committee, and the subcommittee decisions will be overseen by the supreme committee.

Recent restitution programs have relied extensively on standardized valuation methodologies in order to expedite review of claims and ensure consistency and reliability throughout the process. Valuation methodologies affect several stages of the claims resolution process, in particular the categorization of losses, verification procedures, calculation of compensation, due diligence, and transparency of the process (IOM 2008).

RECOMMENDATION: The valuation of property seized is a critical step in the restitution process. If valuation is done poorly and without transparency, the legitimacy of the program is jeopardized. Consider developing a standardized valuation methodology and include as a member of the sub-committee a valuation expert.

4.3.6 DISPUTE RESOLUTION AND ENFORCEMENT

No doubt the process of returning property or providing compensation to dispossessed owners will create disputes over, for example, ownership, boundaries, and compensation as well as allegations of discrimination. Other common restitution-related disputes include:

1. attempts by displaced persons and refugees to physically reclaim their former homes, which are occupied by members of other ethnic groups;
2. claims by persons without documentation to prove their claims but who hold legitimate rights;
3. determining rights where current occupants hold “lawful titles,” but where returnees do not;
4. determining rights following unregistered or unofficial transfers of property;
5. claims by *bona fide* purchasers of property after it was initially expropriated;
6. claims for improvements to homes, lands, and property legally owned;
7. claims regarding boundaries;
8. claims of tenancy rights and cultivation rights; and
9. many others, including challenges to the dispute resolution process itself (Handbook 2007).

It is important to recognize that there are two steps in a restitution process at which adjudication of rights can take place: (1) in the initial consideration of and decision on a claim; and (2) during an appeal of the decision. Countries embarking on a restitution program need to decide which authorities – judicial or administrative – are responsible at each step. Moreover, whether a decision is subject to appeal must also be decided and included in the law. Both South Africa and Colombia started out with the judiciary involved in step one. As time passed, however, South Africa realized that engagement of the judiciary was slowing the process. So

they instead made step one an entirely administrative process and only unresolvable disputes were referred to the courts (Hall 2007).

Once these disputes are resolved in one party's favor, enforcement of those decisions is critical to an effective restitution program. The Draft Law contains no dispute resolution or enforcement provisions.

Policymakers need to decide whether existing institutions will assume responsibility for dispute resolution or new institutions will be created. Creating new institutions, in the form of commissions and special tribunals, for resolving restitution-related claims and disputes is common (*see e.g.*, Iraq, Colombia, Kosovo, South Africa).

In many countries affected by dispossessions and displacement, access to land and other property is regulated under customary law by customary institutions, which present additional challenges to the rule of law and restitution-related dispute resolution. Given that restitution decisions require social legitimacy, where legal pluralism exists, policymakers need to consider whether and to what extent there is an appropriate role for customary institutions (and the application of customary law). For example, one commentator notes the difficulty of reconciling Pinheiro Principle 2.2 (that the right to restitution exists regardless of the actual return of the displaced person) with typical customary rights to a specific parcel based on use. If customary institutions are engaged as part of the institutional restitution framework, it is important to monitor their engagement to ensure it is consistent with applicable national and international law. (McCallin 2012).

Given the heavy caseload restitution programs create and the urgency with which restitution claims typically need to be resolved, it is rare for a country's courts to be able to absorb the additional caseload in a timely manner, and therefore this is often not a viable option. This is particularly the case in post-conflict settings. "The absence of effective, impartial and accessible judicial or other effective remedies can severely compromise the restitution process" (Handbook 2007).

At the same time, however, if new institutions are created, care must be taken to ensure that the institution and staff have the technical and financial resources to fulfill their mandate in a manner that is fair, impartial, and competent.

Another challenge is how to address the large number of claims, many of which have little to no evidence to support them. As mentioned above, evidentiary rules may need to relax and oral testimony will likely be more prominent, but that presents the risk of slowing the process down even more. Countries need to try to develop procedures that "are as light and flexible as possible of course with[out] [sic] reducing the claimants' rights" (Handbook 2007).

Enforcement of restitution decisions is particularly concerning where current occupants refuse to comply with the restitution order. Pinheiro Principles 20.1 and 20.2 provide that states should designate specific public agencies to enforce restitution-related decisions and judgments, and that local and national authorities are legally obligated to respect, implement, and enforce such decisions. For example, in Bosnia and Herzegovina, local authorities could not immediately enforce decisions of the Commission on Real Property Claims (CRPC) until five years later when a law on implementation of CRPC decisions was finally passed. "In addition, CRPC decisions were limited to determination of property ownership and included no reference to the rights of secondary occupants. As a consequence, holders of CRPC decisions had to go through

Principle -12.4: Dispute Resolution

"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."

But particularly in a post-conflict setting, "the particular circumstances and caseload 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" (Handbook 2007).

the local administrative process to have their decision implemented which made them dependent on the functioning of the domestic housing office system” (Handbook 2007).

RECOMMENDATION: Include in the law the specific entity that is responsible for deciding claims, whether that entity(ies) is newly created or an existing institution and administrative only or a combination of administrative and judicial. Also include the right to appeal a decision of both administrative and judicial bodies. If applicable, include in the law requirements for other government entities to enforce decisions of these newly established bodies. Consider specialized or expert judges assigned to deal only with restitution cases. Many judges are unfamiliar with complicated restitution laws and with related provisions in other laws, such as inheritance laws. The training of judges to specialize in the adjudication of such cases can speed the process.

4.3.7 TIMELY REGISTRATION AND DOCUMENTATION OF NEW OWNERSHIP

Timely registration and issuance of documents certifying ownership of newly restituted land is an important step in the restitution process, and acknowledged in Pinheiro Principle 15.1.

Article 12 of the Draft Law provides for the cancellation of all procedures and registrations transferring the ownership of properties to be returned and that properties must be registered in the name of the parties to whom the properties are returned. This provision could be improved by: (1) clarifying the meaning of the first phrase providing for all cancellations of procedures and registrations; and (2) adding a deadline for the registration of rights to restituted land.

Pinheiro Principle 15.1: Registration

“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.”

Finally, care needs to be taken to ensure that as part of this effort, women’s rights are not inadvertently diminished.

RECOMMENDATION: Ensure the efficient and timely registration of documents certifying ownership of newly restituted property by setting a deadline in the law (i.e., within a specific amount of time from an unappealed decision to reconstitute property, by which the government must register restituted property. Guarantee that such registration and issuance of documents is at no cost to newly restituted owners. Clarify the meaning of Article 12 in the Draft Law.

4.4 ADDITIONAL CONSIDERATIONS FOR LIBYA

4.4.1 CURRENT OCCUPANTS

As much of the property seized in Libya has been redistributed, in many cases over 30 years ago, the restitution law needs to take into account the rights of the current occupants, particularly in the case of residential properties. Some current occupants have now occupied the property for as many as 35 years. Many paid “mortgages” to the government during that time and may have legal rights to continue occupying, while other current occupants legally acquired use rights from the original government recipient of the property. The rights of the current occupants must be balanced against those of former owners in the formulation of restitution processes.

As noted above, some estimates indicate that a significant portion of the Libyan population is currently living on residential property that was seized from former owners by the Qadhafi government. Two basic scenarios should be addressed: cases in which former owners make a claim for restitution and cases in which they do not.

Currently unaddressed in the Draft Law are cases in which former owners do not make restitution claims. The law should clarify the rights of current occupants in such cases. The law may include provisions for the conversion of current occupants' rights into full ownership or, alternatively, for the retention of that property in the ownership of the state, in which case it should also include a clear framework describing the rights and obligations of the current occupants as tenants and the GoL as landlord.

The Draft Law includes several provisions addressing the rights and status of current occupants in cases where the former owner files a claim for restitution. Article 1 converts the occupants of commercial property to lessees, guaranteeing their ability to continue occupying the property for at least six months. Article 2 provides protection for current occupants of houses who have previously reconciled with the former owners of residential property. In addition, the Draft obligates the state to pay rent on behalf of the current occupant to the former owner for a defined period of time while he or she locates alternative housing (art. 6) and to provide a state-owned property against a real estate loan for occupants who do not have access to alternative housing (art. 10).

