Right to Restitution and Compensation of Property Damaged or Destroyed During Displacement under International Human Rights Law and International Humanitarian Law

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Introduction

As a general rule internally displaced persons enjoy the same rights as any other citizen of the state where they are residents. When applied to the situation of the internally displaced person from Kosovo*[1] this would mean that they can assert their property rights on the same basis as any other inhabitant of Kosovo i.e. that their property rights can rely on the protection provided for by the Serbian national legal framework as well by the special legal framework applicable to the territory of Kosovo.[2]

Notwithstanding the fact that both legal frameworks contain strong guarantees of the right to property, including the right to be compensated for unlawful damages or destruction of one's property, there are several reasons for which it is worth spelling out the applicable norms of international law.

While internally displaced persons remain citizens of their country and are as such entitled to the full enjoyment of human rights and guarantees provided by the national laws, it is observed that their specific position is often not adequately taken into account by the relevant national and international authorities. An illustration of this in the context of property restitution in Kosovo is that reconstruction projects aimed at restoring destroyed properties over the past years were usually conditioned upon the intent of immediate return to the previous place of residence. This approach was not only neglecting specific safety and other needs of displaced population but, as it will be shown later, it also departed from the important norms of international law such as freedom to choose one's own residence and prohibition of discrimination.

Furthermore, in the complex legal and institutional settings characterizing post–conflict societies with a strong international presence, the legal standing of a claim can be easily confused with the issue of who shall be responsible for property restitution and who shall bear the costs of it. In Kosovo, where the UN mission exercised quasi-sovereign powers for a number of years following the conflict, the question of whether IDPs whose property was damaged or destroyed have right to restitution or compensation is often obfuscated by the question who shall and may be held responsible for providing it.

The aim of the present report is to analyse the legal standing of claims for restitution

[1] Any reference to Kosovo, whether to the territory, institutions or population, in this text is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo Declaration of Independence.

[2] The legal framework applicable in Kosovo is a confusing mixture of laws and bylaws originating from a number of different sources. Firstly, there are legal texts laid down by the UN Mission in Kosovo (UNMIK). The second group of laws are those that were enacted by the Kosovo Assembly and promulgated by the UN Special Representative of the Secretary General. Among the laws applicable in Kosovo are also the legal texts that were in force in Kosovo *on* 22 March 1989, and the laws adopted in Kosovo *after* 22 March 1989 if they were not of a discriminatory nature and were in accordance with international human rights instruments. After the unilateral declaration of independence of Kosovo this variety of legal sources was rendered even more perplex with the introduction of new laws enacted by the Kosovo Assembly and promulgated by the President of Kosovo.

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or compensation of property damaged or destroyed during the conflict in Kosovo raised by the internally displaced persons. This will be done by examining whether and to what extent international law foresees the right to restitution and/or compensation of property damaged or destroyed during or in the immediate aftermath of conflict. The report attempts to provide an answer to the question irrespective of who may ultimately be the bearer of responsibility for the violation and therefore for the restitution/compensation.

The scope of the report is determined by the specific features of the so-called "18,000 compensation claims". As there is no a specific branch of international law dedicated to the protection of internally displaced persons, this report will examine two sources of the applicable international legal standards: human rights law and the segment of humanitarian law applicable to the situation of internal armed conflict and occupation. However, since the focus is on *post-conflict* property restitution, the greater part of the report will be dealing with the norms of international human rights law. The section analysing the international humanitarian law will mainly serve to point out that even in the situations which are covered by its legal provisions, individuals nevertheless enjoy a number of rights derived from the right to property.

At present there is no binding instrument that lays down the rights of IDPs under international law. For that reason the analysis will start from two "soft-law" international instruments which are setting standards in this field. The UN Guiding Principles on Internal Displacement (hereinafter: "Guiding Principles") is the first attempt to formulate the international standards for the protection of the internally displaced. The second one, the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (hereinafter: "Pinheiro Principles"), does not apply exclusively to IDPs but is the point of departure for any analysis dealing with the restitution of property lost during displacement.

