



Reparation for Lost Palestinian Property inside Israel

A review of international developments

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“The House of Windows” - an Arab apartment building from the Ottoman period. Musrara neighborhood.

Source: *To Live in Jerusalem*, p. 42

Nearly 60 years have passed since Palestinians lost access to their properties in West Jerusalem and other parts of historic Palestine now under Israeli sovereignty. Despite the United Nations determination in 1948 that the “refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date”¹, the nascent State of Israel enacted laws to bar their return and expropriate their property. To date, Palestinians have not been allowed to repatriate or repossess their properties nor have they received compensation for their losses. The injustice of the unresolved dispossession is exemplified by the case of former Palestinian residents of West Jerusalem, many of whom live in East Jerusalem within a few kilometres of ancestral homes that remain intact but occupied, often by recent Jewish immigrants.

This essay reviews the international principles and precedents concerning Israel’s obligations to make reparation for property taken – and the corresponding right of Palestinians

to claim remedies for their losses. It explains the implications these principles and precedents have for a prospective process of property reclamation in Israel/Palestine. In turn, it attempts to provide some guidance as to how property reparations may be formulated and claimed in the future.

Reparation is a term of art under international law. It is often misunderstood as being synonymous with monetary payments when it is actually a reference to a wide range of measures available to redress harm suffered by victims of conflict. As will be discussed in more detail later, under international law, states are obligated to repair their violations of law through the provision of remedies. The remedies or forms of reparation available in the event of an international wrong include restitution (restoration of the *status quo ante*)², compensation (monetary payments), satisfaction (non-pecuniary or moral redress such as an apology or prosecution of individual perpetrators) and rehabilitation (service or care to victimized individuals or communities). These measures may be combined and prioritized within a reparation program to facilitate a peaceful resolution of conflict.

The theory of reparations, which includes a diverse array of remedies, covers the full scope of Palestinian suffering. However, because this essay is mostly concerned with reparation for lost Palestinian property inside Israel, it focuses on restitution and compensation, which are the two forms of reparation typically invoked to remedy the illegal expropriation of property. Other forms of reparation such as a statement from Israel acknowledging its responsibility for creating the refugee problem and recognizing the rights of the refugees (moral satisfaction) are obviously important for reaching an end of conflict between Israelis and Palestinians but are not addressed on these pages.

The recent international developments in the area of reparations and refugee return briefly reviewed here shed light on how Palestinian claims for lost properties will be organized and processed. As will be elaborated below, however, some fundamental policy questions will have to be settled before the final details of the reparation process can be determined. The fundamental questions include whether the original Palestinian property owners will repossess their properties or receive compensation in lieu of restitution. These kinds of questions should be posed to and answered by the rights-holders themselves, but will ultimately have to be settled and implemented pursuant to a negotiation process with Israel.

The issue of the fate of Palestinian properties inside Israel has commonly been overlooked in favour of the more pressing issue of the right of return. In Palestinian circles in particular, the issue of reparations for property losses, damages and other suffering has been side-lined out of fear that claiming such remedies may be perceived as relinquishing the demand for return. The right of return and restitution/compensation, however, are formally independent rights. If a displaced person chooses not to return to her country, she can still repossess her property in the place. Put in context, the

rights of Palestinian land owners stand irrespective of their refugee status or their final destination.³ Even if Palestinians choose not to repatriate to what is now Israel, they still have the legal right to repossess their properties. Of course, the modalities for implementing restitution without return may present a practical challenge to policy-makers, but at a minimum, delving into the issue of reparations and property claims should not be viewed as foregoing return. Rather, it is necessary to protect the full scope of Palestinian rights and policy options for resolving the conflict.

