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Case Studies on Transitional Justice and Displacement

# Transitional Justice Responses to Palestinian Dispossession: Focus on Restitution

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August 2012

### **Transitional Justice and Displacement Project**

From 2010-2012, the International Center for Transitional Justice (ICTJ) and the Brookings-LSE Project on Internal Displacement collaborated on a research project to examine the relationship between transitional justice and displacement. The project examined the capacity of transitional justice measures to respond to the issue of displacement, to engage the justice claims of displaced persons, and to contribute to durable solutions. It also analyzed the links between transitional justice and other policy interventions, including those of humanitarian, development, and peacebuilding actors. Please see: [www.ictj.org/our-work/research/transitional-justice-and-displacement](http://www.ictj.org/our-work/research/transitional-justice-and-displacement) and [www.brookings.edu/idp](http://www.brookings.edu/idp).

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### **Acknowledgements**

ICTJ and the Brookings-LSE Project on Internal Displacement wish to thank the Swiss Federal Department of Foreign Affairs (FDFA) and the Canadian Department of Foreign Affairs and International Trade (DFAIT), which provided the funding that made this project possible.

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## Introduction

Palestinians make up the world's largest displaced population. With more than 6.6 million refugees and around 427,000 internally displaced persons inside Israel and the West Bank and Gaza Strip, nearly 70 percent of all Palestinians are displaced from their places of origin.<sup>1</sup> The displacement of Palestinians has been accompanied by massive land seizures, property destruction, and material loss. Palestinian refugees displaced in 1948 were denied citizenship status in the newly established state of Israel by law.<sup>2</sup> Refugees who fled to the West Bank and Jordan were automatically nationalized, while the vast majority of refugees who fled to other Arab countries were given varied levels of rights with the exception of citizenship.

Millions of Palestinian refugees remain stateless three generations on, as the conflict that gave rise to their displacement has gone unresolved. These combined realities leave millions of Palestinians dispossessed of their ancestral homeland, their original properties and assets, and their national identity. While limited property compensation has been made available to internally displaced persons in Israel, the possibility of reparation for refugees has been deferred pending a comprehensive political settlement between Palestinians and Israelis. As the conflict continues, the numbers of displaced increase and prospects of a settlement decrease.

This protracted displacement of Palestinian refugees represents a conundrum for the international refugee, humanitarian, and transitional justice fields. For the most part, these global movements have treated the Palestinian situation as a case apart: Palestinian refugees living in the areas where the UN Palestinian refugee agency (UNRWA) operates are excluded from the 1951 Refugee Convention, and do not fall under the operational jurisdiction of the Office of the UN High Commissioner for Refugees (UNHCR), nor are they entitled to the protections of the 1951 convention.<sup>3</sup> The legacy of the convention's "exclusion clause," combined with the fact that there is no active UN agency mandated to search for durable solutions for Palestinian refugees, has led to a state of "exceptionalism"<sup>4</sup>: the "decade of refugee repatriation" in the 1990s and the lessons gleaned from it, including the policy embrace of restitution as a component of durable solutions, have not typically been viewed as relevant to the Palestinian case by policymakers and generalist academics and advocates, who out of assumption,

habit, and a desire to avoid “politicizing” their work, continuously set aside the Palestinian refugee issue. The lack of progress toward a political consensus on the relevance of international law to the conflict has further frustrated efforts to fit humanitarian and diplomatic responses to the Palestinian refugee crisis within the rubric of universal norms. Nevertheless, the glaringly gross violations of international law suffered by Palestinians are a stark reminder that if universal movements are to be internally consistent, they should not exclude questions about the Palestinian case or leave the matter exclusively to the domain of politicians.

The transitional justice movement is particularly relevant to Palestinian refugees. For decades, the refugees have been marginalized by political negotiations, which have been conducted by elites behind closed doors with little regard to the expectations of the millions of refugees who constitute a significant part of the Palestinian polity. To reverse this trend, or at least raise the profile of the refugee question, it is useful to apply the transitional justice principle of placing victims at the center of conflict resolution and peacebuilding. Transitional justice is also predicated on state accountability—an ingredient whose absence from peace efforts in the Palestinian-Israeli context has allowed the conflict to continue unabated. Viewing the conflict through a transitional justice lens implicates restitution as a principal aim of reparation. Yet significant conceptual and practical challenges arise in linking restitution to the Palestinian refugee question. These challenges include:

- The policy objectives and links with conflict resolution. The main diplomatic platform for resolving the conflict is driven by policies of territorial partition and ethnic separation that would formalize the results of war and displacement. How does property restitution, which is premised on reversing the consequences of conflict, fit into this model? What are the implications for individual rights and demands for justice?
- The timing of restitution. Fundamental human rights of Palestinian refugees are treated as a debatable question subject to political negotiations and settlement. With the continuing conflict between Israelis and Palestinians and the failures of the peace process to adequately address refugee claims to restitution, when and how will those claims be recognized?<sup>5</sup>
- The packaging of justice. Restitution is conventionally regarded as the preferred remedy in the event of a breach of international law. But other remedies and forms of reparation also apply. How can reparation and accountability measures be combined to balance conflicting interests while ensuring that individual victims are satisfied and that the rule of law, peace, and stability are guaranteed? Where does restitution fit in a reparation package for Palestinian refugees?
- The practical challenges in protracted refugee situations. In the Palestinian-Israeli case, practical challenges arise from the extremely long duration of the displacement, the vast numbers of persons affected, and the informal forms of property ownership in pre-1948 Palestinian society. These challenges include issues of secondary occupancy, proportionality, financing, and administration.

