

CENTRE ON
HOUSING RIGHTS
AND EVICTIONS



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(COHRE)**

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Concerning

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TABLE OF CONTENTS

1.	INTRODUCTION	3
2.	LEGAL FRAMEWORK	3
2.1	Economic Social and Cultural Rights	3
3.	THE RIGHTS OF DISPLACED PERSONS TO RETURN AND TO ADEQUATE RESTITUTION	4
3.1	The Right to Adequate Housing during Displacement	4
3.2	Protection of Property during Displacement	4
3.3	Return to Original Locations	4
3.4	Restitution	5
3.5	High Security Zones	5
3.6	Law Reform to Ensure Housing Rights and the Right to Return	5
4.	DISCRIMINATION	6
4.1	Discrimination between Various Categories of Displaced Persons	6
4.2	Gender Discrimination 1: Granting of Co -Ownership under the State Lands Ordinance	7
4.3	Gender Discrimination 2: Head of the Household	7
4.4	Gender Discrimination 3: The Land Development Ordinance (1935) and the Land Grants (Special Provisions) Act (1979)	8
	CONTACTS	9
	END NOTES	9

1. INTRODUCTION

United Nations General Assembly resolutions leading to system-wide human rights institutional reform have brought about major opportunities for the implementation of human rights in all UN Member States. One of the most important of these developments is the new institution of the Universal Periodic Review (UPR), slated to become operative in 2008. General Assembly Resolution 60/251 mandates that constructive engagement with States will be the dominant mode of the UPR. The UPR will engage in “interactive dialogue” with the “full involvement of the country concerned”. The guiding principles behind the UPR are universality, impartiality, objectivity and non-selectivity. The UPR thus constitutes among the most important developments in the Charter-based system of human rights review in the history of the United Nations.

On 18 June 2007, the 5th Human Rights Council adopted unanimously a text on institution building, among other things setting out the modalities of the Universal Periodic Review. As set out in the 18 June resolution, the Office of the High Commissioner for Human Rights (OHCHR) is to prepare for Council two 10-page texts on each country coming under UPR assessment. The first of these documents is to summarize material included in the reports of treaty bodies and special procedures regarding the country concerned. The second document summarizes “additional credible and reliable information” coming to the attention of the OHCHR.

The Centre on Housing Rights and Evictions (COHRE) herewith offers the present submission with the aims of (i) assisting the work of the OHCHR in providing the Human Rights Council with high quality reporting in these areas; as well as (ii) facilitating civil society input into this revolutionary new international procedure. It is our hope that, during this crucial first phase of the Universal Periodic Review, in which its credibility as a mode of redressing human rights harms is inevitably under intense scrutiny, the material provided herein can provide a sound basis for engagement with the authorities of the country at issue.

The present submission concerns implementation of the right to adequate housing in Sri Lanka. It makes special reference to:

- aspects of the domestic legal framework which do not adequately protect individuals from housing rights violations;
- issues facing persons who have been displaced from their homes and lands;
- discrimination.

In this context, the following submissions are made for the attention of the Human Rights Council, in order to call for the Government of Sri Lanka to address the housing rights violations caused by displacement, gender biased laws and policies, and the lack of harmonization between Sri Lanka’s domestic legal system and its international human rights obligations.

2. LEGAL FRAMEWORK

2.1 Economic Social and Cultural Rights

Sri Lanka has not adequately incorporated Economic Social and Cultural rights into its domestic legal order. The Sri Lankan Constitution does not recognize the right to housing or property. It only recognizes the freedom of all citizens to choose one’s residence within Sri Lanka¹. The

Directive Principles of State Policy, enshrined in the Constitution, recognizes that the State should ensure the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housingⁱⁱ. However, the Directive Principles are not regarded as legally enforceable (see Appendix I). The general living conditions of the people and especially the issues arising out of the mass internal displacement by a 20-year-long civil war have increased the need to guarantee ESC rights in the Sri Lankan Constitution. **The Council should recommend that Sri Lanka incorporate ESC rights into its domestic legal order to give effect to Article 2(1) of the ICESCR. (see Appendix I)**

3. THE RIGHTS OF DISPLACED PERSONS TO RETURN AND TO ADEQUATE RESTITUTION

Human rights and humanitarian principles concerning the fundamental rights of displaced persons, including restitution rights, are set out in various international treaties. The relevant provisions of law have been elaborated in detail in the United Nations Guiding Principles on Internal Displacement (the ‘Guiding Principles’) and the United Nations Principles on Housing and Property Restitution for Refugees and Internally Displaced Persons (the ‘Pinheiro Principles’).