The Principles of Reparation

The duty of states to make reparation for violations of international law was laid out as a general principle of law in 1928 by the Permanent Court of Justice (the predecessor to the International Court of Justice). In a landmark decision on the expropriation of a German-owned nitrate factory by Poland, the world court held that every violation of law generates an automatic obligation on the wrongdoing state to remedy the breach (i.e., make reparation). In what has become the leading standard on reparation, the court further ruled that:

The essential principle contained in the actual notion of an illegal act...is that reparation must as far as possible wipe out all the consequences of the illegal act and restore the situation that in all probability would have existed had the wrong not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it –such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴

The court's ruling thereby also affirmed restitution as the primary form of reparation in the case of an unlawful property taking, with compensation as a complementary or alternative remedy.⁵

The obligation on states to amend their wrongs has evolved over time into a right to reparation for individuals and communities. The international human rights law regime established in the aftermath of World War II made individuals subjects of international law, granting individual persons rights and remedies against excessive or abusive state action. The founding document of the international human rights movement, the Universal Declaration on Human Rights (UDHR), includes a right to an effective remedy by national tribunals for rights violations.⁶ In parallel, following World War II, Germany agreed to extensive reparation schemes for the State of Israel and individual Jewish victims of the Holocaust. Prior to this, reparations had traditionally been made

between states for war-related damages. The German Holocaust reparation schemes laid out a new precedent whereby individuals received reparations for mass human rights violations directly from the responsible state.⁷ The Holocaust reparation schemes provided restitution and compensation to victims and their heirs for a wide range of material losses and non-material damages, including lost opportunities.⁸

Numerous reparation programs have since been established in different contexts to provide redress to persons for past atrocities – ranging from an apology and one-off compensation payments to Japanese Americans interned by the US government on account of their race, to the property claims commissions in the Balkans following the ethnic cleansing of the 1990s. Reparation has become a central tenant of transitional justice and conflict resolution. The normative developments in the field of reparations culminated in the recent UN General Assembly’s adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which codified a comprehensive set of principles on the right of individuals and communities to reparations. The UN Principles and Guidelines on the Right to a Remedy and Reparation sets out the forms of reparation mentioned above: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.⁹ For illustrative purposes it is interesting to note that the UN document describes restitution as including “restoration of liberty, legal rights, social status, family life and citizenship, return to one’s place of residence, and restoration of employment and return of property.”¹⁰

Indeed, against these standards, it is assumed that a durable peace between Israelis and Palestinians should be predicated on individual justice. In addition to being granted the choice whether to repatriate home, individuals should receive reparations for their damages in order to satisfy all of their rights, resolve the wounds of protracted dispossession and denial, and move toward equalizing the relationship between Israelis and Palestinians. With respect to property losses inside Israel, this would mean that individual Palestinian landowners and their heirs should be able to directly claim restitution and/or compensation for their properties.

Israel, however, has historically resisted the principle of individualized reparations, including individual compensation, out of concern that it would amount to an admission of wrongdoing. Israel also prefers to do away with Palestinian refugee claims quickly with as little material consequence as possible. In the first international peace process on the Arab-Israeli conflict in 1949, Israel offered to repatriate a limited number of Palestinian refugees and rejected out-of-hand property restitution.¹¹ It opposed compensation payments directly to individual Palestinians, and offered only to pay for select Palestinian land to a common fund.¹² The Israeli delegation took a similar position at the Camp David II summit hosted by US President Clinton in 2000, whereby

it sought to shield itself from liability for the full scope of individual Palestinian claims originating in 1948.¹³ Nevertheless, Palestinian negotiation proposals have consistently sought individual reparations in the form of property restitution and compensation in accordance with international law.¹⁴