This paper addresses these questions in order to highlight the legal, practical, and political relevance of property restitution to reaching a viable (that is, implementable) settlement of the Israeli-Palestinian conflict.

## A Snapshot of Palestinian Dispossession in Israel

In the six decades since the start of the Israeli-Palestinian conflict, there have been two major waves of mass forced displacement of Palestinians from what is now Israel. The first occurred around and following the November 1947 UN decision to partition Mandate Palestine into ethnically constituted Jewish and Arab (“Palestinian”) states.<sup>6</sup> The second wave occurred during and following the 1967 military occupation of the West Bank and Gaza Strip. Other incidents of displacement took place at different historical junctures in the conflict or are ongoing, but refugees from these two periods constitute the bulk of displaced Palestinians today with potential restitution claims.<sup>7</sup> This paper focuses on the displacement and potential restitution claims of “1948 refugees” in particular, as their claims are assumed to be the most complex to resolve.

### Scope of Losses

Not unlike other refugee situations, Palestinian displacement was accompanied by immense housing and property losses. Between 1947 and 1949, the more than 700,000 Palestinians who fled or were expelled to surrounding countries and territories left their homes and properties behind. Mandate Palestine had an extensive network of more than 500 villages with cultivated lands. At the time of partition, advanced agricultural and manufacturing industries and businesses represented significant development in the region. Attempts to quantify the scope of non-Jewish Palestinian property losses from the 1947–49 period vary considerably, with one recent study putting the estimate at around \$300 billion in present day values.<sup>8</sup>

### Israeli Management of Refugee Property

The displacement of Palestinians in 1948 was subsequently enforced by Israeli authorities through a complex regime of officially sanctioned laws and governmental and institutional policies. This regime included legislative and regulatory measures, some of which were intended to formalize the military fait accompli stemming from the displacements. Immediately following Palestinian flight from towns and villages, properties came under the control of Jewish militias and ad hoc custodial authorities. Of the more than 500 Palestinian villages and towns in pre-1948 Palestine, more than 418 villages were destroyed, while urban housing left standing was immediately occupied.<sup>9</sup> The displaced, some of whom were encamped within sight of their former homes and lands, were barred from return by force and by emergency regulations that precluded “infiltration.”<sup>10</sup> The latter were used to prevent the internally displaced from returning to their homes, as well as to implement further deportations.<sup>11</sup>

In 1950, the Israeli Knesset adopted legislation establishing a centralized Custodian of Absentee Property, which was empowered to seize and administer land belonging to refugees and the internally displaced. The legislation granted the custodian the right to take property based on the status of “absentee” persons, and in some cases where property was deemed necessary for developmental purposes.<sup>12</sup> Regulations were adopted by the military governor and Israeli ministries that enabled additional government property seizures under military and public infrastructure rationales.

The Land Acquisition (Validation of Acts and Compensation) Law was passed in 1953, allowing the custodian to transfer immovable property in its possession to the state Development Authority

(DA).<sup>13</sup> In turn, the DA was authorized to pass on the property to state agencies and the Jewish National Fund.<sup>14</sup> The total amount of private Palestinian land appropriated under this regime was around seven million dunums (approximately 7,000 square kilometers, or 1.7 million acres).<sup>15</sup> Land classified as public under the pre-1948 land ownership system was also transferred to the DA.

### Intersection with Nationality and Return

In parallel with the land appropriations, nationality legislation was adopted that indirectly but comprehensively excluded Palestinian refugees from Israeli citizenship on the basis of their location outside of the country between the date the state was declared and the adoption of the nationality law. The Law of Return, enacted in 1950, also applied exclusively to persons of Jewish heritage.<sup>16</sup> The combined effect of the state's land appropriation and nationality measures was to consolidate the demographic transformation of the state's population and land holdings. At the time of the UN Partition Plan in 1947, Jewish residents owned around 7 percent of the land in Mandate Palestine. Following the transfer of property under the Israeli acquisition laws, around 94.5 percent of land was in the hands of the state.<sup>17</sup>

### Current Status

Official figures reflecting the total land holdings of the state are not readily available. It is assumed that the state continues to hold close to the figure cited above of 94.5 percent, which would be inclusive of Palestinian refugee property, as the vast majority of land in Israel is still publicly owned. The state's land administration unit, which holds property in perpetuity for the benefit of Jews everywhere, is authorized to grant leases to private individuals, companies, and community associations. Most urban leaseholds run from 48 to 98 years, some being automatically renewable for another 98 years.<sup>18</sup> Agricultural leases are granted for shorter periods of time. Rural property in the Naqab and northern areas of the country where Palestinian refugee land is concentrated is mostly publicly owned. Privately held land—less than 10 percent of the country's territory—is concentrated in urban areas in the central district. Recent privatization measures adopted in August 2010, intended to transfer ownership rights to private individuals, have not yet been implemented, although there are reports that urban refugee homes and buildings have been slowly transferred through private sales over the past several years.