Pinheiro on Current Occupants

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.”

17.1: “States should ensure that secondary occupants are protected against arbitrary or unlawful eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable...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.”

The Pinheiro Principles includes protections for secondary occupants, including Principle 13.6 (see box) and Principle 17.1 (see box). While the provisions currently included in the Draft regarding current occupants provide some protection (see arts. 1, 2, 6, 10), the Draft does not address the fact that many current occupants may have obtained their rights lawfully and therefore have some legal standing against claims by former owners. In addition, the law must distinguish between categories of current occupants, including those who obtained the property from the government and have paid mortgages⁶ during the time of occupation, those who obtained property from the government at no cost, tenants, and those who legitimately bought or otherwise gained rights to the property from a secondary occupant.

In South Africa, tenants, sharecroppers, those holding customary interests, trust beneficiaries, and occupants for a continuous period not longer than ten years had restitution rights as did former owners (Stickler 2012). In Columbia, good faith subsequent owners or occupants are also allowed to make claims for compensation (Attanasio & Sanchez 2012).

RECOMMENDATION: The law should include provisions addressing the rights of current occupants of property when former owners do not apply for restitution, which may include processes for the conversion of use rights into ownership. Policymakers need to determine the legal status and rights of the varying categories of current occupants of property, such as those who obtained directly from the state, including

⁶ Payments made by current occupants to the state are referred to as “mortgages” in multiple sources (see e.g., UNHCR 2012), although it is unclear if they are in fact mortgage payments or rent. Law No. 4 of 1978 converted tenants into owners of the property they occupied. Occupants were obligated to make monthly mortgage payment to the government, although these payments were lower than the rent they had previously paid. It is unclear from the literature whether these payments were required from other recipients of seized property or continued after the abolishment of private ownership (via Law No. 8 of 1986).

those who paid mortgages to the state, and those who acquired the property from the government-assigned occupant, such as third-party purchasers and tenants. The law should include a framework for the resolution of competing claims from multiple rights-holders, to include some form of restitution for all parties determined to have legitimate rights. Finally, as recommended under Section 4.1, the law ought to clearly define the categories of claimants, including defining “former owners,” “heirs,” and “current occupants,” and articulate their restitution rights.

4.4.2 EQUAL TREATMENT FOR MEN AND WOMEN

Although Libya ratified the Convention for the Elimination of Discrimination against Women (CEDAW), Libya also registered a reservation to CEDAW, citing the “peremptory norms of the Islamic *Shariab* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male” (UNHCR 2012, listing the international conventions that Libya has ratified; UN CEDAW n.d.). Article 1 of the Libyan Constitutional Declaration provides that *Shari’a* is the principle source of legislation, and Libyan family law confirms the Islamic division of inheritance. The Quran is clear in stating that women are entitled to inherit as heirs, although in smaller shares than equally related men, and provides guidance as to the specific portions of an estate to which various heirs are entitled. For example, while a surviving wife is entitled to inherit one-eighth of her husband’s estate, a surviving husband receives one-fourth of his wife’s estate. Similarly, sons are entitled to inheritance shares that are twice the amount of their sisters’ inheritances. It must be noted that an underlying principle of this inheritance distribution is the Islamic requirement that men provide for their wives financially, while women are not expected to contribute financially to the household; under such conditions, larger inheritance shares for men can be seen as reasonable given their larger financial obligations towards their families. However unequal inheritance can place an undue burden on female-headed households, which may not receive the benefits of this inheritance structure. Despite falling short of requiring equal treatment for men and women, *Shari’a* provisions on inheritance provide women with clear inheritance rights that cannot be infringed upon (Sait and Lim 2006).

Libyan women have formal rights equal to men’s rights in almost all areas except inheritance rights, while Libyan social norms tend to limit women’s economic activity. Inheritance is governed by *Shari’a*, under which women receive smaller inheritance shares than equally-related men. As a result of the inheritance structure and social norms, several issues arise: (1) there will naturally be fewer women than men seeking restitution since historically women have inherited less property; (2) women may be disadvantaged in the restitution process, because as in most other countries, the original property is often not in women’s names even if they had legal rights to that land as a member of a household; and (3) if heirs are included and *Shari’a* applies, women will receive less property unless specific steps are taken to counteract this effect.

As discussed above, the Pinheiro Principles call for equal rights and treatment of men and women. In particular, Principle 4.1 calls for equal access to inheritance and Principle 4.2 calls for recognition of joint ownership of restituted land between husbands and wives. The Principles also provide that states must ensure that their restitution programs do not disadvantage women and girls and that they adopt positive measures to ensure gender equality (Principle 4.3). Examples of positive measures that are suggested under the Principles include gender-sensitivity training for government officials responsible for implementing the restitution program, special outreach about restitution to women’s organizations and networks, and providing resources to women-headed households (Handbook at 37).

The Draft Law contains no gender-specific provisions addressing participation and opportunity for women. And as mentioned above, the Draft omits mention of rights of heirs to restitution.

Understanding the current family law and practices governing women’s rights to housing, land, and other property in the broader context of family relations and distribution of wealth in Libya is critical to negotiating for expanded women’s rights. Although Libyan women have formal rights equal to men’s rights in almost all areas, except inheritance rights as discussed above, Libyan social norms tend to limit women’s economic

activity. As a result, several issues arise: (1) there will naturally be fewer women than men seeking restitution since historically women have inherited less property; (2) women may be disadvantaged in the restitution process, because as in most other countries, the original property is often not in women's names even if they had legal rights to that land as a member of a family; and (3) if heirs are included and *Shari'a* applies, women will receive less property unless specific steps are taken to counteract this effect.

Given that this report is limited to desk research and there is little literature on family law and practice in Libya, it is difficult to recommend specific steps at this time, and the recommendations that follow must be considered in this context. Policymakers ought to consider Colombia's example of prioritizing claims involving women-headed households and entitlement to joint restitution of the land restored to their husbands. They may also look to the USAID-supported Land Reform in Afghanistan project (see box, pg. 19) for guidance on the creation of effective public awareness campaigns and trainings, which target women and encourage their participation in land and property-related programs. Finally, policymakers may want to prioritize claims where current occupants are below the poverty line.

RECOMMENDATION: Identify legal experts who understand the larger context of women's land and property rights in Libya, and consult with them on possible legislative provisions that can provide for equal rights for men and women. At a minimum, include provisions guaranteeing women's rights to participate in and benefit from the restitution program, including recognizing their eligibility as heirs. Prioritize claims of women-headed households. Consider including both men's names and women's names on new documents, recognizing that this may be a cultural shift. Ensure public awareness of the restitution program, specifically targeting women and other vulnerable groups.

4.4.3 RESTITUTION OF COMMUNAL PROPERTY

Most of the countries that have implemented a property restitution program returned property that was originally owned by individuals or jointly owned by spouses. Pinheiro Principle 13.6 provides: "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."

There is little literature available regarding the extent of communal property holdings in Libya as well as the nature and scope of any community property interests. In the absence of detailed information, this section can only raise the issue.

To the extent the GoL will restitute property and/or compensate for property originally owned communally, South Africa provides a helpful example. Its restitution law defines persons eligible to claim land to include, "a community or part thereof" (art. 1(viii)). The law requires that where communal land is restituted, it should include conditions necessary to ensure that all community members have access to the land or the compensation in question, on a basis that is "fair and non-discriminatory towards any person, including a woman and a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community" (art. 35(3)). A legal entity, "communal property association," is created to hold the ownership interest.

One of the difficulties of returning land to communities in South Africa has been the difficulty of reconstituting communities, which often consisted of large groups of people living in different places: "This has inevitably produced complex and often conflictual group dynamics centering on how the land is to be used, who can settle there and on what terms, how labour and capital will be mobilized for production, and how income will be either reinvested or distributed" (Hall 2007). Moreover, community restitution often overlooks gender differences within the community and tends to favor men's rights.