Implications for a Future Process of Property Reclamation

The legal and moral imperative of providing individuals with redress for the wrongs they have suffered has significant impact on the remedial claims process for resolving conflicts. Meeting the requirement of individual justice and the right to reparation depends on establishing a process whereby victims can have their claims adjudicated and satisfied individually. The goal of individual adjudication of claims, however, must be measured against the need for efficiency and effectiveness, particularly where the scope of potential claims is as great as it is in the Palestinian case. Hundreds of thousands of Palestinians were displaced in 1948 and subsequent years. The number of displaced Palestinians, including refugees and the internally displaced in Israel, stands at 7.4 million.¹⁵ The scope of Palestinian land lost in 1948 is over 17 million dunums.¹⁶ Palestinians incurred additional property losses in 1948, including land tenancy rights or livelihoods, movable property, businesses, and financial assets. The exact number of property and nonmaterial damages claims that would be posted in a post-conflict implementation process in Israel-Palestine is not precisely known but it is safe to assume that the number of claims would be in the millions, worth hundreds of billions of dollars.

Balancing the interest in satisfying Palestinian rights and their need for justice with efficiency and completion means that Palestinian property and nonmaterial damages claims will be handled by a mass claims program. In contemporary terms, a mass claims program is one that utilizes information technology and streamlined procedures and standards to quickly process a huge number of claims stemming from the same historical event. Claims are still posted and satisfied individually, but may be processed according to simplified class categories or against reduced evidentiary standards, depending on the procedural rules created for the program.

Over the past two decades, tens of mass claims programs or claims commissions have been established to resolve international disputes and national conflicts. These claims commissions were primarily used to receive and process individual claims for war-related violations, such as displacement, property dispossession and human rights suffering, and to facilitate the transformation from conflict to the rule of law, peace and stability. A few of the most successful claims commissions of relevance to Israel-Palestine are the Commission for Real Property Claims for Displaced Person and Refugees (CRPC) in Bosnia and Herzegovina, the United Nations Compensation Commission (UNCC) which compensated individuals, corporations and governments

who suffered losses as a result of Iraq's invasion of Kuwait, and the Kosovo Property Claims Commission.

The institutional models, standards, and processing techniques used in these and other cases will likely shape any future process for Palestinian refugee claims. The magnitude and nature of Palestinian claims demands that the lessons learned from these precedents be employed to achieve the best possible results. Moreover, they indicate that the massive logistical undertaking of dealing with the millions of Palestinian claims that are likely to be covered under any claims mechanism for refugees is doable. The UNCC, for instance, received and settled 2.7 million claims in less than 10 years. The CRPC processed claims for the confirmation of rights to 320,000 properties over a similar period of time.

However, before one can draw the exact parameters of the future claims program for Israel-Palestine, a comprehensive peace agreement is needed to establish the foundations of the process.

The Relevance of Peace

Achieving the right to reparation for Palestinians who lost property inside Israel requires a comprehensive peace agreement between the State of Israel and Palestinian representatives. Although the clarity of the right for Palestinians is virtually uncontested under international law, its implementation depends on Israeli willingness to recognize it and accept liability for its actions in arbitrarily expropriating Palestinian property following their displacement. No viable alternative to Israeli agreement presently exists, although it may be possible to use international and regional forums to establish the applicable principles for resolving the conflict.¹⁷ One has only to look at the outcome of the recent Advisory Opinion issued by the International Court of Justice (ICJ) on the legality of the Wall to understand that achieving the implementation of Palestinian human rights requires Israeli acquiescence. The ICJ opinion was essential for clarifying the rights and duties at issue, but it has had little impact on the ongoing construction of the Wall in Palestinian Occupied Territory. Likewise, the actual enforcement of a reparations regime depends on the effective participation of the wrong-doing state – whether in the form of committing financial contributions or through legislative reform for the return of property to the original owner or other action. (Such participation is likely to come about once Israel accepts its responsibilities and acknowledges Palestinian rights.)

Besides fulfilling an enforcement role, the future peace agreement will also act as the constituting instrument for any future Israel-Palestine claims commission. The CRPC was established by international agreement in Annex 7 of the Dayton Peace Accords.