As noted, both documents belong to the category of so-called "soft law" i.e. they are non-binding legal texts. Yet, one should not forget that they are largely based on the existing principles and norms of international human rights and international humanitarian law. In particular, by compiling and interpreting the norms applicable to IDPs the Guiding Principles "restate in greater detail guarantees relevant for the displaced that are implicit in the more abstract prescriptions of these bodies of law."[3]

After enlisting the relevant principle(s) contained in the Guiding Principles and Pinheiro Principles the analysis goes back to the norms of the international law that served as their foundation. The given structure is present in the entire report apart from the first section describing the main features of the so-called "18,000 compensation cases".

The text of the report will often contain reference to the duties of the state as the state is primary responsible for guaranteeing human rights under international law. In all these instances the term "state" shall be read in relation to the *functions* carried out by the state and as such shall be taken to include any non-state actor exercising powers normally reserved for the state.

[3] This quotation originally refers only to the Guiding Principles, but it substantially applies as well to the character of the Pinheiro Principles. In: "Protecting Internally Displaced Persons: A Manual for Law and Policy Makers", Brookings Institution – University of Bern Project on Internal Displacement (October 2008), p. 3.

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Brief Overview of the "18,000 Compensation Claims"

In the aftermath of the Kosovo conflict in 1999 and 2000, upon arrival of KFOR and the establishment of the United Nations Mission in Kosovo (UNMIK), the property of the minority communities in Kosovo were to a large extent damaged or destroyed.

Although UNMIK established a special claims resolution mechanism for the claims related to immovable property[4], this mechanism did not have the jurisdiction to award compensation in cases of damaged and destroyed property. Until 2004, the Housing and Property Directorate/Claims Commission (HPD/CC) was merely informing the claimants on its lack of competence and they were advised to submit compensation claims to the domestic courts in Kosovo. In April 2004 this practice was changed and those who afterwards submitted claims to the HPD/CC were served with "declaratory orders" recognizing the claimant's right over the property at the time of its destruction.

By December 2004 more than 18,000 claims were filed by internally displaced Kosovo Serbs against UNMIK, KFOR, Provisional Institutions of Self-Government, local municipalities and, exceptionally, against identified individuals. Another, approximately 2,900 claims were filed by Kosovo Albanians.[5] The exact numbers still remain uncertain as the claims were lodged individually, through domestic and international organizations and national/local authorities.[6]

These cases represent a significant part of the current court case backlog[7]. The judicial processing of the cases has been subjected to administrative interventions. On 26 August 2004 the Director of UNMIK Department of Justice (DoJ) introduced an official stay of all proceedings by issuing a circular notification to the presidents of the Supreme Court, district and municipal courts, explicitly requesting the courts not to process the cases. The letter was referring to "huge influx of claims" that posed problems to the courts' functioning, and the request was based on the need to assume a proper strategy on effectively protecting the litigants' rights. On 15 November 2005 the ban was partly lifted and the courts were authorized to process the practically insignificant number of cases where the damage had been committed by an identified natural person and where the act of damagee had been committed after October 2000. On 28 September 2008 the stay was completely lifted.

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[4] UNMIK Resolution 1999/23 (15 November 1999) on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission; Resolution 2000/60 (31 October 2000) on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission; Resolution 2006/50 on the Resolution of Claims relating to Private Immovable Property, including Agricultural and Commercial Property.

[5] Margaret Cordial, Knut Rosandhaug, *Post-conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practice* (MartinusNijhoff Publishers / Brill Academic 2009), p. 221.

[6] The Housing and Property Directorate (HPD) alone confirmed almost 11,000 of the cases. *See e.g*. HPD/CC, Final *Report of the Housing and Property Claims Commission*, p. 79, available at http://www.pca-cpa.org/upload/files/HPCCFinalReport.pdf, accessed on 11 January 2012. There were notions of 20.000 cases filed. *See e.g.* Report of the COE Commissioner for Human Rights' Special Mission to Kosovo, 02 July 2009, para. 174. A similar view is shared by the erstwhile Coordination Centre within the Ministry for Kosovo and Metohija of the Republic of Serbia that coordinated the claims collection before filing.