## The Applicability of Restitution as a Remedy in Resolving the Israeli-Palestinian Conflict

There has been significant scholarship devoted to explaining how property restitution as a remedy for displacement has emerged as a recognized principle of international law and an integral part of responses to displacement-related crises.<sup>19</sup> While the right of return is more firmly grounded in legal jurisprudence than the right to property restitution for the displaced, long-standing customary international law obligates states to make reparation for breaches of law.<sup>20</sup> This principle holds that states should restore, to the extent possible, the situation that existed before the illegality occurred. This translates into a duty to restitute property (and other material losses) or pay a sum corresponding

to the principle (current market value). Since the end of the Cold War, numerous conflicts involving forced displacement have been settled through recognition of the principle of restitution due to the rising acceptance of individual human rights, spread of democratic transitions, and codification of remedial norms.<sup>21</sup> The return of refugees not only to their countries of origin but also to their homes of origin has also come to be regarded as an important element of sustainable repatriations.<sup>22</sup> The principles of transitional justice would further suggest the centrality of restitution as a form of reparation essential for restoring the rule of law and maintaining peaceful conditions in regions where mass dislocations occurred as a result of discriminatory or other abusive measures.

UN agencies have affirmed the relevance of these principles to Palestinian refugees. In the wake of massive Palestinian flight at the end of 1948, the UN General Assembly called for the voluntary return and restitution of the refugees, stating, in what was the first articulation of the right of refugees to return to their place of origin:

[T]hat the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss of or damage to property which, under principles of international law or equity, should be made good by the Governments or authorities responsible.<sup>23</sup>

The General Assembly has annually reaffirmed Resolution 194 as the guiding framework for the resolution of the refugees' situation, but multilateral diplomacy has failed to maintain refugee rights as a central element of the search for peace. In 1949, mediation undertaken by the UN Conciliation Commission for Palestine (UNCCP) focused on the cessation of armed hostilities, the status of Jerusalem, and refugee repatriation. These efforts failed to make headway on the latter two issues of contention. The UNCCP ceased its active diplomacy in search of durable solutions for the refugees in the early 1950s, at the same time that the 1951 Refugee Convention was adopted with its exclusion clause, leaving Palestinian refugees and associated questions such as the treatment of their property to hang in the balance. When negotiations resumed 40 years later, refugee rights occupied a much lower priority on the agenda, deepening the crisis of durable solutions. The Security Council and the Quartet<sup>24</sup> intervened with vague statements regarding the need for a comprehensive solution, but did not specify that it include the reinstatement of lost properties.

Israel's refusal to consider property restitution has been uncompromising. A common explanation put forward by successive governments and their proponents is that the appropriation of refugee property was legitimate because it was done in accordance with their domestic laws and/or that Israel is not bound by the relevant international standards mentioned above.<sup>25</sup> Israeli courts in particular have operated under this line of argumentation when faced with legal suits from internally displaced Palestinians, pointing to state legislation put in place that allowed for the seizure and transfer of refugee property to the state, but without regard to questions about the discriminatory nature of the appropriations.

Israeli scholars have mounted temporal arguments that at the time of displacement in 1948 there was no binding obligation to repatriate refugees.<sup>26</sup> A related strand of legal argumentation advanced is that population transfers were accepted by the international community in 1948, pointing most frequently to the case of Sudeten Germans who were systematically transferred out of Czechoslovakia

with the agreement of the Allied governments in 1945. Other legal arguments have been made that the human right giving rise to a remedy for displacement (that is, the right of return) does not apply to situations of mass displacement. Israeli jurist Ruth Lapidoth, one of the few Israeli lawyers to address Palestinian refugee rights under international law, has written that the international human right to return<sup>27</sup> is an individual right that was not intended “to address claims of masses of people who have been displaced as a by-product of war or by political transfers of territory or population.”<sup>28</sup> She also interprets the right of return as belonging only to a country’s nationals and not to Palestinians who are not citizens of Israel. These arguments indicate a position on restitution defined by a complete rejection of its legal or moral relevance to present day Israel.

The issue of temporality may warrant legal pause concerning the applicability of an individualized right to return home in the Palestinian case, as the principle of property restitution for refugees was solidified only in the post–Cold War era.<sup>29</sup> Nevertheless, the composite nature of the forced expulsions and property seizures and the ongoing arbitrary restrictions on return, restitution, and access to land and housing in Israel gives rise to a continuing composite violation.<sup>30</sup> State appropriation of property following the refugees’ flight was a means to consolidate the demographic gains made from physical displacements and ensure privileged access to land for Jewish citizens.<sup>31</sup> This includes property confiscated from internally displaced Palestinians who now hold Israeli citizenship. All displaced Palestinians continue to be denied the option of return and/or reclamation of properties under the same combination of arbitrary measures that effected or otherwise consolidated their dispossession in the first place. The continuing, compounded nature of the violations experienced by Palestinians is further support for the contention that contemporary norms are applicable to resolving this case of mass uprooting, as the violations are not just historical but current.