RECOMMENDATION: If applicable, include in the law rights to claim communal land and other property and the related eligibility requirements, principles, and processes.

NEXT STEPS

The following recommendations present important next steps in the drafting and operationalization of the Libyan restitution law.

1. **In-country, qualitative interviews to assess the nature and scope of communal property rights and any related rights to restitution.** In order to inform the next draft of the restitution law, the Ministry of Justice, or another government actor, should support field research on the nature and scope of communal property rights. Findings will inform restitution-related policy decisions, provisions in the Draft Law, and regulations related to the restitution of communal property.
2. **In-country, qualitative interviews to assess the legitimacy and capacity of formal and informal dispute resolution mechanisms to engage in the adjudication and enforcement of restitution programs.** The restitution process will undoubtedly require significant adjudication and enforcement work. The identification, or creation, of the appropriate institutions to undertake these tasks requires an understanding of the current capacity of existing government agencies and dispute resolution mechanisms. Findings from field research will inform restitution-related policy decisions, provisions in the Draft Law, and regulations related to the adjudication of restitution claims and enforcement of decisions.
3. **Analysis of Libya’s family law and other laws governing women’s access, ownership, and control of land and other property, as well as in-country, qualitative interviews to assess customary law and practice affecting the same.** Designing a restitution process that is supportive of the rights of women and gender inclusive requires an understanding of the legal and social factors that affect women’s access, ownership and control of property. Field research on customary law and practice and a thorough analysis of existing laws and policies affecting women’s property rights will give drafters a more complete understanding of the status of women’s property rights in Libya and inform restitution-related policy decisions, provisions in the Draft Law, and regulations.
4. **Production of a second draft of the restitution law.** The current draft of the law represents an important first step towards the resolution of long-standing conflicts over housing, land and other property in Libya. However, in its current form the Draft Law fails to address several key issues and is overly broad with insufficient detail to accomplish its goals, to create certainty and land tenure security for Libyans, and to protect, as much as possible, all innocent parties. In order to be an effective foundation for Libya property restitution process, the law should be revised to incorporate the recommendations included in this report as well as other feedback received since the Draft Law was made public in March 2013. It is highly recommended that the Ministry of Justice engage legal experts to conduct an article-by-article analysis of the new draft in order to ensure that the provisions are appropriate in light of the government’s identified objectives, that the language of the law conforms to Libya’s existing legal framework and obligations under international treaties and agreements, and to highlight potential unintended effects which may result from implementation of the law. Note that the law may require several rounds of drafting and review prior to adoption.
5. **Presentation of the new draft for public comment.** The Ministry of Justice clearly recognizes the importance of allowing public comments on this draft prior to adoption, as evidenced by the decision to make the initial draft public. The next draft should also be made public to allow for comments from the general public, key Libyan stakeholders, and legal and development experts with

restitution experience. Transparency is critical to the process of restitution, including drafting the legislation that sets out the framework for restitution

6. **Identification of a sustainable funding source(s) for the restitution process.** Restitution processes are often lengthy and expensive, and ensuring that adequate funding is available to support the process has been a primary challenge in past efforts. The Libyan government will need to identify a sustainable source of funding to pay for the costs associated with the process, which will include administrative costs, any compensation to former owners, and costs associated with the relocation of current occupants (which may include compensation) where property is restored to former owners. It will be useful to look to lessons learned from past restitution programs where funding presented a challenge.
7. **Production of regulations, guidelines and procedures.** In order for the restitution law to be operationalized it will require the development of regulations, guidelines and procedures to govern the various components of the restitution process. .
8. **Training and capacity building around the law for relevant actors.** Once a restitution law is adopted, the Libyan government will need to ensure that all relevant actors, such as staff of local and national institutions involved in property restitution, administration, and management are well apprised of the contents and application of the law in order to ensure uniform and proper implementation across regions. Trainings should provide actors with information around: the scope and purpose of the restitution law, including the historical context out of which the need for restitution arose; the provisions of the law and how they will be implemented; the development of regulations, guidelines and procedures related to the law; and the role of various institutions and actors in the restitution process. Additional subjects for which training and capacity building are needed should be identified.
9. **Robust public information and awareness campaign throughout the country via multiple communications methods.** As described in the report, a restitution program can only achieve the broader objectives if Libyans understand the objectives, rights, and processes of restitution, including current occupants' rights, and avail themselves of this remedy.

REFERENCES

2012. “Colombia - The Victims and Land Restitution Law: An Amnesty International Analysis.” *Amnesty International Publications*, Vol. 23, No. 18, pp. 14. Available online. URL: <http://amnesty.org/en/library/asset/AMR23/018/2012/en/9cfa36ee-95c2-406b-bea0-4d5aff522d60/amr230182012en.pdf>
2012. “Women and Land.” Available online. URL: http://www.idrc.ca/EN/Documents/Colombia_E.pdf
2013. “Colombia: Landmark Ruling for Land Registration,” *Human Rights Watch*. Available online. URL: <http://www.hrw.org/news/2013/02/20/colombia-landmark-ruling-land-restitution>.
- ABColumbia, 2012. “Colombia the Current Panorama: Victims and Land Restitution Law 1448.” Available online. URL: http://www.abcolombia.org.uk/downloads/ABColumbia_land_report_-_Colombia_the_Current_Panorama.pdf.
- Albuja, Sebastian. 2010. “Building Momentum for Land Restoration Towards Property Restitution for IDPs in Colombia,” Internal Displacement Monitoring Centre, Geneva. Available online. URL: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/A0CCF5D6CC55525DC12577D600458E97/\\$file/Colombia_SCR_Nov2010.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/A0CCF5D6CC55525DC12577D600458E97/$file/Colombia_SCR_Nov2010.pdf)
- Arraiza, Jose-Maria and Massimo Moratti. 2009. *Getting the Property Questions Right: Legal Policy Dilemmas in the Post-Conflict Property Restitution in Kosovo (1999-2009)*. Oxford University Press. Available online. URL: <http://ijrl.oxfordjournals.org/content/21/3/421.abstract> (subscription only).
- Asfura-Heim, Patricio. N.D. *Tribal Strategies and Their Impact on Legal Pluralism in Iraq*. Available online. URL: <http://fundforfallenallies.org/sites/fundforfallenallies.org/files/library/Tribal%20Strategies%20and%20Their%20Impact%20on%20Legal%20Pluralism%20in%20Iraq.pdf>
- Attanasio, David L and Sanchez, Nelson Camilo. 2012. “Return Within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience,” *Washington University Global Studies Law Review*. Vol. 11, No. 1, pp. 1-53. Available online. URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1797946 (subscription only).
- Ballard, Megan J. 2010. “Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations,” *Berkeley Journal of International Law*. Vol. 28, Issue 2, pp. 462-494. Available online. URL: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1386&context=bjil>.
- Black, Ian. 2011. “Libyans try to get back property seized by Gaddafi,” *The Guardian* (November 4, 2011). Available online. URL: <http://www.guardian.co.uk/world/2011/nov/04/libya-gaddafi-property-res>
- Boudreaux, Karol. 2009. “Land Reform as Social Justice: The Case of South Africa,” Working Paper No. 09-37, Mercatus Center at George Mason University. Available online. URL: <http://mercatus.org/publication/land-reform-social-justice-case-south-africa>.