[7] *See e.g. supra* COE Commissioner's Report.

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Since then, certain number of courts have processed the claims and rejected those on the grounds of the lack of passive legitimacy.[8] These courts assumed the position that UNMIK and KFOR could not be sued due to the possession of the legal immunity in Kosovo[9], while the Kosovo authorities could not be sued for acts occurring before their formation.

In the course of 2009 and 2010, the courts made another shift in the approach, by legally resorting to a 180-day stay of the proceedings, instead of the flat rejection. The decisions were based on the 2008 Law on Public Financial Management and Accountability and the main reason was that the Ministry of Justice and the Ministry of Economy and Finance should be introduced to any unresolved compensation claim against a public authority in Kosovo.[10] In 2010 the new Amendment on the Law of Public Financial Management and Accountability[9] was passed, which effectively suspends the processing of these compensation claims for up to 18 months or until the Ministry of Justice of Kosovo notifies the court in writing that it is assuming representation on behalf of the government or public authority[11]. Reportedly, only in 2011, a number of courts started processing the claims without restrictions with the results yet to be observed.[12]

Right to Restitution and/or Compensation of the Property Damaged or Destroyed During Displacement under International Human Rights Law

Principle 29(2) of the Guiding Principles:[13]

> "Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."

Principle 2 of the Pinheiro Principles: The right to housing and property restitution[14]

> "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.

[8] This was done mainly by the Municipal Court in Skënderaj/Srbica, Malishevë/Mališevo and Vushtrri/Vučitrn. Information based on the observations of the Project Legal Team.
[9] *See e.g.* Resolution 2000/47 (18 August 2000) on the Status, Privileges and Immunities of UNMIK, KFOR and their Personnel in Kosovo.
[10] *See* articles 67 and 68 of the Law on Public Financial Management and Accountability, No. 03/L-048 (13 March 2008).
[11] Amendment to the Law on Public Financial Management and Accountability, July 2010, Kosovo Assembly Law 03-L-221, Article 25, Amending Article 68.2.
[12] *E.g,* municipal courts in Ferizaj/Urosevac, Shtërpcë/Štrpce, Istog/Istok. Information based on the observations of the Project Legal Team.
[13] E/CN.4/1998/53/Add.2.
[14] E/CN.4/Sub.2/2005/17, p. 6.

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> 2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution."

Principle 21 of the Pinheiro Principles: Compensation [15]

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

Another important document containing an explicit reference to the right to restitution and compensation of the property lost as a consequence of displacement is the Resolution 1708 (2010) on Solving Property Issues of Refugees and Internally Displaced Persons, adopted by the Parliamentary Assembly of the Council of Europe (CoE) on 28 January 2010. By invoking the Pinheiro Principles and existing international standards, the Resolution 1780 (2010) calls on the CoE Member States to guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by IDPs "without regard to pending negotiations concerning […] the status of a particular territory".[16] The Resolution 1780 (2010) also emphases the importance of ensuring that such redress takes the form of restitution in the form of "restoration of safe physical access to, and possession of, such property" and, when the restitution is not possible, of adequate compensation or other forms of just reparation.[17]

The principle of restitution and/or compensation of the property lost as a consequence of displacement is derived from four distinct rights guaranteed by the international human rights law: right to property, right to remedy for human rights violation, freedom from arbitrary interference with one's home and the right to housing.

Right to Property

The right to property is guaranteed in the Universal Declaration of Human Rights

[15] *Ibidem,* p. 14.
[16] Para. 9.
[17] Paras. 10.1 and 10.2.