Despite the weak diplomatic efforts to achieve lasting solutions for the refugees, the legal applicability of contemporary international human rights norms to Palestinian refugees has been recognized by UN treaty bodies. During a recent periodic review of Israel, the Committee on the Elimination of All Forms of Discrimination called on the government to revisit its denial of refugee rights. In 2011, after a visit to Israel and the occupied Palestinian territories, the UN high commissioner for human rights, Navi Pillay, reiterated the call for Israel to address the right of return of Palestinian refugees, who hold the same set of rights as all refugees.

### **What Do Refugees Want?**

The lack of attention devoted to refugee issues at the official level has drawn criticism from the Palestinian polity. In the mid-1990s, when it was decided to postpone permanent status talks on refugee and other core issues of the conflict, activists held a series of conferences in the West Bank to reassert the centrality of refugee issues to the peace process. Refugee networks were founded and organizational units formed to conduct advocacy. These networks drew on comparative examples of the return and restitution of the displaced, in places such as Bosnia, Kosovo, South Africa, and Cyprus, to formulate popular positions. In the course of their advocacy, property restitution rose in prominence as the preferred remedy for Palestinian refugees consistent with international law. These movements today continue to demand the return of refugees, focusing on strategies to obtain Israeli accountability to international principles (for example, the Boycott, Sanctions and Divestment Campaign), as progress in achieving conflict resolution appears distant.

## The Relationship between Property Restitution and Durable Solutions

The evolving international policy linking housing and property restitution with durable solutions for displaced persons stems from the recognition that adequate reparations for victims of mass arbitrary displacement should include remedies for the loss of homes and lands from which they were wrongly evicted. Restitution is an important element for reinforcing perceptions of justice and reinstating the rule of law. Housing and property restitution is also viewed as important for enabling the reintegration and socioeconomic rehabilitation of displaced persons.

The normative linkage of the rights of restitution and return was crystallized in postwar Bosnia, where return to homes of origin was strongly enforced by international agencies, initially out of a desire not to reward ethnic cleansing and to ensure refugee return. Over time, however, international agencies operating in Bosnia applied restitution in a rights-based manner, amending laws to allow the displaced to repossess homes irrespective of their actual return. This change, intended to lift barriers to return by removing pretexts for denial by local authorities, moved international policy toward an individualized approach to property restitution for refugees. Treating return and property restitution as distinct but complementary remedies could enable reparation for individual refugees without coercing their choices with respect to return or resettlement, which is essential to the fair resolution of protracted displacements, especially the Palestinian refugee situation.

## Substantive Challenges

### Political Objectives and Conflict Resolution

A main challenge to property restitution in the Palestinian case is the dominant mode of political settlement and the assumptions that underlie it. The philosophical motivation of restitution as a form of reparation—to return the situation to that which would in all likelihood have existed if the breach had not been committed—appears inapposite to territorial compromises drawn along demographic lines. Unlike in Bosnia or Burundi, in the Palestinian case, international actors and negotiating leaders on both sides of the divide have not sought to reverse the displacements of 1948. While it was an original priority of the Palestinian national movement, after leaders accepted the compromise of territorial partition in 1988, the issue of return changed from a political program to an issue of individual “choice” pursuant to UN General Assembly Resolution 194. As negotiations proceeded in the 1990s and 2000s, the desire to achieve a solution that would grant refugees the choice of return and restitution was overshadowed by a greater desire among negotiators to achieve an independent Palestinian state, an objective that Israel and the international community framed as inconsistent with refugee return.

Palestinian leaders (the Palestine Liberation Organization/Palestinian Authority) now prioritize an end to the military occupation of the West Bank and Gaza Strip that began in 1967, and self-determination

(that is, “statehood”) within limited swathes of their former homeland. On the Israeli side, maintaining a Jewish demographic majority appears to be the highest priority, and there is significant international sympathy for such an ethnically drawn and constituted state.

Assuming that the “two-state solution” is workable, how does restitution, with its objective of reversing the effects of conflict, fit in? For the most part, in considering this question, political leaders have conceived of return and restitution as one complete act and outcome. Therefore, their answer is that property restitution cannot be an option if the aim is the creation of two separate, ethnically constituted states.

In the two-state equation, then, the individual rights of victims whose losses were sustained on the other side of the border are relinquished for the sake of the “meta-bargain.”<sup>32</sup> Compensation is typically referenced as the alternative or trade-off. While compensation is an internationally recognized form of reparation and the appropriate alternative to the restoration of property, if restitution rights are held individually, how can their wholesale trade-off serve the aims of transitional justice and, in turn, peace and stability? In other words, how can the individual victim be accommodated in the meta-bargain? The meta-bargain may be an effective means for achieving a pragmatic peace in the face of clear differences between warring parties in a protracted conflict, but if it fails to provide adequate redress consistent with victim expectations, it is unlikely to bring about a sustainable end of conflict. Rather than insist on a strict application of return and restitution, or alternatively on their complete suppression, the key to balancing principles of transitional justice with the realities of a conflict is, at the very least, to include the victims in the shaping of decisions and their implementation.