- Castillo, Zoraida, Lisa Haugaard and Annalise Romoser. 2012. “Still a Dream: Land Restitution on Colombia’s Caribbean Coast.” Available online. URL: <http://www.lawg.org/action-center/lawg-blog/69-general/1090-still-a-dream-land-restitution-on-colombias-caribbean-coast>.
- Centre on Housing Rights and Evictions. 2003. *The Pinheiro Principles*. Available online. URL: <http://www.cohre.org/sites/default/files/pinheiroprinciples.pdf>.
- Cotula, Lorenzo. 2002. “Women’s Rights to Land and Other Natural Resources” in Gender and Law: Women’s Rights in Agriculture (FAO). Available online. URL: <http://www.fao.org/docrep/005/y4311e/y4311e04.htm>.
- Di Martino, Samantha and Victoria Stanley. 2012. “Assessing Land Administration Project’s Gender Impacts in the Western Balkans.” pp. 1-16. Available online. URL: <http://siteresources.worldbank.org/INTECA/Resources/landgenderassessment.pdf>
- du Plessis, Jean. 2004. “Land Restitution in South Africa,” Working Paper No. 6, BADIL Expert Forum, Geneva, 2-5 October, 2003.
- Economic Commission for Africa. 2010. Land Policy in Africa: North Africa Regional Assessment. AU-ECA-AFDB Consortium. http://uneca.africa-devnet.org/files/lpi_north_africa_regional_assessment.pdf>).
- Food and Agriculture Organization (FAO), Norwegian Refugee Council (NRC), Office for the Coordination of Humanitarian Affairs (OCHA), UN High Commissioner for Human Rights (UNCHR), UN-Habitat, and UNHCR. 2007. “Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the Pinheiro Principles [Handbook].” Available online. URL: http://www.ohchr.org/Documents/Publications/pinheiro_principles.pdf
- Gaafar, Reem. 2012. “Libya Land Tenure Briefing with Focus on Women’s Land Rights,” Landesa Working Paper.
- Galtier, Mathieu. 2013. “After Qaddafi’s ‘socialism,’ Libya tries to untangle who owns what,” *The Christian Science Monitor* (May 12, 2013) pp. 1-4. Available online. URL: <http://www.csmonitor.com/World/Middle-East/2013/0512/After-Qaddafi-s-socialism-Libya-tries-to-untangle-who-owns-what>
- Government of Iraq. 1990. Civil Code No. 40 of 1951. Available online. URL: <http://gipi.org/wp-content/uploads/2009/01/civilcode928-end-x.pdf>.
- Government of Libya. 2013a. Draft Law No. () year 2013, determining some provisions regarding properties that devolved to the state under Law No. 4 year 1978 and its amendments. Available online. URL: http://www.aladel.gov.ly/main/uploads/sections/403_uderLaw04.pdf (Arabic only)
- Government of Libya. 2013b. Memo regarding a draft law amending some provisions regarding properties that devolved to the state. Available online. URL: http://www.aladel.gov.ly/main/uploads/sections/403_NotetouderLaw04.pdf (Arabic only)
- Government of South Africa. 1994. “Restitution of Land Rights Act,” Office of the President. Available online. URL: <http://www.info.gov.za/acts/1994/a22-94.pdf>.
- Government of South Africa. 2013. “The Restitution of Land Rights Amendment Bill,” Ordinance no. 36477, 23 May 2013. Government Gazette, Vol. 575. Available online. URL: http://www.dla.gov.za/phocadownload/Bills/restitution_amendment_bill230513.pdf

- Government of South Africa. 2013. *Claiming Land Restitution*. Department of Rural Development and Land Affairs.
- Hall, Ruth. 2007. "The Impact of Land Restitution and Land Reform on Livelihoods," Research Report No. 32. Programme for Land and Agrarian Studies, Cape Town. Available online. URL: <http://repository.uwc.ac.za/xmlui/handle/10566/90>.
- Hall, Ruth. 2009. "Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa," Paper presented at the Seminar on Land Restitution and Transitional Justice, Oslo, September 2009.
- Hanni, Uku. 2012. "Restitution in Estonia." Available online. URL: <http://estonia.eu/about-estonia/history/restitution-in-estonia.html>.
- Hartvigsen, Morten. 2013. "Land reform in Central and Eastern Europe after 1989 and its outcome in the form of farm structures and land fragmentation," Land Tenure Working Paper 24, Rome: Food and Agriculture Organization of the United Nations (FAO). Available online. URL: <http://www.fao.org/docrep/017/aq097e/aq097e.pdf>
- Ingunn, Ikdahl, Anne Hellum, Randi Kaarhus, and Tor A Benjaminsen. 2005. "Human rights, formalization and women's land rights in south and eastern Africa." Noragric Report No. 26, Norway.
- International Human Rights Internship Program and Forum Asia. 2000. "Circle of Rights: Economic, Social, and Cultural Rights Activism: A Training Resource." Available online. URL: <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/copyright.htm>
- International Law Commission (ILC). 2001. "Responsibility of States for Internationally Wrongful Acts." Available online. URL: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.
- International Legal Assistance Consortium. 2013. "*ILAC Rule of Law Assessment Report, Libya 2013*" Stockholm. Available online. URL: <http://www.ilac.se/2013/05/09/ilac-assessment-report-libya-2013/>.
- International Organization for Migration (IOM). 2012. *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*. Geneva: IOM. Available online. URL: http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/Property_Restitution_and_Compensation.pdf.
- Jansen, Rudolph. 2013. "State of the Nation 2013 – What should we make of the State of Land Reform?" Lawyers for Human Rights. Available online. URL: <http://www.lhr.org.za/blog/2013/3/state-nation-2013-%E2%80%93-what-should-we-make-state-land-reform>
- Kindi, F. I., 2010. Challenges and Opportunities for Women's Land Rights in the Post-Conflict Northern Uganda. MICROCON Research Working Paper 26, Brighton: MICROCON. Available online. URL: http://www.microconflict.eu/publications/RWP26_KFI.pdf.
- Lahiff, Edward. 2010. "Q&A: Land Reform in South Africa." POV. Available online. URL: http://www.pbs.org/pov/promisedland/land_reform.php#.Ua_Z3Nh0bKc.

- Mavuso, Sihle. 2013. "Nearly 200 claims of land restitution still outstanding." The New Age online. Available online. URL: http://thenewage.co.za/92201-1008-53-Nearly_200_claims_of_land_restitution_still_outstanding
- McCallin, Barbara. 2012. *Restitution and Legal Pluralism in Contexts of Displacement*. Available online. URL: http://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Restitution-Legal-Pluralism-CaseStudy-2012-English_0.pdf.
- Medina, Eduardo. "Property restitution in Colombia," *Preventing Displacement*. Available online. URL: <http://www.fmreview.org/en/preventing/medina.pdf>.
- Meertens, Donny. 2012. "Colombia's law on victims and restitution: a challenge for gender-sensitive transitional justice" UN Entity for Gender Equality and the Empowerment of Women Expert Group Meeting on Good practices in realizing women's rights to productive resources, with a focus on land, Geneva, 25-27 June 2012.
- Paglione, Guilia. 2008. "Individual Property Restitution: from Deng to Pinheiro – and the Challenges Ahead," *Oxford Journal*, July 2008. Available online. URL: <http://ijrl.oxfordjournals.org/content/20/3/391.full> (subscription only).
- Pardo, Camilo and Raquel Victornino. 2013. "Putting things back together: Colombian Land Restitution Policy and Its Potential for Land Administration Services," Paper presented at the Annual World Bank Conference on Land and Poverty, 8-11 April, 2013.
- Republic of Bulgaria. 1991. Ownership and Use of Farm Land Act. Law No. 17.
- Republic of Lithuania. 1991. On the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property. Law No. I-1454.
- Sait, Siraj and Hilary Lim. 2006. *Land, Law & Islam: Property Rights and Human Rights in the Muslim World*. Zed Books: London.
- Sibanda, Sanele. 2010. "When Is the Past Not the Past? Reflections on Customary Law under South Africa's Constitutional Dispensation," *Human Rights Brief*, vol. 17, no. 3, pp. 31-35. Available online. URL: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1131&context=hrbrief>.
- Stan, Lavinia. 2006. "The Roof over Our Heads: Property Restitution in Romania," *Journal of Communist Studies and Transitional Politics*, vol. 22, no. 2, pp. 108-205. Available online. URL: http://www.academia.edu/183374/The_Roof_over_Our_Head_Property_Restitution_in_Romania.
- Stanley, Victoria and Di Martino, Samantha. 2012. *Assessing Land Administration Project's Gender Impacts in the Western Balkans: Country Case Studies: Albania, Bosnia-Herzegovina and Montenegro*. Available online. URL: <http://siteresources.worldbank.org/INTECA/Resources/landgenderassessment.pdf>.
- Stefan, Laura. 2010. *Private properties issues following a change of political regime in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia*. European Parliament Policy Department Citizen's Rights and Constitutional Affairs. Available online. URL: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/peti/dv/peti20100504_studyrestitution2/peti20100504_studyrestitution2_en.pdf.
- Stefansson, Anders H. 2006. "Homes in the Making: Property Restitution, Refugee Return, and Senses of Belonging in a Post-war Bosnian Town." *International Migration* Vol. 44(3). Available online. URL:

[http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/2D5F62E4638B34BDC125741000518A38/\\$file/Homes+in+the+Making.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/2D5F62E4638B34BDC125741000518A38/$file/Homes+in+the+Making.pdf)

Stickler, Mercedes. 2012. "Land Restitution in South Africa," Focus on Land in Africa Brief, Lesson 2. Land and Natural Resource Tenure in Africa Program. Available online. URL: <http://focusonland.com/lessons/land-restitution-south-africa/>.

