

Post-Conflict Reparation, Restitution and Human Rights - Where to Head From Here?

Scott Leckie¹

Three excellent articles within this volume of NQHR address several of the pertinent themes surrounding the question of restitution and reparation following conflict. A common thread running through each of these pieces - beyond the descriptions of the various trials and tribulations the restitution concept has faced through the years - centres on what can perhaps best be characterised as restitution's weakest link. Recognising the various manifestations of restitution and reparation as rights, even if we are only part of the way there, may turn out to have been the easy part of the process when the full history of restitution is finally written. Achieving these rights in practice, on the other hand, presents human rights practitioners of all ilk's - lawyers, researchers, UN officials, advocates, community organisers, academics and others - with some of the most daunting tasks anywhere within the increasingly vast human rights domain.

For with the promise of restitution we implicitly demand not merely assurances that past acts of extreme injustice will not occur again, but also that that most difficult task of turning back the clock of abuse and cruelty to a time and place where peace and relative calm prevailed can be made real. With reparations we seek to repair the damage done, but usually in a limited way, often through compensation and admissions of accountability. With restitution, we seek something more than that; here we strive to create conditions whereby past acts are in effect *reversed* leading ideally to a situation where the tragic months, years, and even decades of forced displacement are legally and practically made null and void. Restitution offers the promise that the wrong done will not be allowed to stand. It tells those planning to 'ethnically cleanse' an area, those who are intent on forcibly removing people and populations from their places of historic residence, that you will not prevail, you will not get away with your crimes, you will not be allowed to take what is not rightfully yours.

Thus we have the lofty principle that if abuse, extreme injustice, an illegal act or a crime that caused the forced displacement of a person, family or community, these victims will be afforded every opportunity to reverse the process and return home with their rights restored and a sense of residential justice achieved. The concept of restitution, of course, has been with us for a considerable period of time, and in international legal terms the now famous Chórzow Case of 1928 is often viewed as the start of restitution's global journey, a path that has advanced steadily over the past century. What is more recent, however, is the manner by which restitution and, in lieu of it, compensation have come to form an increasing part of peace agreements, post-conflict peacebuilding, voluntary repatriation agreements and efforts in

¹ Scott Leckie (BA, LL.M) is the Founder and Director of Displacement Solutions (www.displacementsolutions.org), an organisation dedicated to resolving cases of forced displacement throughout the world. He is also Founder and Special Advisor to the Centre on Housing Rights and Evictions (COHRE), an organisation he headed from 1991-2007.

support of transitional justice and the protection of human rights and as an element in the enforcement of international humanitarian and criminal law. And it is in these particular links of restitution to violations of housing, land and property (HLP) rights that we find both this principle's greatest promise and most overwhelming obstacles.

The articles by Veraart, Buyse and Parmentier, Valinas and Weitenkamp each make important contributions to the growing body of work examining the efficacy and real human impact of restitution principles in practice. Each of the three articles are correct in touching on the limits of the restitution enterprise to date, and usefully identify several areas where further efforts need to be made to strengthen the right of everyone to housing, land and property restitution. Above all else, these articles reveal that notwithstanding what law and jurisprudence may say, ultimately in the real world, restitution succeeds only when those exercising political power enable this to be so. And if we are to be true to the promise of restitution, we need not only outlaw the practices that bring restitution into the remedial sphere, but so too must we outlaw any attempts to prevent restitution from implementation, for this obstructs justice, thwarts the prospects for peace and rewards outright theft and the violent taking of property.

So even with advances as significant as 2005's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law and the UN's Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons, and the increasingly clear equation of forced displacement with crimes against humanity and gross violations of human rights, it remains distressingly difficult to achieve restitution in practice. Even in Bosnia-Herzegovina, which Buyse's article addresses, the restitution record is far from ideal. While of indisputable importance in many respects, the compromise-heavy deal hammered out at Dayton, replete as it was with internal contradictions, and influenced very much by a Europe not particularly keen to permanently host hundreds of thousands of new Balkan refugees, the restitution rights found in the agreement that brought the war to an end in 1995 fell far short of their aims, despite billions of Euros of support and the hard work and good will of thousands of people to transform the restitution rights of Annex 7 into existence. Yes, it is true that many hundreds of thousands were able to reclaim their former homes and to re-assert their rights and control over their places of habitual residence, and we should not under-estimate the significance of this.

At the same time, however, and recalling that the restitution undertakings in Bosnia are still held up as *the* great HLP rights restitution victory of the post Cold War era, in all likelihood more people did not return to their pre-war homes than those that did actually do so. In Kosovo this was much the same, with facilitated sales and leasehold arrangements characterising the vast majority of the 29,000 cases (almost all of which were submitted by Serbs who fled after the Nato-led War) settled by the UN's Housing and Property Directorate (HPD). Ethnic Albanians by and large were able to reclaim their homes following the UN Mission in Kosovo's establishment there, while more than 200,000 Serb civilians were rapidly forced to depart Kosovo with only the HPD to assist them in re-establishing control over their homes and lands. South Africa's restitution hopes have by and large been dashed as the reality of market-

value compensation requirements tacitly protect those still living on land from which the Black majority was routinely displaced during apartheid. So, too, with the restitution provisions in both the El Salvador and Guatemala peace agreements of the 1990s; restitution as a principle finds its way into the agreements only to be almost universally stifled on the ground. The post-Communist and Jewish restitution programmes in Europe may have fared considerably better than many of the other restitution arrangements, but even this cannot hide the fact that there remain many millions of people alive today whose legitimate housing, land and property restitution rights are as far as ever from being realised.