Annex 7 included details concerning the composition, mandate, basic staffing, funding and operating parameters for the CRPC. The UNCC was established by a decision of the UN Security Council. The relevant UN resolutions calling for the establishment of the UNCC and its operating principles serve as the constituting documents, which the UNCC utilized for implementation purposes.

In order to ensure effective, comprehensive implementation, the agreement should address the following key elements of a claims process: the rights of the displaced and others who suffered as a result of the conflict, the form of reparation that will be made available to them, the types of claims or property losses to be covered, the modalities for implementing the remedies, as well as the more functional issues regarding the institutional structure of the implementation mechanism and its governing laws and procedures. Perhaps most importantly, the agreement should determine the funding of the process. Whatever elements are left unresolved in the final agreement will have to be deferred to the claims program of the implementation mechanism.

Of particular urgency for peace negotiations between Israelis and Palestinians are the substantive elements concerning the rights of Palestinian victims, the remedies to be made available to them and the parameters for their implementation. The answer to these issues will have a large impact on the design of the claims program and its operation. For instance, a program involving the restitution of property will differ from a program involving only compensation.¹⁸ In general, there are no standard claims processing models that can be applied wholesale to conflict situations. Any program will have to be geared toward the particularities of the situation it seeks to resolve. The substantive questions regarding the applicable forms of reparation and their implementation are, however, the most fundamental for drawing the outlines of a future claims program for Palestinians.

Although the substantive elements of such a program remain in dispute between Israel and Palestinians, there appears to be little disagreement remaining over the appropriate type of mechanism for their implementation. In past permanent status negotiations, Israel and the PLO have agreed to establish a dedicated international mechanism to implement all aspects of the agreement related to refugees, including return/resettlement and rehabilitation and remedial claims for restitution and compensation. This approach is in line with the emerging norms on the right to reparation and best practices in the area of mass claims programming. The mechanism will be established to implement the refugee-related provisions, but it will logically cover all claims stemming from 1948 whether held by Palestinians with formal refugee status or not. Individual claims arising from the 1967 occupation of the West Bank and Gaza Strip may also be processed through the mechanism.

Irrespective of the final political framework for settling the historical conflict, it is expected that an international mechanism will be needed to sustain what will likely be

the largest mass claims program in world history. A national mechanism would lack the resources and technical expertise to meet the full scope of the claims. Moreover, as was the case with the return and restitution process for Bosnia, international intervention may be needed to affect the appropriate domestic reforms needed to fulfil the terms of the peace agreement and allow for the full function of the commission, especially if the restitution of property is involved.

The composition, location and structure of the implementation mechanism, among other matters, will have to be resolved in the course of negotiations between Israel and Palestinians once there is a commitment to address the core elements of the conflict, including the right of return. The seemingly-technical nature of these questions (such as who will sit on the international claims commission) has significant political ramifications, and therefore, it is reasonable to expect the beneficiaries of the agreement to have a say in what is decided. And, without a doubt, they should have a say in what forms of reparation would satisfy their need for justice and closure.

In his final report, the UN Special Rapporteur on the Right to Reparations Theo Van Boven noted that gross violations of human rights are by their very nature irreparable and redress will fail to be proportional to the grave injury experienced, especially where the violations have been committed on a massive scale.¹⁹ But the purpose behind reparations – to hold states accountable for their wrongful acts – is a necessary precursor to restoring the rule of law, peace and stability. The recognition of a person's experience of dispossession is also met through the provision of individual reparations. A process of reparation and property reclamation will be an important component of establishing peace between Israelis and Palestinians even if the actual measure of justice meted out in the end falls short of the full experience of 60 years of displacement and dispossession.

It is clear that there is substantial international practice to draw on to make the provision of remedies to Palestinians for the losses they suffered in 1948 a reality. This short comment has attempted to offer some indication of how that may happen. Yet, it is necessary to clarify some of the most contentious issues of peace before a final process can be laid out and before individual property owners may be able to post their claims for justice. In the meantime, Palestinians entitled to restitution and compensation for lost properties should preserve any documentary evidence of their property ownership or use and continue to seek accountability from Israel in line with universal norms and standards.