Summers, Nicole. 2012. "Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?" *Harvard Human Rights Journal*. Vol. 25, pp. 219-235. Available online. URL: <http://harvardhrj.com/wp-content/uploads/2009/09/Summers.pdf>.

UN CEDAW. n.d. *Declarations, Reservations and Objections to CEDAW*. Available online. URL: <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N38>.

UNHCR. 2012. "Housing, Land, and Property Issues and the Response to Displacement in Libya." Available online: <http://terra0nullius.files.wordpress.com/2013/02/unhcr-report-hlp-issues-and-displacement-in-libya-copy.pdf>.

Van der Auweraert, Peter. 2007. *Property Restitution in Iraq*, presented at the Symposium on Post-Conflict Property Restitution, U.S. Department of State. Available online. URL: <http://2001-2009.state.gov/documents/organization/98032.pdf>.

Van der Auweraert, Peter. 2009. "Policy Challenges for Property Restitution in Transition – Iraq" in *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity*, Ferstman, Carla, et al., eds. pp. 459-482. Available online. URL: <http://www.brill.com/reparations-victims-genocide-war-crimes-and-crimes-against-humanity> (subscription only).

Van der Auweraert, Peter. 2010. "Iraq updates its approach to former regime-related land and property claims," TerraNullius Blog. Available online. URL: <http://terra0nullius.wordpress.com/2010/03/11/iraq-updates-its-approach-to-former-regime-related-land-and-property-claims/>

Van der Auweraert, Peter. 2012. "The Potential for Redress: Reparations and Large-Scale Displacement," in *Transitional Justice and Displacement*, Duthie, R. ed., pp. 139-188. Available online. URL: http://www.academia.edu/1981254/The_Potential_for_Redress_Reparations_and_Large-Scale_Displacement.

Virgo, Graham. 1999. *The Principles of the Law of Restitution*. New York: Oxford University Press.

Williams, Rhodri C. "Post-conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice," *International Law and Politics*. Vol. 37, pp. 441-553. Available online. URL: http://law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_059622.pdf.

Williams, Rhodri C. 2007. "The Contemporary Right to Property Restitution in the Context of Transitional Justice," *International Center for Transitional Justice*. Pp. 1-52. Available online. URL: <http://ictj.org/sites/default/files/ICTJ-Global-Right-Restitution-2007-English.pdf>.

Worth, Robert F. "Thousands of Libyans Struggle with Recovery of Property Confiscated by Qaddafi." *The New York Times*, 14 May 2012. Available online. URL:
<http://www.nytimes.com/2012/05/14/world/africa/libyans-consider-recovery-of-property-confiscated-by-qaddafi.html?pagewanted=all>.

ANNEX I: DRAFT LAW NO. () OF 2013 DETERMINING CERTAIN PROVISIONS CONCERNING THE PROPERTIES TRANSFERRED TO THE STATE PER LAW NO. 4 OF 1978 AS AMENDED

**The General National Congress:
Having reviewed:**

- The constitutional declaration
- Civil Law as amended
- Law No. 4 of 1378 determining certain provisions on real property as amended,
- Law No. 11 of 1992 determining certain provisions on real property,
- Law No. 25/ 1993 amending the provisions of Law No. 11/ 1994 determining certain provisions on real property,
- Law No. 10 of 1427 determining certain provisions concerning the claims of ownership, dismissal and evacuation concerning the properties transferred to the community,
- Law No. 21 of 1984 concerning the provisions determining the public benefit and disposal of the lands, and
- Law No. 17 of 2010 concerning the real estate registration and state-owned properties,

In affirmation of the principle of transitional justice, and

Based on the presentation of the Minister of Justice and approval of the Council of Ministers.

The following law was drafted

Article (1)

The ownership of the craft, professional and commercial shops shall be transferred to the former owners thereof whatsoever the occupier thereof, in addition to the vacant lands within the approved plans and agricultural lands upon which no installations were built by the parties to whom such lands were allocated by the state unless the owner has received a compensation for the same.

The occupier of the above shops is deemed a lessee who leased the same from the owner for six months from the date of delivery thereof. The occupier shall deliver the shops to the owner after elapse of the above period, otherwise the shops will be evacuated through the administrative methods.

Article (2)

The houses may be returned to the former owners thereof, except for the following cases:

- 1- If the owners were compensated amicably or legally
- 2- If the owner accepted compensation instead of return
- 3- If the owner reconciled with the party to whom the house was allocated by the state.

Article (3)

The houses sated in the above two articles shall not be returned if the ownership thereof was seized for public interest and the execution of the public project began before the effective date hereof and if the value of the property is not appropriate with the value of the installations built thereupon after the transfer thereof to the state, which installations were built with good faith. Good faith is deemed present if the said installations were built based on a legally proper reason. If the installations were built with bad faith, the owner of the property shall choose either to remove the same on the expense of the builder thereof or remain the same and pay the value thereof. If the owner chose the removal of installations, the removal must be executed through the administrative methods by the competent authorities.

Article (4)

The owner may apply for the reconsideration of the compensation if such compensation is unfair and claim for the difference between such compensation and the fair compensation. The Council of Ministers shall develop the bases and regulations of return and compensation.

Article (5)

The owner of the property may claim for compensation for the period between the date of receiving and returning the property against the non-utilization of the owner of such property according to the regulations and bases established by the Council of Ministers, including the limits of compensation and method of payment thereof.

Article (6)

If it is established that the house shall be returned to the owner thereof, but such house is occupied and the occupier cannot find alternative house, the competent ministry shall pay the rent of the house to the owner thereof for the period in which the occupier remains therein. The rent must be determined according to the applicable rents in the market. The occupier shall search for alternative house during the period determined by the Council of Ministers, otherwise the occupier will be dismissed from the house through the administrative methods upon the elapse of such period without the need to any proceedings.

If the occupier of the property is not a Libyan citizen, the occupier shall remain in the property till the expiration of the lease contract signed with the state. The occupier shall discuss with the owner the renewal of the lease contract or search for alternative property.

Article (7)

If the property to be returned to the owner thereof is mortgaged by the non-owner, the original owner shall bear the value of such mortgage only to the extent of the benefit availed to the property. The mortgage must be removed if no benefit was availed to the mortgaged property therefore and the mortgager shall bear the value of mortgage and replace the mortgage of the property with another mortgage or provide another guarantee to the creditor as agreed with the concerned bank.

Article (8)

All the easements of the property arising after receiving the same must be invalidated if it is established to return such property to the owner thereof. If such invalidation is not legally applicable, the owner shall instead receive a compensation from the beneficiary of the easement.

In order to invalidate the easement or pay any compensation for the same, the owner shall not have started arranging such easement on the property.

Article (9)

The Council of Ministers shall form a supreme committee chaired by not less than a advisor at the Court of Appeal and subcommittees chaired by a judge with a rank not less than deputy chief of a court of first instance in order to consider the applications for the return of houses or estimate the compensation therefore and determine the method of paying such compensation putting into considering the status and location of the property, heavies and installations thereupon and improvements made thereto on a case-to-case basis.

The resolution forming such committees must determine the work mechanism thereof.