### Issues of Applicability and Timing

The Human Rights Committee—the treaty body for the International Covenant on Civil and Political Rights, which includes a nonderogable binding obligation to allow persons to enter their country<sup>33</sup>—has explained that this right applies to refugees en masse.<sup>34</sup> Other principles of international law make it clear that even if refugees left under their own volition, as opposed to being expelled, they should still be permitted to return to their homes after the cessation of armed hostilities. The applicability of these norms to Palestinian refugees has been repeatedly affirmed by the UN General Assembly. Palestinians and Arab states that are party to the conflict have called for their rights to be recognized in line with these international standards. Yet the applicability of these rights to return and restitution is contested, and the issue has been deferred to a nonexistent political process.

Postponing Israel’s recognition of its international obligations vis-à-vis the refugees contributes to an environment of impunity where forced displacements are ongoing. Laying out a framework of applicable rights before a bilateral settlement is reached could in fact contribute to achieving that settlement. Since the Palestinians’ negotiating position, reflected in the Arab Peace Initiative, has indicated party willingness to compromise on the implementation of the rights to return and restitution, a prior endorsement of the principles would not preclude a practical settlement. Yet as above, in order to facilitate peacebuilding, the refugees themselves should be part of this process.

## Packaging of Justice

Unlike UN Resolution 194, which presented return and restitution together as a single option, property restitution itself constitutes a specific remedy for illegal property takings, subject to its own test under international customary law.<sup>35</sup> Even if refugees were unable to return or uninterested in repatriation, their right to repossess their property should be honored. Following developments in Bosnia, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted principles spelling out that:

Refugees and displaced persons shall not be forced or otherwise coerced either directly or indirectly to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return if they so wish, without prejudicing their right to the restitution of their housing, land and property.<sup>36</sup>

The separation of return from restitution could open the way for a disaggregated, albeit complementary, approach to conflict resolution. By delinking return and restitution as principles, refugee families could theoretically be more empowered to make decisions regarding repatriation without having to sacrifice all forms of justice (as in the Palestinian case, compensation has never been viewed as a measure of justice, but instead as a trade-off of rights). It could facilitate resettlement outside of Israel, or it could encourage return based on the freedom to settle in an urban location or near other Palestinian Arab communities.<sup>37</sup> This manner of choice is obviously an ideal, but it illustrates the potential of restitution as a rights-based response to protracted conflict as discussed.<sup>38</sup>

The loss of patrimony, freedom of movement, and opportunities, as well as the pain of dislocation and impoverishment were perhaps more damaging for Palestinians than the loss of property per se. Repairing these varied but interrelated sorts of harms would require equally varied forms of remedies, including statements of recognition, apologies, restitution, and compensation. Restitution as an independent remedial measure would facilitate a packaging of remedies that could be shaped to address the multiple and compounded violations suffered.<sup>39</sup> Rather than dictating a particular outcome, offering restitution as a choice, albeit one subject to equitable limitations, would enable refugees to adopt or dismiss it depending on what justice they feel is applicable to them. Further, framing restitution within the context of transitional justice could open the way for a comprehensive, integrated set of remedies from truth-telling to property repossession to compensation to other transitional justice measures. The more flexible and layered the remedies, the greater the chance that refugees will be satisfied despite political, social, or legal limitations.

There is also a practical dimension to turning to property restitution as a remedy for advancing conflict resolution in the Israeli-Palestinian case. As in other conflicts where restitution provided important assets that helped to finance resettlement or integration in asylum states, enabling property repossession could minimize the costs associated with a permanent settlement in the Palestinian case. As mentioned, compensation claims, exclusive of nonmaterial damages but inclusive of the full scope of material damages, have been valued at more than \$300 billion.<sup>40</sup> Property restitution would greatly reduce the cost of resolving the conflict, especially if arranged in a manner that did not result in extensive evictions of current occupants. Utilizing the modalities employed in other cases, such as

the provision of alternate land, title to rental arrangements that allow current occupants to remain, exemption of certain properties fundamentally converted for noncommercial purposes, and property sharing arrangements, could actually transform property restitution into a win-win situation.

### **Practical Challenges: Secondary Occupancy**

Contemporary restitution practice and its codifying principles have made it clear that states should prioritize restitution as a key element of restorative justice and a right distinct from return.<sup>41</sup> However, secondary occupancy is an important potential legal and practical limitation that would have to be accounted for in framing and designing a restitution program for Palestinians. It amounts to the major practical issue here. The emerging principles on housing and property restitution recognize that the right to property restitution may be satisfied by the provision of compensation where it is “factually impossible to restore” lost items.<sup>42</sup> Similarly, customary international law on state responsibility reflects the standard that alternatives to restitution are reasonable where it would be “materially impossible” or “out of proportion” to return property.<sup>43</sup> The subsequent occupation of housing and land belonging to displaced persons is a leading consideration in assessing the possibility of restitution.

