Addressing Land Restitution in Transitional Justice

Jemima García-Godos

Jemima García-Godos Dr. Polit. (Oslo), Post Doctoral Research Fellow, University of Oslo, Norwegian Centre for Human Rights.

Abstract: Long-term peace is commonly stated as one of the main objectives of transitional justice processes. The issue of land and property restitution for internally displaced people (IDPs) has increasingly been considered as a most important element in terms of political stability and the prevention of new outbreaks of violence. What are the implications of considering restitution a preferred measure of redress for refugees and displaced peoples in transitional justice processes? The aim of this article is to provide an overview of the right to restitution of land and property from a transitional justice perspective, based on a conceptual clarification of restitution as a form of reparation and a discussion of the implications of restitution for transitional justice policy and implementation.

Keywords: Restitution, Victim Reparations, Transitional Justice

I. Introduction

As war and armed conflicts around the world continue to produce massive internal displacement and waves of refugees, pictures of people on the move escaping from violence have become common on international news. According to the latest IDMC’s global report, an estimated 26 million people were still displaced within their countries, the same number as in 2007 and the highest since the early 1990s. Only occasionally do we see displaced peoples and refugees returning back home; this still is, unfortunately, more the exception than the rule. What happens to the land and property left behind by those who flee or have been expelled as a consequence of armed conflict? The number of unresolved land and property restitution claims in the world today is larger than the one being actually addres-

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...Given the increasing number of transitional justice schemes throughout the world putting forward an agenda of victims’ rights, the issue of land restitution in transitional justice is a timely endeavour.

In the field of transitional justice, victim reparations have moved centre-stage in the international debate during the past decade, assuming both political and academic importance. This revitalised interest in victim rights and a victim-oriented perspective is partly due to and can be observed in, among others, the practice of the International Criminal Court and in the adoption of the Basic Principles on the Right to Remedy and Reparation (Basic Principles) by the UN General Assembly in December 2005. According to the Basic Principles, victims have the right to justice and reparation for harm suffered. One of the forms of reparation identified by the Basic Principles is restitution, which includes the ‘return to one’s place of residence, restoration of employment and return of property’ (art 19). Along the lines of this development, the issue of land and property restitution for internally displaced people (IDPs) is increasingly being considered as a most important element in terms of political stability and the prevention of new outbreaks of violence. A number of recent peace agreements since the mid 1990s can be said to have combined these issues, by incorporating some form of reparations measures, including restitution of property, for refugees and IDPs. What are the implications of considering restitution a preferred measure of redress for refugees and displaced peoples in transitional justice processes? The aim of this introductory article to the Special Issue on ‘Land Restitution in Transitional Justice’ is to provide an overview of the right to restitution of land and property from a transitional justice perspective, based on a conceptual clarification of restitution as a form of reparation and a discussion of the implications of restitution for transitional justice policy and implementation.

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2 UNHCHR, ‘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’, UN General Assembly Res 60/147 (2005) (adopted without a vote) (Basic Principles). Also known as the Van Boven/Bassiouni Principles, the Principles were adopted both by the Commission on Human Rights and by the UN General Assembly in April and December 2005 respectively.


II. Understanding ‘Restitution’: From Refugee Studies to Transitional Justice

Restitution is one of the preferred remedies sought by victims of internal displacement, as it aims to restore the person to his or her original position prior to the loss or injury, or in the position he or she would have been in had the violation not occurred.5 However, the issue of land restitution has received limited attention in the transitional justice literature until fairly recently.6 As Williams observes,

[W]ith its new, post-Cold War focus on addressing displacement, restitution has come to play an increasingly prevalent role in post-conflict settings, albeit one that is rarely conceived of in explicit transitional justice terms or integrated with transitional justice programming.7

This situation is progressively changing with the publication of studies documenting country experiences with restitution as well as contemporary debates linking transitional justice and post-conflict redress with development issues.8 This contrasts greatly, however, with the attention given to land restitution in the field of refugee studies, where the issues of return, repatriation, the right to housing and the right to a home, made the discussion about land restitution una-

5 C Bailliet, Between Conflict & Consensus: Conciliating Land Disputes in Guatemala (Institute for Public & International Law, Oslo 2002) 107.
7 Ibid 49.
voidable. Committed scholars and practitioners alike succeeded in the 1990s to place the rights of refugees and IDPs on the international agenda, particularly UN forums. Human rights NGOs such as the Centre on Housing Rights and Evictions (COHRE) and Habitat International Coalition played a significant role advocating the property restitution rights of refugees and IDPs. In the UN system, these efforts led to the adoption of two important legal instruments since the late 1990s: the Guiding Principles on Internal Displacement in 1998 and in 2005, the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (also known as the Pinheiro Principles) and the UN Basic Principles. The Basic Principles clearly formulate victims’ right to reparation, with restitution being one of its forms. We will return to this later.