In all cases the resolution of the subcommittees shall be valid only after being approved by the supreme committee.

Article (10)

The occupier of the house who does not own another house must be given an alternative state-owned property against a real estate loan from which the payments made thereby to the state for such property must be deducted or the occupier shall receive a proper cash compensation.

Article (11)

Subject to the provisions of Article (3) hereof, no provisions hereof breach the procedures taken concerning the return of and compensation for properties per Resolution No. 108 of 2006 concerning the regulations and bases of compensation for the properties subject to the provisions of the above Law No. 4 of 1978.

Article (12)

All the procedures and registrations transferring the ownership of properties to be returned per the provisions hereof must be cancelled and the properties must be reregistered in the name of the parties to whom the properties are returned.

Article (13)

The properties subject to the provisions hereof may not be disposed of and no disposal concerning such properties may be registered. Moreover, the notary public may not conclude or notarize any contracts concerning the above properties and the Tax Authority may not collect any taxes thereupon. The Tax Authority and Department of Land Registration and State-Owned Properties shall detect any deed concerning the above properties and refer the persons in charge to the competent authorities to take the legal procedures against them.

Article (14)

Any person violating the provisions of Article (13) hereof must be sentenced to imprisonment or a fine equal to the value of the property.

Article (15)

The following laws must be invalidated:

Law No. 11 of 1992 determining certain provisions concerning the real estate property as amended, Law No. 10 of 1427 determining certain provisions concerning the claims of ownership, dismissal and evacuation concerning the properties transferred to the community and law No. 21 of 1984 concerning the provisions determining the public benefit and disposal of the lands, in addition to any provisions contradicting with the provisions hereof.

Article (16)

The present law must be published in the official gazette and take force as of the date of the publication thereof.

General National Congress

Issued on / /
Corresponding to / /
Mrs./ Samia

ANNEX II: PINHEIRO PRINCIPLES

Pinheiro Principles	Explanation	Illustrative Examples
1. Scope and Application		
<p>1.1 The <i>Principles on Housing and Property Restitution for Refugees and Displaced Persons</i> 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.</p> <p>1.2 The <i>Principles on Housing and Property Restitution for Refugees and Displaced Persons</i> 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</p>	<ul style="list-style-type: none"> • “The <i>Principles</i> emphasize 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 housing and property restitution rights of refugees and displaced persons” (p. 16). • “The <i>Principles</i> apply in all cases of involuntary displacement resulting from international or internal armed conflict, gross human rights violations such as ‘ethnic cleansing’, development projects, forced evictions and natural and manmade disasters” (p. 16). 	N/A
2. The Right to Housing and Property Restitution		
<p>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.</p> <p>2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy to 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.</p>	<ul style="list-style-type: none"> • “The term <i>restitution</i> refers to an equitable remedy (or a form of restorative justice) by which individuals or groups of persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position” (p. 24). • In the past several decades, a comprehensive, individual right of refugees and displaced persons to housing and property restitution has emerged. <i>Principle 2.1</i> recognises this fundamental right of all refugees and displaced persons to housing, land and property restitution” (p. 24). • “In essence, the <i>Principles</i> take the view that efforts to secure return-based restitution must be exhaustively explored and determined to be impractical prior to any subsequent efforts which may rely on compensation-based durable solutions to 	Colombia

Pinheiro Principles	Explanation	Illustrative Examples
	<p>displacement” (p. 24).</p> <ul style="list-style-type: none"> It is important for users of the Handbook to be clear that the term <i>factually impossible</i> (also sometimes referred to as ‘materially impossible’) firstly addresses the actual physical damage or destruction of housing, land and property so commonly a result of armed conflict, or in the event of some natural disasters, the actual non-existence of original lands (in the event of a mudslide, for example). The term does not refer to particular political or related obstacles which may prevent a particular restitution case from being resolved on the basis of actual re-possession of original homes and lands” (p. 24) 	
3. The Right to Non-discrimination		
<p>3.1 Everyone has the right to non-discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p> <p>3.2 States shall ensure that <i>de facto</i> and <i>de jure</i> discrimination on the above grounds is prohibited and that all persons, including refugees and displaced persons, are considered equal before the law.</p>	<ul style="list-style-type: none"> In the specific context of restitution, of course, this right is particularly fundamental given the fact that many instances of displacement are clearly rooted in the intentional discrimination of certain groups – especially racial, ethnic, national and religious minorities. When displacement is demonstrably discriminatory in nature, such as when certain ethnic, racial or other groups are specifically targeted for removal from their homes, these prohibited acts will have the cumulative result of actually <i>strengthening</i> the future restitution claims of those displaced in this manner (p. 32). “In relation to the implementation of restitution programmes, upholding the right to non-discrimination is critical to developing durable solutions to displacement and assuring that the most marginalized groups and vulnerable individuals are able to benefit on an equal footing with respect to their housing and property restitution rights” (p. 32). 	Colombia
4. The Right to Equality Between Men and Women		
<p>4.1 States shall ensure the equal right of men and women, and the equal right of boys and girls, to the enjoyment of housing, land and property restitution. In particular, States shall ensure the equal right of men and women, and the equal right of boys and girls, to <i>inter alia</i> 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.</p> <p>4.2 States should ensure that housing, land and property restitution</p>	<ul style="list-style-type: none"> “Gender equality refers to the equal enjoyment by women, men, girls and boys of rights, socially valued goods, opportunities, resources and rewards. Equality does not mean that men and women are the same but that their enjoyment of rights, opportunities and life chances are not governed or limited by whether they were born male or female” (p. 36). Equality rights are widely recognised at the international and national levels, and have been consistently interpreted to require the implementation of positive measures designed to eliminate the 	Colombia, CEE

Pinheiro Principles	Explanation	Illustrative Examples
<p>Programs, policies and practices recognize the joint ownership rights of both the male and female heads of the household as an explicit component of the restitution process, and that restitution Programs, policies and practices reflect a gender sensitive approach.</p> <p>4.3 States shall ensure that housing, land and property restitution Programs, policies and practices do not disadvantage women and girls. States should adopt positive measures to ensure gender equality in this regard.</p>	<p>effects of <i>de facto</i> or <i>de jure</i> discrimination on the basis of sex” (p. 36).</p> <p>4. “Consequently, under <i>Principle 4</i>, housing and property restitution laws and processes must not only not discriminate, but they must also ensure the right to equality of men and women, as well as equality between boys and girls” (p. 36).</p>	
5. The Right to be Protected from Displacement		
<p>5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>5. “[A] number of human rights safeguards are of particular significance in terms of <i>preventing</i> displacement from taking place” (p. 39).</p>	Prospective
6. The Right to Privacy and Respect for the Home		
<p>6.1 Everyone has the right to be protected against arbitrary or unlawful interference with his or her privacy and his or her home.</p> <p>6.2 States shall ensure that everyone is provided with safeguards of due process against such arbitrary or unlawful interference with his or her privacy and his or her home.</p>	<p>6. “The widely recognised rights to privacy and respect for the home are fundamental human rights protections that can be linked directly to both the prevention of displacement and to the restoration of these rights should they be subject to violation” (p. 42).</p>	Prospective
7. The Right to Peaceful Enjoyment of Possessions		
<p>7.1 Everyone has the right to the peaceful enjoyment of his or her</p>	<ul style="list-style-type: none"> • “The right to the peaceful enjoyment of possessions is one of the 	Prospective

