The international response to internal displacement marshaled under the auspices of the Brookings Institution in the early 1990s has, over time, provided convincing answers to many of the vexing questions this issue initially raised. The 1998 Guiding Principles on Internal Displacement, in particular, shed light on the status of internally displaced persons (IDPs), provided a descriptive definition of who they are and grounded a theory on why they require protection and assistance on the notion that sovereignty entails responsibility (which was so successful at overcoming state reluctance to allow international scrutiny of their internal affairs that it was eventually cribbed by the founders of R2P).

However, one lingering question related to when IDPs stopped being “displaced”. Did it matter, for instance, that Greek Cypriots displaced from the north in 1974 still didn’t have the option to return when they were firmly established in the south and often enjoyed a higher standard of living than their non-displaced neighbors? When, on the other hand, return was encouraged through the withdrawal of assistance at displacement sites, could those who nevertheless remained behind still claim to be displaced?

Whereas refugees receive a special international status based on loss of the protection of their country of origin – and can lose this status once such protection resumes – IDPs generally remain citizens throughout and are entitled to special protection based on their factual vulnerability rather than any change in legal status. When does this state of vulnerability end?

The Brookings-Bern Project on Internal Displacement took an initial stab at this question with a research project initiated in 2002. The first draft of a Framework for Durable Solutions was published five years later (helpfully, along with many of the documents that led to its preparation). The document was welcomed by the Inter-Agency Standing Committee, which recommended in March 2007 that it be field-tested and finalized on the basis of practitioners’ feedback. In the meantime, the UN Development Group published a 2004 Guidance Note on durable solutions for “displaced persons” (including refugees and returnees as well as IDPs) meant to assist UN country teams in incorporating these issues into common country assessments and UN development assistance frameworks.

Both the UNDG Note and particularly the draft Framework were heavily drawn on by the Global Protection Cluster Working Group in developing a chapter on durable solutions in the December 2007 provisional release of the IDP Protection Handbook, which was meant to provide guidance to the staff of international organizations in the field. Now a revision process led by the current Representative of the UN Secretary General (RSG) on the Human Rights of IDPs, Walter Kälin, has concluded with the publication of an advance draft of the final Framework, as an attachment to Mr. Kälin’s final report to the UN Human Rights Council. The Framework includes a great deal of interest for housing, land and property (HLP) practitioners, but it may be useful to begin with a few of the more general features of the document.
First, the Framework represents an interesting variant on the RSG’s longstanding focus on encouraging states affected by displacement to recognize their responsibility to address the issue and providing tools, such as the IDP Law and Policy Manual, that directly build their capacity to do so. In this case, the Framework “assists” states indirectly, by providing a tool aimed at allowing international and non-governmental actors to more effectively monitor their efforts (see para. 7). The section on monitoring (paragraphs 44 to 47) makes the accountability function of the Framework explicit, but presents it in a manner that stresses the need for states and civil society actors to seek complementarity rather than conflict:

Scrubbing by independent actors complements the efforts of national and local authorities and humanitarian and development actors in monitoring their own work. Independent mechanisms should ensure the transparency of their work through public reporting. The scope of the monitoring work should be determined in memoranda of understanding signed by national and local authorities and the monitoring institution. (para. 46)

Second, the Framework settles the issue of how the various options for durable solutions are defined. The Guiding Principles themselves refer only to return to homes or places of origin and resettlement elsewhere in the country. Resettlement has subsequently broken down into two options – local integration at the site where displaced persons find initial shelter or resettlement at some third location within the country or abroad. While this tripartite formulation – return, local integration and resettlement – provided greater descriptive coherence, it also perpetuated terminological confusion, with UNHCR noting that ‘resettlement’, in particular, had a specific and entirely different meaning in international refugee law. As a result, the new formulation maintains the three options but reframes them in a new, IDP-specific terminology of integration (para. 9):

A durable solution can be achieved through:

- Sustainable reintegration at the place of origin (hereinafter referred to as “return”);
- Sustainable local integration in areas where internally displaced persons take refuge (local integration);
- Sustainable integration in another part of the country (settlement elsewhere in the country).

In this context, durable solutions are defined as achieved “when former IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement” (para. 8).

Finally, the Framework abandons earlier efforts to define “when displacement ends” – an inquiry that was both practically unnecessary and potentially condescending to those who had found durable solutions but would reasonably consider themselves marked by displacement for the rest of their lives – in favor of guidance and criteria explicitly designed to be translated, on a case by case basis, into indicators sensitive to local context (para. 45).