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(hereinafter: “Universal Declaration”)[18] and in a number of regional human rights instruments, including the European Convention on Human Rights (hereinafter: “European Convention”)[19]. Article 17 of the Universal Declaration grants everyone the right to own property alone or in association with others and prohibits arbitrary deprivation of such property.[20] Article 1 of the First Protocol to the European Convention guarantees to every person the right to "the peaceful enjoyment of his possessions", and prohibits the deprivation of such possessions "except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

When interpreting international law provisions on the right to property in the context of the specific needs of IDPs, both the Guiding Principles and the Pinheiro Principles stress that the right to restitution exists as a distinct right. This is particularly evident in the text of the Pinheiro Principles which contains an explicit statement that recovery of property rights by displaced persons cannot be made dependent on their actual return or non-return.

Important to mention in this context is that formerly displaced persons shall have access to mechanisms for property restitution or compensation regardless of the type of durable solution afforded to them: return, local integration or resettlement. The former IDPs “do not lose their claim to restitution or compensation because their displacement has ended”. The right to restitution and/or compensation of property lost as a consequence of displacement is not an entitlement conditioned upon having the IDP status.[21]

Closely linked to the issue of return of an IDP to the former place of residence is the availability of remedies. The scope of the available remedies for violations of the right to property in the context of displacement is very much determined by another right foreseen in the Guiding Principles and Pinheiro Principles. This is the right to a free and informed choice of whether to return or to resettle elsewhere within the country. This right is deduced from the right to the liberty of movement and the right to choose one’s residence as embodied in Article 12 of ICCPR[22] and in Article 2 of the Protocol No. 4 to the European Convention. The right to property, interpreted in the light of this important provision, prioritises restitution over compensation due to its inherent features. The physical recovery of damaged or destroyed property supports all three durable solutions to internal displacement: return to the place of origin, local integration in the place of displacement or settlement in another part of the country. On the contrary, the compensation as a remedy is seen as primarily encouraging local integration in the place of displacement or resettlement. As such, not only compensation would affect the right to free and informed choice of whether to return,

[18] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).
[19] The European Convention on Human Rights (ECHR) and its Protocols (formally the Convention for the Protection of Human Rights and Fundamental Freedoms), adopted in Rome on 4 November 1950.
[20] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953.
[21] “When Displacement Ends - A Framework for Durable Solutions”, The Brookings-Bern Project on Internal Displacement & Georgetown University's Institute for the Study of International Migration, 2007, p. 15, available at: http://www.brookings.edu/reports/2007/09displacementends.aspx
[22] International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly on 16 December 1966, and entered into force on 23 March 1976.

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locally integrate or resettle, but it could also be used as a way to actually discourage return by paying off potential returnees and encouraging them to resettle.

For these reasons the Guiding Principles and the Pinheiro Principles limit the possibility of providing compensation for destroyed properties only to the situations when recovery of property is not possible. The Pinheiro Principles also provide for the possibility of providing compensation when the injured party knowingly and voluntarily accepts compensation *in lieu* of restitution or when this is decided through a negotiated peace settlement. However, these provisions have to be read in the light of their strong emphasis on the physical recovery of property through reparation or reconstruction as the most appropriate remedy.

While the Guiding Principles set only a general rule, the Pinheiro Principles contain a more precise wording on when the compensation can replace restitution. Such wording limits compensation to situations when there is a "factual impossibility to recover the property". Namely, this can be only when the property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. The main rationale for this could be found in the intention to prevent situations in which the priority is given to the right of a secondary occupant over the right of an IDP or any other type of action that could obstruct return. Although this principle was somehow tempered in *Demopoulos v Turkey*[23], nevertheless the discretional power of states in assessing when restitution is impossible is significantly limited. Another important reason is related to the situation in which IDPs predominantly belong to minority communities such as the case of IDP population from Kosovo. To favour compensation as a remedy for property violations could, in such a case, threaten to permanently alter the ethnic structure of the areas that, prior to the displacement, were inhabited by persons belonging to a minority community. The occurrence of this would be contrary to Article 16 of the Framework Convention for the Protection of National Minorities. Article 16 in fact requires states to refrain "from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities […]".[24]

Compensation can be provided through the payment of cash in an amount equivalent to the value of the lost property (monetary compensation) or through the provision of property functionally equivalent to the destroyed or damaged property. The provision of compensation is not limited to immovable property only, as "IDPs should, in principle, be able to seek restitution or compensation for significant movable property as well, particularly when it was central to the exercise of their livelihoods".[25]

According to both the Guiding Principles and the Pinheiro Principles, the right to property restitution shall have as its goal the restoration of property rights of displaced persons as closely as possible to the situation that existed before the violations occurred.