Pinheiro Principles	Explanation	Illustrative Examples
<p>possessions.</p> <p>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 interference with the right to peaceful enjoyment of possessions</p>	<p>most frequently violated rights when forced displacement occurs” (p. 44).</p> <ul style="list-style-type: none"> • Users of the Handbook need to be aware of the subtle distinctions between the peaceful enjoyment of possessions and property rights. The ‘right to private property’ is very explicitly absent from a number of the most central international treaties” (p. 44). 	
8. The Right to Adequate Housing		
<p>8.1 Everyone has the right to adequate housing.</p> <p>8.2 States should adopt positive measures aimed at alleviating the situation of refugees and displaced persons living in inadequate housing.</p>	<ul style="list-style-type: none"> • “Adequacy includes: security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy” (p. 48). • “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 equality of treatment and access vis-à-vis housing and protection against racial discrimination, guaranteeing housing affordability, regulating landlord-tenant relations and securing access to and provision of housing resources suited to the needs of marginalized and/or vulnerable groups, such as women-headed households, persons with disabilities, the chronically ill, migrant workers, the elderly and refugees and internally displaced persons” (p. 48). 	Prospective
9. The Right to Freedom of Movement		
<p>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.</p> <p>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.</p>	<ul style="list-style-type: none"> • “These rights presume the ability of returnees to literally ‘move freely’ back to their places of origin and, once again, literally to ‘choose their place of residence’, including their original homes. Any restrictions placed on the exercise of these rights, and by inference restitution rights, would be incompatible with the <i>Principles</i>. At the same time, users the Handbook should guard against attempted forced movement couched in terms of freedom of movement, particularly when repatriation is under discussion” (p. 51). 	Prospective
10. The Right to Voluntary Return in Safety and Dignity		

Pinheiro Principles	Explanation	Illustrative Examples
<p>10.1 All refugees and displaced persons have the right to voluntarily return 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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<ul style="list-style-type: none"> • “[T]he idea of voluntary repatriation/return has in recent years expanded into a concept involving not simply the return to one’s country or region, but to one’s <i>original home, land or property</i>” (p. 54). • UNHCR’s growing involvement in restitution questions is grounded in its experience that voluntary repatriation operations are likely to be <i>less successful</i> if housing and property issues are ignored or are left to be considered only after significant numbers of persons return” (p. 55). • “[I]t must be recognised that the right to return – whether for refugees or displaced persons – is not an obligation to return. Return cannot be restricted, and conversely it cannot be imposed. The right to housing and property 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” (p. 56). 	<p style="text-align: center;">Colombia</p>
11. Compatibility with International Human Rights, Refugee and Humanitarian Law and Related Standards		
<p>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.</p>	<ul style="list-style-type: none"> • “In broad terms, <i>Principle 11</i> sets out the baseline for determining the adequacy of whatever national restitution procedures, institutions, mechanisms and legal frameworks may exist, by urging States to ensure that these are compatible with international human rights, refugee and humanitarian law and related standards. To do so will require intensive national legislative reviews to be undertaken, combined with the development of expertise in the country of origin of the meaning and stature of housing and property restitution rights within these various legal regimes” (p. 60). • <i>Principle 11</i> re-affirms through its reference to ‘other standards’ the necessity of streamlining national restitution rules and 	<p style="text-align: center;">Colombia</p>

Pinheiro Principles	Explanation	Illustrative Examples
	regulations with those found in international human rights, refugee and humanitarian law as reflected in the <i>Principles</i> ” (p. 60).	
12. National Procedures, Institutions, and Mechanisms		
<p>12.1 States should establish and support equitable, timely, independent, transparent and non-discriminatory 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.</p> <p>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.</p> <p>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.</p> <p>12.4 States should establish guidelines which 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 possessory rights, as well as decision-making, 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 non-discrimination.</p> <p>12.5 States should, 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</p>	<ul style="list-style-type: none"> • “<i>Principle 12</i> 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 (p. 63). • “The absence of effective, impartial and accessible judicial or other effective remedies can severely compromise the restitution process” (p. 64). • “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 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” (p. 64). 	Colombia; South Africa; Iraq

Pinheiro Principles	Explanation	Illustrative Examples
<p>facilitate the housing, land and property restitution process in a just and timely manner, request the technical assistance and cooperation of relevant international agencies in order to establish provisional regimes responsible for providing refugees and displaced persons with the procedures, institutions and mechanisms necessary to ensure effective restitution remedies.</p> <p>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.</p>		
13. Accessibility of Restitution Claims Procedures		
<p>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, and to receive a determination on their claim. States should not establish any pre-conditions for filing a restitution claim.</p> <p>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.</p> <p>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.</p> <p>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</p>	<ul style="list-style-type: none"> • “While <i>Principle 12</i> speaks of the necessity of having effective restitution procedures, mechanisms and institutions in place, <i>Principle 13</i> recognises that not only must measures be effective in their work to implement restitution policies, but they must also be accessible to those constituencies they are designed to benefit. Claims procedures must be physically, linguistically and economically accessible, and special measures should be taken to ensure that marginalized groups and vulnerable persons are able to benefit from such institutions in an equitable and just manner” (p. 69). • “A restitution programme following a period of conflict can bring a sustainable solution and thus contribute to the reconciliation within a country only if it provides a meaningful opportunity to participate in the process for all victims, including refugees” (p. 70). • “In order to achieve fair and sustainable solutions, access to restitution claims procedures needs to be given to all parties concerned, including those who are currently occupying or using the claimed property. The notification of current occupants and other third parties about pending claims poses a large administrative burden on programmes and the consideration of their respective rights to the property adds considerable 	<p>South Africa; Colombia; Iraq; CEE Kosovo; Bosnia; Croatia</p>

Pinheiro Principles	Explanation	Illustrative Examples
<p>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.</p> <p>13.5 States should seek to establish restitution claims processing centers 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.</p> <p>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.</p> <p>13.7 States should develop restitution claims forms that are simple, easy to understand and use and make them available in the first language or languages of the groups affected. Competent assistance should be made available to help persons in completing and filing any necessary restitution claims forms, and such assistance should be provided in a manner which is age and gender sensitive.</p> <p>13.8 Where restitution claims forms cannot be sufficiently simplified due to the complexities inherent in the claims process, States should engage qualified persons to interview potential claimants in confidence, and in a manner which is age and gender sensitive, in order to solicit the necessary information and complete the restitution claims forms on their behalf.</p> <p>13.9 States should establish a clear time period for filing restitution claims. The time period 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 information and access, the spread of displacement, the accessibility of the process for potentially disadvantaged groups and</p>	<p>complexity to the decision-making process. It is crucial that claims restitution procedures are designed to deal with third party participation in a fair and efficient manner” (p. 70).</p>	

Pinheiro Principles	Explanation	Illustrative Examples
<p>vulnerable individuals, and the political situation in the country or region of origin.</p> <p>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.</p> <p>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 (be they 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.</p> <p>13.12 States should ensure that no one is persecuted or punished for making a restitution claim.</p>		
14. Adequate Consultation and Participation in Decision-Making		
<p>14.1 States and other involved international and national actors should ensure that voluntary repatriation and housing, land and property restitution Programs are carried out with adequate consultation and participation with the affected persons, groups and communities.</p> <p>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.</p>	<ul style="list-style-type: none"> • “In applying <i>Principle 15</i>, users of the Handbook need to be aware of the many different views on the question of registering housing and property rights, and why great care must be exercised in pursuing these questions. For instance, the process of constructing or reconstructing official records can be abused by corrupt officials and can equally be used as a motivation to economically or politically strong groups to illegally grab land belonging to refugees and displaced persons and registering it as their own” (p. 75). 	CEE
15. Housing, Land and Property Records and Documentation		
<p>15.1 States should establish or re-establish national multi-purpose cadastre or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution Programs, respecting the rights of refugees and displaced persons when doing so.</p>	<ul style="list-style-type: none"> • 	CEE

Pinheiro Principles	Explanation	Illustrative Examples
<p>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 right 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 non-discrimination.</p> <p>15.3 States should ensure, where appropriate, that registration systems record and/or recognize the possessory rights of traditional and indigenous communities to collective lands.</p> <p>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.</p> <p>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.</p> <p>15.6 States and other responsible authorities or institutions conducting the registration of refugees or displaced persons should endeavor 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.</p>		