The interest in protecting the rights of secondary occupants is not unique to Palestine. Secondary occupants are civilians. Unjust or unreasonable evictions of current occupants could constitute new violations, provoke further violence, undermine popular support needed for a sustainable transition, or call into question the entire morality of a peace agreement. In its study on access to land and ownership in repatriation operations, UNHCR has recommended an ad hoc approach, taking into account considerations of justice and equity as well as political and economic factors.<sup>44</sup> International law favors restitution and the rights of displaced claimants to their places of origin, but this must be weighed equitably against other factors, including considerations of fairness, reasonableness, and policy.<sup>45</sup> A study of other conflict resolution settings shows that even where restitution has been recognized as a framework principle, its implementation is usually crafted in accordance with the broad goals underlying the constitutive peace plans.<sup>46</sup> Such an approach, however, should not be oversimplified to a matter of “being realistic”—an overwhelming and defeating attitude that pervades the Palestinian-Israeli context. Rather, it confirms the conclusion reached by scholars, that remedies for the displaced should be treated as a component of transitional programming, as part of a broad collection of measures of redress meant to satisfy victims and preclude further conflict. Achieving this end demands consideration of competing interests and needs.

In response to the mass displacement that occurred in Bosnia in the early 1990s, the Security Council affirmed the right of all displaced persons to return to their homes, and that any land transactions made under duress were “null and void.”<sup>47</sup> Following the Dayton Peace Accords, international interventions in Bosnia heavily favored the rights of displaced claimants. Rights of subsequent users were typically cancelled in cases where the property was acquired through illegal means, including the passage of discriminatory laws after the start of hostilities.<sup>48</sup> Enforcement of eviction notices took into account humanitarian concerns, but original owners were mostly treated as the primary rights-holders in cases of forced reallocation. A similar approach was followed in Kosovo by the UN claims commission, which regulated that: “any person whose property was lost between 23 March 1989 and 13 October as a result of discrimination has a right to restitution.”<sup>49</sup> The rights of

secondary occupants were intended to be protected through the provision of alternate housing. Bosnia and Kosovo were momentous in terms of the development of international principles on housing and property rights for displaced persons, but, among other issues, the shortness of the time that had elapsed between the wartime evictions and the decision to enforce restitution may call into question the reasonableness of a strict application of this precedent as a model for restitution programs in Israel. Whether secondary occupants in Israel have acquired rights to property has not been debated sufficiently. The fact that most of the land and buildings in Israel are still formally held by the state suggests that, as a matter of principle, a Bosnia-style restitution program would not substantially interfere with private property rights. Nevertheless, the long-term leases granted to Israeli citizens certainly give rise to an expectation among occupants that they retain solid entitlements to the property, although the history of Palestinian dispossession is well known to Israelis.<sup>50</sup> This expectation is further compounded by the decisions of the Israeli courts and statements of the Israeli government responding to any Palestinian claims to confiscated property by asserting sovereign rights and generally dismissing the relevance of international standards.

Anecdotally, the assumption is that most of the lands formerly inhabited by Palestinian refugees and internally displaced are vacant. Although precise information from Israeli authorities is not readily available, some researchers have suggested that more than two-thirds of the Israeli population lives on less than 8 percent of the territory of the state of Israel.<sup>51</sup> Israeli Jews within the pre-1967 boundaries are concentrated in the central district of the country, between the urban environs of Tel Aviv, Haifa, and Jerusalem. Coinciding with recent land privatization measures, the Jewish National Fund is currently undertaking development initiatives to settle empty lands, especially in the Negev/Naqab region, where the Palestinian Bedouin population resides.<sup>52</sup> The designation of lands as public could also present a challenge to property restitution, although significant controversy surrounds the legitimacy of these classifications.<sup>53</sup> The impact of these projects on the rights of the displaced and dislocated has yet to be measured, but they no doubt contribute further to raising expectations of exclusive entitlement without giving consideration to possible remedies for dispossessed Palestinians. Current land reforms in Israel that allow for the private transfer of property could further complicate matters.

## Concluding Remarks

There is little prospect of achieving property restitution in the near term for Palestinian refugees. Incidents of displacement are ongoing and current interventions by decision-makers do not prioritize issues of displacement. However, this should not delay inquiries into whether and how property restitution could be pursued as part of a broader platform for conflict resolution in the Palestinian-Israeli context. As argued, addressing and learning from the challenges and unique legal aspects of this setting could strengthen universal projects while also facilitating an improved atmosphere for peace and eventual conflict resolution. Promoting a victim-centered, more rights-based approach to conflict resolution that is inclusive of the restitution claims of displaced and dispossessed Palestinians would go a long way toward creating new momentum for a fair, just, and sustainable peace.