In terms of structure, the Framework is divided in to four sections, comprising (1) the definition of durable solutions, (2) key background principles guiding the search for durable solutions, (3) rights-based organizing principles for developing processes to support durable solutions, and (4) criteria for the achievement of durable solutions. The criteria are further broken down into four applicable in all situations (security, adequate standard of living, livelihoods and – never fear – HLP rights) and four discretionary categories (documentation, family unity, participation and remedies).

Treatment of HLP rights in the Framework is interesting at two levels. First, the Framework places HLP rights in a broader context without conflating them with related issues. The section on housing,
land and property rights clearly focuses on the recovery of property left behind by IDPs, or compensation where this is not feasible. However, some of the other criteria discussed address situations in which restitution is not possible or not relevant in a manner that is responsive to some of the current debates surrounding standards such as the Pinheiro Principles, while others set out principles applicable to both HLP restitution and broader reparations efforts.

For instance, the discussion of “long term safety and security” notes that situations involving significant risks of recurring disasters militate against rebuilding the status quo before displacement and may even require permanent relocation of affected populations (paragraphs 59 and 61). The subsequent section on “adequate standard of living” notes that housing assistance should be provided to IDPs regardless of their choice of durable solutions where they “did not have property prior to displacement” (paragraph 66).

Meanwhile, discussion of the (discretionary) criterion of access to effective remedies and justice describes the broader transitional justice framework in which property restitution, along with other relevant forms of reparation should be situated. As such, it points out a number of important principles such as the utility of programmatic approaches (para. 98), the need to distinguish between assistance and compensation (para. 99), and the importance of accessibility and the informed participation of IDPs in the design and implementation of such measures (paras. 101-3).

A second interesting HLP-relevant feature of the Framework is the nuanced manner in which HLP rights are themselves defined. Because the Framework does not simply reiterate any of the prior formulations, it represents a new iteration in a long line of articulations of the right, ranging from Annex 7 of the Bosnian Dayton Accords to Guiding Principle 29 to the Pinheiro Principles. As such it is likely to trigger further debate over how HLP restitution itself should be defined and how it relates to alternative remedies such as compensation. Two basic features are of particular interest.

First the scope of the right is defined very broadly, to include “not only ... all residential, agricultural and commercial property, but also ... lease and tenancy agreements” entitling displaced claimants to remedies for “lost ownership, tenancy rights or other access entitlements to their housing, land and property, whether they have formal or informal titles or rights on the basis of mere uncontested use or occupation ....” (para. 76).

This formulation corresponds roughly with European Court of Human Rights jurisprudence broadly defining property rights, as well as standards such as the Pinheiro Principles whereby for instance, holders of tenancy rights should “to the maximum extent possible” be able to repossess their properties on the same basis as owners (Principle 16). However, such a broad scope can lead to practical difficulties as, by definition, rights held on the basis of less exclusive forms of tenure are more likely to be contested by other parties that can credibly claim to have an interest.

On the other hand, the nature of the remedy is described unusually flexibly, with restitution remaining preferred “in principle”, but compensation permitted in lieu of restitution where this would be “more equitable, after weighing the different interests” (para. 78). With this formulation, the Framework departs fairly radically from the “impossibility” standard for allowing compensation in other HLP-related texts such as the Pinheiro Principles and moves closer to the case-by-case approach advocated for remedying human rights violations of a more general nature in texts such as the Van Boven/Bassiouni Principles, which states in relevant part that:
In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. (Principle 18).

This departure from the impossibility standard for compensation set out in the Guiding Principles themselves (GP 29.2) is likely to be seen as a step backwards by some HLP rights advocates. However, from a practical perspective, it may also be a necessary corollary to the broad substantive scope of the right articulated in the Framework, as discussed above.

Many of the other recommendations for HLP restitution made in the Framework are more conventional, such as contextual approaches to institutional solutions (para. 77), alternative accommodation for occupants (para. 78), recognition of women and children’s property rights (para. 79), rejection of unfair application of abandonment rules and a call for systematic enforcement (para. 80). However, some further novel elements include a reminder that “returnees without property rights” and others still enjoy the prospective right to adequate housing (para. 80, as discussed above) and an assertion of states’ legal obligation to reconstruct wrongfully destroyed homes, as well as more negotiable duties to reconstruct homes under circumstances in which they are not directly liable (para. 81).

By including HLP remedies as one of the non-discretionary criteria for achieving durable solutions, the Framework firmly anchors HLP rights as a crucial element in post-conflict and post-disaster recovery. However, by defining these rights in a manner that departs from previous formulations, the Framework indicates the extent to which debates regarding their scope and nature remain open. While the persistence of this debate may blunt their advocacy impact in the short term, the fact that it has now been joined between parties that may disagree on many fronts but are united on the fundamental importance of HLP rights to vulnerable individuals is itself a form of progress.