Pinheiro Principles	Explanation	Illustrative Examples
<p>15.7 States may, in situations of mass displacement where little documentary evidence exists as to ownership or possessory rights, 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.</p> <p>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.</p>		
16. The Rights of Tenants and Other Non-Owners		
<p>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 Programs. To the maximum extent possible, States should ensure that such persons are able to return to and re-possess and use their housing, land and property in a similar manner to those possessing formal ownership rights.</p>	<ul style="list-style-type: none"> • “During discussions leading to the development of restitution plans and processes, users of the Handbook should seek to ensure that the restitution laws, procedures and institutions that may emerge do not intentionally or by default discriminate against or otherwise treat non-owners inequitably vis-à-vis owners. As noted in <i>Principle 16</i>, three distinct groups - tenants, social-occupancy rights holders and other legitimate occupants – should be ensured explicit rights under restitution programmes” (p. 79). 	South Africa
17. Secondary Occupants		
<p>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 which is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process, including, <i>inter alia</i>, an opportunity for genuine consultation, adequate and reasonable notice, and the provision of legal remedies, including opportunities for legal redress.</p> <p>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</p>	<ul style="list-style-type: none"> • “The unauthorised possession of refugee and displaced person housing, land and property is common to all post-conflict situations” (p. 81). • “While some manifestations of secondary occupation clearly require reversal (particularly if the occupation in question took place during an ethnic conflict as an element of ‘ethnic cleansing’ or where clear cases of opportunism, discrimination, fraud or corruption are involved), care always needs to be taken to protect secondary occupants against homelessness, unreasonable eviction or any other human rights violations” (p. 81). • “While restitution rights need to be enforced, peace operations and restitution institutions should ensure that people do not become homeless due to the recovery of refugee housing, land or property 	Colombia

Pinheiro Principles	Explanation	Illustrative Examples
<p>the housing, land and property in question in a just and timely manner.</p> <p>17.3 States should, in cases where evictions of secondary occupants are justifiable and unavoidable, 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 to facilitate 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.</p> <p>17.4 States may consider, in cases where housing, land and property has been sold by secondary occupants to third parties acting in good faith, 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 <i>bona fide</i> property interests in such cases.</p>	<p>rights from a secondary occupant” (p. 81).</p> <ul style="list-style-type: none"> • “Mechanisms need to be developed which ensure the provision of alternative accommodation to those who are legally required to vacate homes over which they do not hold legitimate rights” (p. 81). 	
18. Legislative Matters		
<p>18.1 States should ensure 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.</p> <p>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</p>	<ul style="list-style-type: none"> • “Providing people with a clear statement of their housing and property restitution rights and a concrete legal remedy for the violations that they have suffered is one of the most concrete steps to building a functioning justice system and a society built on the rule of law” (p. 85). • “In order to establish an adequate legal regime for the protection of the rights articulated in these <i>Principles</i>, States will need to pursue a range of legislative measures, including the adoption, amendment, reform, or repeal of relevant laws, regulations and/or practices” (p. 85). 	<p style="text-align: center;">South Africa; Colombia; CEE; Iraq</p>

Pinheiro Principles	Explanation	Illustrative Examples
<p>claim on the same basis as primary claimants.</p> <p>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.</p>		
19. Prohibition of Arbitrary and Discriminatory Laws		
<p>19.1 States should neither adopt nor apply laws which prejudice the restitution process, in particular through arbitrary, discriminatory, or otherwise unjust abandonment laws or statutes of limitations.</p> <p>19.2 States should take immediate steps to repeal unjust or arbitrary laws, and laws which 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.</p> <p>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 non-discrimination and to equality in both law and practice.</p>	<ul style="list-style-type: none"> • “Failing to rectify discriminatory, arbitrary or otherwise unjust application of law in countries of return prevents successful restitution and may even contribute to future instability and conflict” (p. 87). • “Discriminatory restitution programmes further entrench social divisions and animosities, and are counter to post-conflict resolution, peace-building, as well as to fundamental human rights principles and international human rights legal obligations” (p. 87). 	CEE
20. Enforcement of Restitution Decisions and Judgments		
<p>20.1 States should designate specific public agencies to be entrusted with enforcing housing, land and property restitution decisions and judgments.</p> <p>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 judgments made by relevant bodies regarding housing, land and property restitution.</p> <p>20.3 States should adopt specific measures to prevent the public obstruction of enforcement of housing, land and property restitution decisions and judgments. Threats or attacks against officials and agencies carrying out restitution Programs should be fully investigated and prosecuted.</p>	<ul style="list-style-type: none"> • “[T]he importance of including an enforcement arm within any restitution institution or an external entity subject to its control, cannot be over emphasised. Restitution bodies should be given the powers necessary to enforce their decisions and to ensure that Governments and other relevant parties comply. Local and national Governments should be legally obliged to accept decisions by restitution bodies” (p. 89). • “The re-establishment of the rule of law and the physical protection of people who wish to return to their homes are two of the most fundamental pre-requisites of successful restitution programmes” (p. 89). 	Bosnia; CEE; Iraq

Pinheiro Principles	Explanation	Illustrative Examples
<p>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 Programs.</p> <p>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 non-compliance with housing, land and property restitution decisions and judgments, including failing to vacate occupied housing, land and property voluntarily and damaging and/or looting of occupied housing, land and property.</p>		
21. Compensation		
<p>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 be 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.</p> <p>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.</p>	<ul style="list-style-type: none"> • “[Compensation] should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement or other agreement provide for a combination of restitution and compensation. At the same time it is important to note that compensation and restitution should not be seen as an ‘either/or’ decision, and the <i>Principles</i> rightly acknowledge that in some cases, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice” (p. 92). 	Colombia
22. Responsibility of the International Community		
<p>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.</p> <p>22.2 International financial, trade, development and other related</p>	<ul style="list-style-type: none"> • “Housing and property restitution processes, no matter how just they may be or how carefully they have been planned, will invariably causes tensions within certain sectors of any post-conflict country to which refugees or displaced persons are hoping to return. Given the frequently volatile environments where 	Bosnia-Herzegovina

Pinheiro Principles	Explanation	Illustrative Examples
<p>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.</p> <p>22.3 International organizations should work with national governments and share expertise on the development of national housing, land and property restitution policies and Programs 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.</p> <p>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 <i>inter alia</i> the establishment of national procedures, institutions, mechanisms and legal frameworks.</p> <p>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 Programs may be successfully implemented and enforced.</p> <p>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 judgments. Member States in the Security Council should consider including this role in the mandate of peace operations.</p> <p>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.</p>	<p>restitution processes are undertaken, the fear of renewed conflict due to poorly managed or ill-conceived restitution programmes can sometimes impede restitution efforts. Restitution almost always takes place in countries that have experienced major traumas, and adequately addressing any fears about restitution will be vital to ensure that restitution succeeds in building a stable and peaceful society” (p. 97).</p> <ul style="list-style-type: none"> • “One of the primary functions, therefore, for any involvement by the international community in these efforts is to act as an independent arbiter, playing a mediating and pacifying role in reducing tensions during the often slow process of building a sustainable peace” (p. 97). • “Principle 22.7 addresses the potentially negative impacts that international organisations can have upon the enjoyment of housing and property restitution rights in countries where they operate, and urges agencies to avoid using or buying housing, land or property belonging to refugees and displaced persons” (p. 98). • “There are many examples of staff of international organisations residing in refugee homes while working with peace operations, and great care should be exercised to ensure that the restitution rights of refugees and displaced persons are neither undermined nor diminished because members of the international community have occupied their homes. Users the Handbook should encourage their organisations to adopt appropriate policies to deal with this question. In both Bosnia-Herzegovina and Kosovo UN staff were asked to prove that owner of accommodation rented by UN staff was, in fact, the legitimate owner” (p. 98). 	

Pinheiro Principles	Explanation	Illustrative Examples
23. Interpretation		
<p>23.1 The <i>Principles on Housing and Property Restitution for Refugees and Displaced Persons</i> 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.</p>	<p>“This [provision] ensures that the <i>Principles</i> will not be misused in any way to justify the violation of human rights or other international legal provisions in unforeseen circumstances that may arise in the future” (p. 100).</p> <ul style="list-style-type: none"> • 	<p>n/a</p>

U.S. Agency for International Development

1300 Pennsylvania Avenue, NW

Washington, DC 20523

Tel: (202) 712-0000

Fax: (202) 216-3524

www.usaid.gov