3.1 The Right to Adequate Housing during Displacement

Principle 18 of the Guiding Principles extends the right to adequate housing guaranteed in Article 11.1 of the International Covenant on Economic, Social and Cultural Rights to the context of displacement. Displaced persons are entitled to an adequate standard of living, including ‘basic shelter and housing’⁷. In many instances, internally displaced persons (“IDPs”) continue to live in inadequate shelters, congested environments and without sufficient access to water and sanitation sometimes decades after they were first displaced (see Appendices A and B). **The Council should recommend that the Government of Sri Lanka adopt a clear policy to provide adequate interim housing solutions for IDPs, while safeguarding their future right to return and restitution.**

3.2 Protection of Property during Displacement

Principle 7.1 of the Pinheiro Principles makes reference to the right to the peaceful enjoyment of one’s possessions. This right requires the protection of one’s property from arbitrary destruction and damage. The protection of property during displacement is significant to subsequent return and restitution. Persons displaced due to the conflict for both short and long periods of time often find on returning to their homes that their properties have been damaged or destroyed. Looting of both moveable property and fixtures are widespread and a serious cause for concern.

3.3 Return to Original Locations

The right to return is articulated in a number of prominent international commitments, foremost among them, Article 13(2) of the Universal Declaration of Human Rights.ⁱⁱⁱ The Pinheiro Principles in Principle 10 articulates that return must be ‘voluntary’ and be implemented without violating the requirements of ‘safety and dignity’. Methods employed to return IDPs to their original lands and properties are often in violation of these standards:

The return process is often planned with limited, or no participation of the returning IDPs. Access to information of the locations to which IDPs return are inadequate, and the process itself is most often not sensitive to IDPs' concerns for their safety and the conditions of their homes and property. Certain areas of return have not been cleared from mines/UXO prior to returns taking place or are close to military operations and thus create the risk of re-displacement. Returnees regularly experience severe restrictions on their freedom of movement, which include the prevention by authorities of renewed displacement where IDPs do not feel safe in the return areas (see Appendix C).

3.4 Restitution

Principle 2 of the Pinheiro Principles articulates the right to restitution, which is recognised in international law as a right to a remedy against gross violations of human rights. Restitution includes, among other things, the restoration of liberty, enjoyment of human rights, return to one's place of origin and return of property.

While IDPs are being returned to their original lands, the plans for assistance that have so far been established cover only a period of six months of relief and early recovery (see Appendix D). The assistance currently available to returnees to be restored to their properties does not follow a comprehensive policy or even a pattern of comprehensive practice, but differs in scope depending on capacity and willingness of the respective central, provincial and local authorities of the Government of Sri Lanka involved in the process. **The Council should urge Sri Lanka to implement a long-term housing and property restitution policy for the whole country that meets international standards and protects the property of IDPs, their right to a voluntary and safe return, and their right to adequate restitution.**

3.5 High Security Zones

High Security Zones have resulted in the long-term displacement of a significant number of persons. These Zones are often put into place without following due process under national legislation and in violation of constitutionally established fundamental rights, primarily the right to equality and the right to freedom of movement and the freedom to choose one's residence.^{iv} The Deng Principles in Principle 1 attributes to displaced persons the same rights and freedoms under international and domestic law, equally and without discrimination. Furthermore, compensation paid for the loss of housing and livelihoods resulting from the demarcation of these Zones are at best not adequate or not awarded at all. **The Council should urge the Government of Sri Lanka to take urgent measures to attain a balance between concerns of national security and the fundamental human rights of the displaced. (see Appendices B and C).**

3.6 Law Reform to Ensure Housing Rights and the Right to Return

Over 80% of the lands in Sri Lanka are owned by the State. The two main laws which deal with providing state land to individuals are the Land Development Ordinance No. 19 of 1935 and the State Lands Ordinance No. 8 of 1947.

Many of the permit holders and licensees of state land, allocated under the above laws, have been forced to leave their lands and properties due to the conflict. The mere fact of abandoning the land due to displacement and resulting inability to develop the land often breach the conditions stipulated in the permits, rendering them liable to cancellation. On their return, IDPs may find that their permits have been cancelled or even without cancellations, others have been given permits to occupy the lands they held prior to their displacement. In other instances secondary occupants occupy the lands even without a permit or a license (see Appendices H and I).

The Council should recommend that the provisions relating to cancellation of permits be relaxed when displaced persons are affected. Similarly, even where the internally displaced permit holder has failed to fulfil the conditions stipulated in the permit, the Commissioner of Lands should be empowered to make special concessions and settle the matter.

The Government must ensure that secondary occupants are protected against arbitrary and unlawful forced evictions and that adequate alternative housing is provided if they are lawfully evicted. Where the secondary occupants have been occupying the land for a considerable period of time and have made substantial improvements to the land, they should be compensated for the improvements made to the land and/or house.

Under the Prescription Ordinance No. 22 of 1871 a person who has ten years of undisturbed and uninterrupted possession of immovable property adverse to or independent of that of the owner can claim a statutory title to the property by prescription. Conflict IDPs who have been living in welfare centres for well over ten years, on return find that their lands are occupied by others for over ten years, who now may be able to claim prescriptive title, provided they satisfy the requirements of the Ordinance. To regain possession of their property, the IDPs then have to go through lengthy legal proceedings.