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Endnotes

¹ United Nations General Assembly Resolution 194 (III), paragraph 11 (hereinafter “UNGAR 194”).

² In international legal circles there is a debate as to whether restitution requires a return to the situation that existed before the wrong occurred - *status quo ante*, or to establish what might have existed in all likelihood had the injury not occurred. The former would entail the return of lost property to the original owner, whereas the latter would involve also compensating him for damages incurred during displacement such as lost rents or profits.

³ See *Pinheiro Principles: UN Principles on Housing and Property Restitution for Refugees and Displaced Persons*, E/CN.4/Sub.2/2005. This approach was pursued in Bosnia and Herzegovina and recommended in the Annan Plan for Cyprus.

⁴ *Factory at Chorzow (Ger. V. Pol.) Indemnity*, PCIJ (Ser. A) No. 17 (Sept. 13) at 47. (The remedy available for the illegal expropriation of property is restitution. If physical restoration of the property is impossible, compensation is due in the amount of the value of the property at the time of the taking plus interest – an amount corresponding to the standard of restitution.)

⁵ UNGAR 194 sets out the same framework with property restitution being the primary remedy and compensation as the alternative in the event that the owner decides not to repossess it. Compensation should also be paid for any damages to the property, for instance if the house was destroyed but the land is returned *supra* note 1.

⁶ Universal Declaration of Human Rights, art. 8. The right to an effective remedy is also provided in the International Covenant on Civil and Political Rights and the International Covenant and the International Convention on the Elimination of All Forms of Race Discrimination, both of which are binding on Israel.

⁷ The issues of guilt and responsibility, and if and how they could be resolved through the provisions of reparation, were controversial from both the Jewish and German perspectives.

⁸ Reparations for lost opportunities were characterized as damages to career or economic advancement. See “German Reparations to the Jews after World War II: A Turning Point in the History of Reparations”, in *Handbook on Reparations*, Pablo de Grieff, 390 - 405.

⁹ A/RES/60/147 (21 March 2006), para. 21.

¹⁰ *Ibid.*, para. 22.

¹¹ Michael R. Fischbach, *Records of Dispossession: Palestinian Refugee Property and the Arab-Israeli Conflict* (New York: Columbia University Press, 2003), 92.

¹² *Ibid.*

¹³ Fischbach, pp. 352-53.

¹⁴ See Palestinian written proposal made at the permanent status negotiations at Taba, Egypt in January 2001 at <http://www.mideastweb.org/taaba.htm>.

¹⁵ BADIL Survey, 2006-2007.

¹⁶ Fischbach, *supra* note 11.

¹⁷ For a discussion on the use of courts and international institutions for bringing Palestinian claims for restitution and compensation outside of political negotiations, see Susan Akram, “Fora Available for Palestinian Refugee Restitution, Compensation and Related Claims”, BADIL Information & Discussion Brief Issue No. 2, February 2000.

¹⁸ As noted above, there is a wide array of reparations that are available to displaced Palestinians who lost property. By law, restitution is the primary remedy for the illegal expropriation of property, however, the possibility of restitution in Israel is complicated by numerous factors, not least of which is the protracted displacement of the original property owners. Palestinians displaced in 1948 may very well wish to receive compensation rather than repossess their properties, particularly if they are comfortably resettled in another country. If the property has been destroyed and converted to another purpose, restitution may also be precluded by international law, although it is clear from a visual survey of Palestinian property in Israel that much of it remains open and vacant. In any event, even if restitution is to be made available, it is likely to be controlled by parameters designed to meet the political objectives of the peace agreement.

¹⁹ Referenced in Dinah Shelton, “United Nations Principles and Guidelines on Reparations: Context and Contents” in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, eds. K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (Antwerpen: Intersentia & Institute for Human Rights, 2006) 15.