Can reconstruction projects be considered as a method for post-conflict property restitution?

In post-conflict scenarios, when addressing the issue of reparations for loss of

[23] Demopoulos v. Turkey (merits), (App. 46113/99; 3843/02; 13751/02; 13466/03; 10200/04; 14163/04; 19993/04; 21819/04), March 2010, p. 115-119.
[24] Framework Convention for the Protection of National Minorities, 1 Febr. 1995, E.T.S. 157.
[25] "Protecting Internally Displaced Persons: A Manual for Law and Policy Makers", Brookings Institution – University of Bern Project on Internal Displacement (October 2008), p. 186.

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properties, it is often argued that reconstruction projects can be considered as a form of reparation. Even though this view could generally be supported, there are a number of issued to be solved before a concrete reconstruction project is to be seen as method of property restitution.

In first place, it is worth recalling that reconstruction projects, for their success, depend on a number of external factors. One of those, for example, is the creation of basic security conditions in order to avoid renewed displacement of potential returnees. Another one is the existence of the rule of law, in order to make sure that there is a sufficient level of protection of reconstructed properties (and their owners) against trespass, damage, looting, and other possible criminal activities. If one or both of these factors are absent, reconstruction efforts are almost certainly doomed to failure.[26]

In addition, in order to benefit from reconstruction projects IDPs are often required to return immediately upon the completion of reconstruction or otherwise face the risk of losing possession of their properties. This is the practice of certain reconstruction agencies, which through *ad hoc* agreements require from returnees to start living in their houses within 6 months upon completion of the reconstruction. It is questionable whether such deadlines, which in fact condition the right to compensation to its immediate enjoyment regardless of other external factors (i.e. rule of law and security), are in accordance with the nature of the right to property.

Finally, it is worth mentioning that reconstruction programs are open only to those who show a firm intent to return, which has often led to the situation where IDPs sell their property as soon as it is reconstructed in order to obtain monetary compensation. To remedy it, the tripartite agreements on reconstruction signed by the reconstruction agency, IDP and the local authority, usually contain provisions that limit the freedom of the owners in disposing of their rebuilt properties. While it is easy to understand the concern of reconstruction agencies about achieving the goal of supporting return, it remains to be seen whether such provisions are in full compliance with human rights standards.

In the light of the above said it could be argued that return-related reconstruction programmes cannot be considered as a true alternative to judicial or quasi-judicial mechanisms for property restitution. Otherwise, IDPs not wishing to return, who thus would not be able to benefit from the reconstruction projects, would be denied the right to compensation. Furthermore, they would be subject to direct discrimination on the ground that they are displaced or to indirect ethnic discrimination since IDPs usually belong to specific ethnic groups. In this regard, it is worth recalling that Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[27] and all the major international human rights instruments explicitly prohibit such discrimination. In the General Recommendations No. 22 the UN Committee on the Elimination of Racial Discrimination elaborates this rule by emphasising that when the displacement occurred on the basis of ethnic criteria:

[26] For instance, in Kosovo a particular matter of concern was the protection of empty reconstructed properties where the former lawful occupant did not return. See on this: OSCE Mission in Kosovo, “Eight years after: Minority returns and housing and property restitution in Kosovo”, June 2007, pp. 33-34.

[27] International Convention on the Elimination of All Forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX)of 21 December 1965, e.i.f. on 4 January 1969.

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> "2(c). All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void;"[28]

It is therefore possible to conclude that reconstruction projects can be considered as a form of property restitution only in those cases where there are appropriate security conditions for return, IDPs make a free and informed choice to return, and their personal safety as well the safety of their property is adequately protected. If such conditions are not met, not only the restitution proves to be ineffective, but also the whole reconstruction effort is doomed to fail.