## Notes

- <sup>1</sup> BADIL Resource Center for Palestinian Residency and Refugee Rights, *Survey of Palestinian Refugees and Internally Displaced Persons 2008-2009* (Bethlehem, Palestine: BADIL, 2009).
- <sup>2</sup> Palestinian refugees were effectively denationalized when Israel enacted its Nationality Law in 1952 (Nationality Law, 5712-1952). The law automatically excluded anyone outside of the country from 1948 to 1952 from citizenship [see Provision 3(a)(1)–(3)]. This provision was directed at Palestinian refugees who had fled in 1948, and came in contravention of international customary laws on state succession and nationality. For an analysis of Israel’s nationality obligations toward Palestinian refugees, see John Quigley, “Displaced Palestinians and a Right of Return,” *Harvard International Law Journal* 39, no. 1 (1998): 171–229.
- <sup>3</sup> Convention and Protocol Relating to the Status of Refugees, July 28, 1951, U.N.T.S. 189, entered into force April 22, 1954.
- <sup>4</sup> Michael Kagan, “The (Relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East,” *Journal of Refugee Studies* 22, no. 4 (2009): 417–438.
- <sup>5</sup> This issue raises questions regarding the role of international actors, but these questions are not discussed in this paper.
- <sup>6</sup> UN General Assembly Resolution 181 (II), “Future Government of Palestine,” U.N. Doc. A/RES/181(II) (November 29, 1947). The resolution proposed two states that would be joined in an economic union. The civil and property rights of minority residents in both states were to be protected under the resolution. The resolution provoked active hostilities between Jewish and Arab militias. Full scale war between Jewish and Arab state forces broke out upon the declaration of the state of Israel in May 1948. Mass flight and expulsions of Palestinians lasted up until the signing of armistice agreements between Israel and surrounding Arab states in 1949.
- <sup>7</sup> BADIL, *Survey of Palestinian Refugees*, 3. The NGO BADIL estimates the numbers of Palestinians who were originally displaced as follows: during the British Mandate years of 1922–1947, 100,000–150,000; between 1947 and 1949, 750,000–900,000; under Israeli emergency regulations between 1949 and 1966, 35,000–45,000; during 1967, 400,000–450,000; during the military occupation of the West Bank and Gaza Strip from 1967 to present, “hundreds of thousands.”
- <sup>8</sup> Indeval, “Property Losses of Palestinian Refugees, 1947-1948: Quantification of the Aggregate Value of Property” (unpublished study on file with the author, 2009). The study includes the quantification of the Palestinian share of public property and lost income/opportunities. It excludes nonmaterial damages.

- <sup>9</sup> Walid Khalidi, ed., *All that Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington, D.C.: Institute for Palestinian Studies, 1992). One-third of all immigrants entering Israel in the late 1940s and early 1950s settled in Palestinian homes. Michael Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict*, Institute for Palestine Studies Series (New York: Columbia University Press, 2003), 11.
- <sup>10</sup> Souad R. Dajani, *Ruling Palestine: A History of Legally Sanctioned Jewish-Israeli Seizure of Land and Housing in Palestine* (Bethlehem and Geneva: Centre on Housing Rights and Evictions and BADIL Resource Center for Palestinian Residency and Refugee Rights, 2005).
- <sup>11</sup> Ibid.
- <sup>12</sup> An “absentee” was defined as any person who from November 29, 1947, was: a legal owner of any property situated in the area of Israel or a person who enjoyed or held it, whether by himself or through another, and who at any time during the specified period: i) was a national or citizen of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, or Yemen; or ii) was in one of those countries or in any part of Palestine outside the area of Israel; or iii) was a Palestinian citizen and left his ordinary place of residence in Palestine either a) for a place outside of Palestine before September 1, 1948, or b) for a place held at the time by forces which sought to prevent the establishment of the state of Israel or which fought against it after its establishment. See Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (New York: Zed Books, 2003).
- <sup>13</sup> Abu Hussein and McKay, *Access Denied*, 82. This law provided that transferred agricultural land used for livelihood purposes would be restituted through the provision of alternative lands. Compensation was offered to certain owners. See also Dajani, *Ruling Palestine*.
- <sup>14</sup> The Jewish National Fund (JNF) is a land acquisition agency established in 1901 to aid Jewish settlement in historic Palestine. The JNF acquired 2,373,677 dunams (approximately 2,374 square kilometers, or 587,000 acres) of land from the state’s Development Authority, most of which was Palestinian refugee property that had been confiscated by the Custodian of Absentee Property. Land held by the JNF continues to be reserved for the exclusive use of Jews. Along with the Jewish Agency, the JNF plays a significant role in government land planning policies, although it has a formally independent status. Abu Hussein and McKay, *Access Denied*, 72, 149–159, 194.
- <sup>15</sup> Ibid.
- <sup>16</sup> Dajani, *Ruling Palestine*.
- <sup>17</sup> Abu Hussein and McKay, *Access Denied*.
- <sup>18</sup> Yifat Holzman-Gazit, *Land Expropriation in Israel: Law, Culture and Society* (Burlington, VT: Ashgate, 2007).
- <sup>19</sup> UNHCR et al., *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the ‘Pinheiro Principles,’* March 2007 [“Handbook on Restitution”]; See also Rhodri Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice” (Occasional Paper Series, International Center for Transitional Justice, May 2007).
- <sup>20</sup> Permanent Court of International Justice, *Factory at Chorzow (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26, 1927); International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001 (“ILC Articles on State Responsibility”), adopted by the commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission*, 2001, vol. II (Part Two); Christine Bell, *Peace Agreements and Human Rights* (New York: Oxford University Press, 2000); International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (July 9), 136.
- <sup>21</sup> UN General Assembly Resolution 60/147, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of