The Prescription Ordinance provides for an exception: if the owner of the land is under a disability or condition specified in the Ordinance, for example: infancy, idiocy, absence beyond seas, the prescriptive period is extended to 30 years. **The Council should urge the Sri Lankan Government to amend the Prescription Ordinance to exempt the property of IDPs from the Prescription Ordinance.**

4. DISCRIMINATION

4.1 Discrimination between Various Categories of Displaced Persons

There is a large disparity in the manner in which conflict IDPs and Tsunami IDPs are treated. Tsunami victims were initially housed in basic emergency shelters and most were soon moved to transitional housing. However, conflict IDPs have been living in welfare centres for long periods of time while only a few have been moved to transitional housing. There is no overall government policy or law on their return or resettlement and only Tsunami victims are covered under the Tsunami Housing Policy.

The housing assistance schemes for the two groups vastly differ from each other. Tsunami victims are provided with lands and houses or money to buy/build the same and those outside the buffer zone are given money to repair their houses. Conflict IDPs receive a nominal amount,

the payment of which is often delayed, to build basic shelter upon their return to their original lands. Initially, the monetary assistance given to build their houses was significantly low. Subsequently, the amounts have been raised to ensure parity with the Tsunami displaced. However, there are no dedicated funds for this project and assistance is given under ad hoc policies of the Government. **The Council should urge the Government to formulate an overall policy on the return and restitution of IDPs which is premised upon the Deng principles and the Pinheiro Principles and the prohibition of discrimination.**

4.2 Gender Discrimination 1: Granting of Co -Ownership under the State Lands Ordinance

The Reconstruction and Development Agency (RADA) adopted the Tsunami Housing Policy in May 2006 for the purpose of allocating land and housing for those affected by the tsunami of December 2004. The allocation of state land for this purpose is being carried out under the State Lands Ordinance No. 8 of 1947 (hereafter SLO).

The State has been giving title deeds upon the allocation of state land to a single owner, on the basis that the State Lands Ordinance does not make provision for co-ownership. This is the position of the Land Commissioner General's Department.

However, under specific situations, women are being discriminated against in the allocation of state land under the SLO. Neither the 1978 Constitution -- which promotes equality before the law -- nor the SLO prohibit women from owning land in their own name or jointly with another.

The State Lands Ordinance contains no express prohibition or legal impediment to co-ownership. However, State land is being allocated to a single owner purely for administrative convenience.

In the post-tsunami context, the Council should urge Sri Lanka to permit co-ownership under the State Lands Ordinance in the following situations:

(1) New land titles should be given in co-ownership to both spouses in cases where the land was encroached upon, unless there are compelling reasons to do otherwise.

(2) The State should use its discretion to grant new land title in co-ownership to both spouses, in cases where previous ownership is disputed or unclear, or where both spouses have contributed to the previous property (see Appendix E).

4.3 Gender Discrimination 2: Head of the Household

The 'head of the household' concept is used in official government documentation to elicit information from the general public (electoral lists, applications for electricity and telephone connections, school admissions, land grants, and birth certificates). As it is invariably the male who is traditionally considered the 'head of the household,' the result has been that women are being discriminated against in the grant of benefits and assistance by the State. The application of this concept also results in overlooking and undermining the contribution of other members of the household to the wellbeing of the family (see Appendix F).

The application of the 'head of the household' concept in Sri Lanka results in de facto discrimination against women, in contravention of Sri Lanka's international human rights obligations (see Appendix G). Under the International Covenant on Economic, Social and Cultural Rights, the Government of Sri Lanka is obligated to ensure substantive equality between genders, not only formal equality as a matter of law.

While expressions of formal equality may be found in constitutional provisions, legislation and policies of governments, the ban on discrimination, set out under every single major international human rights treaty, mandates the equal enjoyment of rights in practice. **The Council should urge Sri Lanka to reject the use of the 'head of the household' concept, and instead offer joint titling and co-ownership as standard practice.**

4.4 Gender Discrimination 3: The Land Development Ordinance (1935) and the Land Grants (Special Provisions) Act (1979)

Schedule III of the LDO is based on the discriminatory principle of primogeniture (preference for the eldest of males among heirs). A similar provision is seen in the Land Grants (Special Provisions) Act of 1979.

Another provision in the LDO discriminates against a surviving spouse who has not been nominated by the permit holder or owner of land as an heir. A surviving spouse loses the life interest they acquire in the land upon remarriage. Although this provision is gender neutral on paper, in practice, its impact is disproportionate and affects women to a greater extent. Many more women are left as surviving spouses under the LDO as more men than women are allocated lands under the LDO.

In 2002, the Committee on the Elimination of All Forms of Discrimination Against Women expressed its concern over "...the contradiction between the constitutional guarantees of fundamental rights and the existence of laws that discriminate against women." **The Council should urge Sri Lanka to review all laws which discriminate against women, and repeal or reform them in order to ensure that they comply with internationally accepted human rights standards.**

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END NOTES

i Article 14 (1) (h) of the Constitution

ii Article 27 (c) of the Constitution

iii In addition in Article 12(4) of the ICCPR, and articles 45, 127, 132 – 135 of the Geneva Convention on the Protection of Civilian Persons in Time of War

iv Article 12 (1) of the ICCPR: Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.