Hence, it is important to stress that IDPs who chose not to return are not forfeiting their right to compensation. Such right remains until it is fulfilled in an appropriate manner.

To sum up this whole discussion, rather than imposing stringent requirements on IDPs, such as to reoccupy property immediately or prohibition on sale, it appears wiser for reconstruction agencies to integrate human rights standards more consistently in their activities. This would imply non-discriminatory criteria for the selection of beneficiaries and careful planning that would provide for sustainability of returns. If these tasks were adequately performed, only then it would be possible to consider reconstruction projects as a form of post-conflict property restitution.

Right to a remedy for human rights violations

The right to a remedy for human rights violations is another important right that lays at the foundations of the right to restitution and compensation of property. Its basis is to be found in the important principle of the international law that a victim of human rights violations should be restored as closely as possible to the conditions existing before the violation occurred. Elaboration of its applicability in the context of post-conflict property restitution is laid in another important UN document, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter: "Basic Principles and Guidelines").[29] This Basic Principles and Guidelines applies to "persons who individually or collectively suffered harm, including […] economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law" irrespective of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted.[30] Return of property is one of the possible types of

[28]UN Committee on the Elimination of Racial Discrimination, General Recommendations No. 22, Refugees and displaced persons (Fortyninth session, 1996), U.N. Doc. A/51/18, annex VIII at 126 (1996), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 211 (2003), para. 2 (c).
29 Resolution adopted by the United Nations General Assembly on 21 March 2006, A/RES/60/147.
30Paras. 8 and 3 (c).

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restitution envisioned in its Principle No. IX.[31] The same principle refers as well to the compensation as another form of reparation that "should be provided for any economically assessable damage, […]", such as *inter alia* "material damages and loss of earnings, including loss of earning potential".

As it is the case with the Guiding Principles and Pinheiro Principles, the Basic Principles and Guidelines "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law […]".[32]

The right to a remedy for victims of violations of international human rights law is foreseen in numerous international instruments. According to Article 8 of the Universal Declaration "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law". Similar guarantees are also contained in Article 2 of the ICCPR and Article 6 of the CERD.

The right to reparation for the violation of international human rights and international humanitarian law was firmly upheld by the International Court of Justice (ICJ) in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004.[33] There the ICJ found that loss of property owned by natural and legal persons as a consequence of the construction of the wall gave raise to right to reparation. In order to elaborate the given finding the ICJ cited the judgment of its predecessor, the Permanent Court of International Justice, in the case *Factory at Chorzow* from 1928:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[34]

The right to effective remedy is among the core rights guaranteed by the European Convention (Article 13). Furthermore, Article 41 of the European Convention empowers the European Court of Human Rights to award just satisfaction to the victim provided that the consequences of the violation cannot be fully redressed according to the domestic law of the state that has breached the rights guaranteed by the Convention.

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[31] Of course, another issue is under which conditions the destruction of property during displacement can qualify as gross violation of international human rights law, or serious violations of international humanitarian law.

[32] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble.

[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, **I.** C.J. Reports 2004.

[34] *Factory at Chorzow Merits,* Judgement No. 13, 1928, P.C.I. J., Series A, No. 17, p. 47.

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When applying Article 13 of the European Convention to displacement related human rights violations, the ECtHR has demonstrated a preference for restitution over compensation. An illustration of this can be found in the case *Xenides-Arestis v. Turkey* from 2005 where the Court held that a legal mechanism set up by Turkey to address property claims could not be viewed as providing an effective remedy, in part because the terms under which the legal remedy could be sought did not allow "for the possibility of restitution of the property".[35]

Right to respect for one's home and right to housing

Rather than forming its basis, the right to home and the right to housing serve as an alternative legal avenue for establishing the right to restitution or compensation for property lost as a consequence of displacement. Namely, it is through these rights that even those IDPs whose rights to housing, land and property are established *de facto* but not recognised *de jure* could claim the right to restitution or compensation for their loss. In the context of the so-called "18,000 claims" or any other claims of similar legal nature, this would mean that even IDPs who prior to displacement had only tenancy right could raise a restitution/compensation claim. The same applies to the informal settlements where Kosovo Roma community lived before the conflict. Even if an IDP claimant would have a formally invalid but unchallenged right to home or land he/she would still have a legal title to claim restitution of his/her pre-displacement home.