- International Humanitarian Law” (“Reparation Principles”), U.N. Doc. A/RES/60/147 (March 21, 2006); Economic and Social Council, *Final Report of the Special Rapporteur, Paulo Sergio Pinheiro — Principles on Housing and Property Restitution for Refugees and Displaced Persons* [The Pinheiro Principles], U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).
- <sup>22</sup> Megan Bradley, “Refugees and the Reparations Movement: Reflections on Some Recent Literature,” *Journal of Refugee Studies* 20, no. 4 (2007): 662–668.
- <sup>23</sup> UN General Assembly Resolution 194 (III), “Progress Report of the United Nations Mediator,” U.N. Doc. A/RES/194 (December 11, 1948), para. 11.
- <sup>24</sup> The UN, the European Union, the United States, and Russia.
- <sup>25</sup> Michael Kagan, “Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict,” *Florida Journal of International Law* 19, no. 2 (August 2007): 421–489.
- <sup>26</sup> Yaffa Zilbershats, “International Law and the Palestinian Asserted Right of Return to the State of Israel” (unpublished draft on file with the author).
- <sup>27</sup> International Covenant on Civil and Political Rights (ICCPR) (New York, December 16, 1966), 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* March 23, 1976, Art. 12(4).
- <sup>28</sup> Ruth Lapidot, “Do Palestinian Refugees have a Right to Return to Israel?” Israel Ministry of Foreign Affairs, January 15, 2001, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Do+Palestinian+Refugees+Have+a+Right+to+Return+to.htm>.
- <sup>29</sup> Permanent Court of International Justice, *Factory at Chorzow*.
- <sup>30</sup> Kagan, “Restitution as a Remedy.”
- <sup>31</sup> The linking of mass displacement, housing evictions, and property reallocations as a composite violation has been witnessed in other conflicts. In Bosnia it was undertaken as a means of “ethnic cleansing.” Bradley, “Refugees and the Reparations Movement,” 11, 34–35.
- <sup>32</sup> Bell, *Peace Agreements and Human Rights*, 194–96.
- <sup>33</sup> ICCPR, Art. 12(4).
- <sup>34</sup> Human Rights Committee, *General Comment No. 27: Freedom of Movement* (Art. 12), U.N. Doc. CCPR/C/Rev.1/Add.9, November 2, 1999.
- <sup>35</sup> ILC Articles on State Responsibility, 95–105.
- <sup>36</sup> Pinheiro Principles, Principle 10.3.
- <sup>37</sup> Bradley, “Refugees and the Reparations Movement.”
- <sup>38</sup> UN General Assembly Resolution 60/147, “Reparation Principles.”
- <sup>39</sup> The five basic forms of reparation recognized in international law all provide important redress corresponding to dispossession in the Palestinian case: restitution, compensation, satisfaction, rehabilitation and guarantees of nonrepetition. See UN General Assembly Resolution 60/147, “Reparation Principles”; ILC Articles on State Responsibility.
- <sup>40</sup> Indeval, “Property Losses of Palestinian Refugees.”
- <sup>41</sup> Pinheiro Principles, Principle 2.2.
- <sup>42</sup> Pinheiro Principles, Principle 2.1.
- <sup>43</sup> ILC Articles on State Responsibility.
- <sup>44</sup> UN High Commissioner for Refugees Inspection and Evaluation Service, “The Problem of Access to Land and Ownership in Repatriation Operations,” U.N. Doc. EVAL/03/98 (May 1998); see also Kagan, “Restitution as a Remedy,” 467.
- <sup>45</sup> Kagan, “Restitution as a Remedy,” 468; Bradley, “Refugees and the Reparations Movement,” 38.
- <sup>46</sup> Megan Bradley, “Back to Basics: the Conditions of Just Refugee Returns,” *Journal of Refugee Studies* 21, no. 3 (2008): 285–304.
- <sup>47</sup> UN Security Council Resolution 820 (1993), U.N. Doc. S/RES/820 (1993) (April 17, 1993).
- <sup>48</sup> Marcus Cox and Madeline Garlick, “Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina,” in *Returning Home: Housing and Property Restitution Rights of Refugees and*

*Displaced Persons*, ed. Scott Leckie (Ardsley, NY: Transnational Publishers, 2003), 74–76.

<sup>49</sup> UN Mission in Kosovo, Regulation no. 2000/60, *On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*, UN. Doc. UNMIK/REG/2000/60, October 31, 2000.

<sup>50</sup> For instance, former Palestinian Arab homes in Israel are sought after for their charming architectural style. Home advertisements frequently explicitly refer to the “Arab-ness” of a home as an advantageous feature of the listed property. Nevertheless, the belief that Palestinian properties were acquired through legal means consistent with Israeli domestic regulations likely leads most Israelis to assume the legitimacy of their acquisitions.

<sup>51</sup> Kagan, “Restitution as a Remedy.”

<sup>52</sup> Jewish National Fund website, accessed October 2010, [www.jnf.org](http://www.jnf.org).

<sup>53</sup> Holzman-Gazit, *Land Expropriation in Israel*.