And thus we come to the crux of the matter, the eternal dilemma of the restitution project. Without good governance, without political courage and will and without the simple poise required to accept responsibility for the crimes that give rise to restitution rights, restitution simply will not happen. This, despite the obvious links between sustainable peace and restitution and between restitution and the observance of the rule of law. Yes, restitution is a question of rights and justice, but so too - in many ways far more than is the case with other rights - it remains a highly political issue, and thus one overly dependent upon the collective consciousness of whatever society it is that grapples with the question.

So what is needed next, I believe, in the quest for expanding the reach and strength of restitution rights is a three-fold approach designed to push the restitution project yet further. To achieve this, firstly we require ever growing shifts in public awareness about the degrees of wrong incurred through the process of forced displacement and the necessity of reversing these acts of extreme injustice. The article by Parmentier, Valinas and Weitenkamp reveals how these matters have shifted in the minds of many in the Balkans, but we need this to occur everywhere where nations still refuse to accept their responsibility for acts resulting in forced displacement.

Secondly, we then need this growing understanding of the inherent links between restitution and peace to translate into far stronger actions by States in support of restitution. Yes, there are quite literally hundreds of legal standards in the world that recognise the rights of refugees, displaced persons and others to have restored to them any housing, land or property arbitrarily taken from them, and we can very legitimately address restitution as a right, but these fall far short of ensuring restitution rights in practice to all who are entitled to them.²

And thus, third, we need to transform heightened citizen awareness of the just nature of restitution (driven from the perspective of justice rather than expediency or as an easy way of justifying deportations of recent asylum seekers) and whatever expanded support from States for restitution rights as may be forthcoming, into a framework specifically designed to secure the restitution rights of all of those groups of forcibly displaced persons and peoples

² See: Scott Leckie (2007) *Housing, Land and Property Restitution Rights for Refugees and Displaced Persons: Laws, Cases and Materials* (editor), Cambridge University Press, New York.

throughout the world who continue to find it impossible to return to and re-possess the homes, lands and properties which are still very much their own.

And in this quest, let us start with what is both the world's largest refugee population and the group that has waited the longest to return to the homes and villages they still call home. Here, of course, we are speaking of Palestine's seven million refugees and displaced persons. There are few cases of extreme injustice more tragic and seemingly more intractable than the case of Palestinian refugees, and the time for remedying this gross abuse and extreme injustice is surely upon us. If Governments are truly serious about peace, about justice, about HLP rights and thus about restitution, they need to come together and solve the Palestinian refugee question once and for all. Sixty-one years of waiting is long enough. Watching as billions of dollars worth of land and homes is illegally confiscated by Israel without as much as a drop of compensation being paid is enough. Witnessing hundreds of thousands of illegal settlers unlawfully occupying land not rightfully theirs is enough. Squeezing ever more people into ever smaller spaces in Gaza and the West Bank is enough. Blindly ignoring the plain truth that peace in the Middle East is an impossibility without enforcing the restitution rights of all Palestinians, which, after all, have been enshrined in General Assembly and Security Council resolutions for decades will get us nowhere. The evidentiary proof needed to make restitution a reality for the Palestinians is there for all to see, safely and secretly stored in a non-descript UN building in Queens, New York.³ The facts of the situation are known to all who choose to look and learn.⁴

Restitution must not become the impossible dream for Palestinians. Securing the right to HLP restitution for all entitled to it - even in Palestine and Israel - is possible. Returning the thousands of Palestinian homes, currently occupied by Israeli citizens in what have become some of the most expensive and trendy neighbourhoods in Israel, is *materially possible* to achieve. Returning confiscated and now mostly fallow land to those Palestinians from whom it was taken is *materially possible* to achieve. Restoring rights of control over dwellings, village compounds and farms to their legitimate owners is *materially possible* to achieve. And, at the end of the restitution process, once every Palestinian with a restitution claim has been able to have their day in court and their claim adjudicated by an impartial and independent tribunal, providing just and satisfactory compensation to those relatively few refugees for whom physical restitution not in fact be materially impossible is also *materially possible* to achieve. Indeed, restitution for Palestinian refugees is far from the impossible task those resisting these rights want us to believe it is. It can happen and it must happen if the elusive quest for peace in that volatile region is ever to emerge in a sustainable way, enveloped with a sense of justice, reconciliation and grace.

³ Perhaps the best overview of this vital element of the Palestinian refugee question is found in: Michael R. Fischbach (2003) *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict*, Columbia University Press, New York.

⁴ See, for instance, the widely acclaimed 2007 book by one of Israel's leading historians: Ilan Pappé (2007) *The Ethnic Cleansing of Palestine*, Oneworld, Oxford. This book covers the full history of the planned expulsion of Palestinians from their homes and lands, and shows convincing how this act was at the political core of Israel's earliest days.

And let us not end the restitution project with the Palestinians, but let us extend these efforts in support of the 100,000 Bhutanese citizens who faced expulsion from their homes and their lands in the 1980s, the tens of thousands of Western Saharan refugees who have languished in Algerian refugee camps since 1975, the millions of those displaced inside and outside of Burma during the past several decades and all others longing for a return home. Let us place the restitution process ever higher on the political and legal agendas of governing institutions the world over, coupled with a process that strengthens ever further the rights of people not to be arbitrarily displaced in the first place. As we solidify housing, land and property rights protections, reduce the virtually absolute powers of Governments to compulsorily acquire land and expand rights to HLP restitution for those forced from their homes against their will, we may eventually nestle into a state of legal solace, where one's home is indeed one's castle, where that place on planet Earth we each hold uniquely and singularly dear is respected as such, and where the calls for justice are heard ever louder over the echoes of crimes past and tragedies which are repeated never more.