The freedom from arbitrary interference with one's home is laid down in several binding international human rights instruments. In its Article 12 the Universal Declaration guarantees that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, […] and that [e]veryone has the right to the protection of the law against such interference or attacks." The same wording is contained in Article 17 of the ICCPR. A comparable right is also guaranteed in Article 8 of the European Convention.

The right to housing is guaranteed by the Universal Declaration (Article 25) and the ICESCR (Article 11), both of which establish the right to housing through the right to adequate standard of living. At the regional level, the right to housing is spelled out in Article 31 of the Revised European Social Charter[36].

A key element of the duty to respect right to home even regardless of the legal basis for using certain house, land, premise, etc. as home lays in in the concept of "security of tenure". According to the United Nations Committee on Economic, Social and Cultural Rights General Comment No. 4 "notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".[37]

[35] *Xenides-Arestis v. Turkey* (admissibility), decision of 14 March 2005 (Application No. 46347/99), p. 44.
[36] The European Social Charter is a Council of Europe treaty which was adopted in 1961 and revised in 1996. The Revised Charter came into force in 1999 and is gradually replacing the initial 1961 treaty.
[37] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 8(a).

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An important illustration of this is the decision of the United Nations Human Rights Committee in case *Vojnovic v. Croatia*.[38] There, the UN body found that the wartime termination of the occupancy right of a displaced Croatian Serb family gave rise to *inter alia* violations of the prohibition of arbitrary interference with one's home and non-discrimination as guaranteed by the International Covenant on Civil and Political Rights. The Human Rights Committee hence obliged the state to provide a victim with an effective remedy, including adequate compensation for the given violation.

Right to Restitution and/or Compensation of the Property Damaged or Destroyed During Displacement under International Humanitarian Law

For those who argue that in the aftermath of the 1999 conflict Kosovo was under the regime of belligerent occupation[39], international humanitarian law is applicable to the issue of property restitution. Namely, the supporters of this view would state that in 1999 Kosovo was placed under the authority of an international military presence and would hence invoke the argument of the occupation under the 1907 Hague Regulation IV.[40] The deployment of UNMIK and KFOR resulted in exercising complete control over the territory which raises the issue of the rights of persons whose property was damaged and destroyed, and the responsibility of the international presence.[41] Regardless of these opinions, it can nevertheless be argued that the Hague Regulation and the 1949 Geneva Convention IV (GC IV) is fully applicable in cases of occupation even when it meets no armed resistance[42], as it was the the case of Kosovo in the post-June 1999 context, since the GC IV does not deal with the legality of the occupation.

The 1907 Hague Regulation IV[43] stipulates that:

> "23. … it is especially forbidden
> g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and

[38] United Nations Human Rights Committee, *Vojnovic v. Croatia* (views), 30 March 2009 (Communication No. 1510/2006).
[39] This view implies that Serbia was forced to accept the terms of the Military Technical Agreement.
[40] *See* article 42 of the Hague Regulation IV concerning the Laws and Customs of War on Land (18 October 1907). An argument may be advanced that the NATO's involvement should not be seen as that of an occupier, but rather that of a "neutral power" in the context of the 1907 Hague Regulation V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The neutral power is forbidden to use its territory to move troops or convoys, establish communication and other installations, as well as form corps of combatants or recruiting agencies (articles 2-4). However, the NATO's involvement in the conflict and the KFOR's mandate based upon the UN SC Resolution 1244 does not correspond with the obligations of the neutral power.
[41] While UNMIK is not a state and cannot be directly charged under the international law of occupation, KFOR participating countries could be directly obliged to respect the law – irrespective of the legality of such a deployment.
[42] Article 2 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (12 August 1949).
[43] 18 October 1907.

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> safety, while respecting, unless absolutely prevented, the laws in force in the country."

Similar to the article 23 of the Hague Regulation IV, GC IV provides that:

> "53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons … is prohibited, except where such destruction is rendered absolutely necessary by military operations.[44]
>
> 147. Grave breaches […] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: […] extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

The articles 23 of the Hague Regulation and 53 of GC IV prohibit destruction of all property, irrespective of the nature (real or personal) or the ownership (private, public etc.), and they are mutually complementary.[45]It is worth recalling that such obligations last one year after the end of military operations[46] and that the facts complained of in the "18,000 compensation cases" arise within this temporal framework. With regard to the possible consequences of not observing the obligations it is worth to note that article 3 of the Hague Regulations states that:

> "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. [...]"[47]

While the article does not state it explicitly and a number of domestic courts have refused to accept individual rights under international humanitarian law, the *travaux preparatoires* of the Article 3 of the Hague Regulations clearly demonstrate that it was intended to be an individual right to compensation.[48] This approach was reiterated in the Basic Principles and Guidelines which calls upon, among the rest, Article 3 as the legal ground for the right to a remedy for victims of violations of international humanitarian law.[49] Notwithstanding the issue of responsibility of any actor (state or international organization) in Kosovo, it is important to stress that, even if there are no possibilities for enforcement, the right can still exist independently.

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[44] *See also* article 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), 08 June 1977.

[45] While Article 23 (g) of the Hague Regulations covers the situation of property destruction under broader concept of "hostilities", the Article 53 GC IV does not offer that general protection and is specialized for the property protection within an occupied territory. Pictet (Ed.), *op.cit.*, p. 301.

[46] Article 2 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (12 August 1949). Art. VI.

[47] A similar wording is found in the article 91 of the Additional Protocol I.

[48] *See* Frits Kalshoven, Expert opinion, Article 3 of the Convention [IV] Respecting the Laws and Customs of War on Land, as cited at CarolinAlvermann, ICRC, *Customary International Humanitarian: Practice, Volume 2, Part 1* (Cambridge University Press, 2005), p. 3591.

[49] Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly resolution 60/147 (16 December 2005), Annex, Preamble, first paragraph.

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International courts uphold the principle that an individual may claim compensation through invoking responsibility of the state(s). In *Velasquez Rodriguez v. Honduras* case[50], the Inter-American Court on Human Rights (IACHR) confirmed the right to seek to obtain compensation for individuals in accordance with the American Convention on Human Rights (ACHR).[51]

The general principle of individual compensation is clearly recognized in the Rome Statute of the International Criminal Court.[52] Article 75 of the Rome Statute of the International Criminal Court explicitly recognizes the right to reparations (including compensation) to victims against individual perpetrators, for serious crimes, including war crimes. Article 8.2 of the Statute defines war crimes which comprise, among others, grave breaches of the Geneva Convention IV including "extensive destruction and appropriation of property … carried out unlawfully and wantonly". The compensation is envisioned to be conducted, where appropriate, through the Trust Fund maintained by voluntary contributions and fines/penalties imposed upon perpetrators.

These developments represent a strong foothold for the individual compensation principle that could be further applied to other relevant international legal domains.

Conclusion

From the above analysis, it can be concluded that the right to property restitution and compensation is firmly rooted in both international human rights and international humanitarian law. The Guiding Principles and the Pinheiro principles are useful tools as they compile and further develop existing international treaty law as well as customary norms. Their provisions are therefore underpinned by existing obligations to which both states and non-state actors need to conform. This also applies to military forces even in cases of military occupation. Following this approach, the sphere of the duty bearers for the enforcement of human rights is significantly expanded beyond the sphere of the traditional state authorities.

[50] *Velasquez Rodriguez v. Honduras*, Judgment (29 July 1988), IACHR.
[51] American Convention on Human Rights signed on 23 May 1969 in San José and entered into force on 18 July 1978.
[52] Adopted on 17 July 1998, e.i.f. 1 July 2002.

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