According to Bagshaw, ongoing developments in international law and practice, in particular at the regional level, clearly point towards an emerging right to restitution of property. The GPID build on these precedents and mark an important step in clarifying law and practice in this area. Although the GPID do not in themselves constitute a legally binding instrument, their increasing international standing and recognition can only serve to enhance their authority as a practical tool to guide States confronted by internal displacement and the challenges arising that situation.


Thiele (n 9).


while the right of refugees and displaced persons to return to their homes is well-established in international law, the right to repossession of property lost during displacement is only now starting to be recognized on a regular basis. […] It is becoming apparent that the right to repossession/compensation is becoming an integral part of international human rights law.

The right to restitution for property lost on account of displacement is fundamental for IDPs and refugees. It is derived from general property rights and the obligation of the state to make good any violations producing injury. The right to property is established in the Universal Declaration on Human Rights; however, it is absent from the binding international human rights treaties ICCPR and ICESCR. Not surprisingly, the right to restitution of property is thus also absent from these instruments. Considering that there may be different understandings of what constitutes the right to property, it is possible that the right to restitution may be similarly unclear. Leckie argues that restitution rights cover not only formal owners, but also tenants and occupants. He therefore does not only use the term 'property restitution', but couples it with the term 'housing' to ensure that there is equal treatment given in the restitution process to both owners ('property') and non-owners ('housing'), and also to draw attention to the fact that the right to housing is acknowledged more widely in international human rights law than are property rights as such. Since the end of the Cold War and the wave of ethnic conflicts arising in the 1990s, the right to housing, land, and property (HLP) restitution is gradually – albeit slowly – gaining attention and recognition. Indeed,

15 Bailliet (n 5).
16 Leckie (n 9).
The international community has lately come to realize the important role property rights may play in rebuilding peace and stability to a society. Conducting a restitution process in the aftermath of an armed conflict is thus a fairly new endeavour and is likely to be of topical interest in the future.\(^{18}\)

The restitution process in Bosnia and Herzegovina is a case in point. According to Buyse, the international community’s support to the effective implementation of the right to housing restitution enshrined in the Dayton Peace Agreement, contributed to the relative success of the process. Legal and practical measures were taken at the national and district levels to ensure that property laws made restitution feasible. By so doing, not only individual restitution rights were being protected, but also the rule of law was strengthened in the process.\(^{19}\)

There is however, still a long way to go before restitution and HLP become uncontested issues on the international political and humanitarian agendas. Even in the context of peace operations supported by the United Nations, HLP rights are still difficult to promote and implement.\(^{20}\) According to Leckie, it is necessary to improve the ‘UN post-conflict HLP policy’ to secure the implementation of HLP rights in UN peace operations.\(^{21}\) While the presence of supportive policy frameworks can advance HLP rights, it is questionable whether or not the implementation of such an important task – with clear consequences for long-term peace – ought to be undertaken by transitional UN Peacekeeping Administration Authorities rather than national governments.

Is it then feasible to argue for an emerging right to restitution?\(^{22}\) If so, this emerging right is arguably best defined, to date, in the Pinheiro Principles, art 2:

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/

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\(^{21}\) Ibid 16.

\(^{22}\) Malcolm Langford and Khulekani Moyo address this question in their contribution to this Special Issue, which discusses the normative legal framework of a right to restitution.
or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

Article 2 explicitly declares the status of restitution as a preferred remedy for displacement; so, the Pinheiro Principles as a whole provide practical guidance to governments, UN agencies and the international community on how to best address the complex legal and technical issues surrounding housing, land and property restitution. The Pinheiro Principles strengthen the international normative framework in the area of housing and property restitution rights, and they are firmly grounded in international humanitarian and human rights law, applying existing human rights to the specific question of housing and property restitution.23 NGOs and UN agencies working on these issues have developed guidelines and handbooks to ensure the effective implementation of the Pinheiro Principles.24 Recently, the Parliamentary Assembly of the Council of Europe issued a resolution calling to address and resolve HLPR issues taking into account the Pinheiro Principles, existing Council instruments and international law.25 If developments in this area are already well in progress, what would then be the added value of transitional justice in terms of framing and securing the right to restitution? Our entry point to answer this question will be a conceptual clarification of restitution with regards to related terms applied in the field of transitional justice, and a discussion of restitution within the framework of the Basic Principles on the Right to Remedy and Reparation.

23 See Langford and Mayo (n 22).
III. Restitution as a Form of Victim Reparations

Restitution and reparations are sometimes used synonymously. Both terms can be interpreted expansively to include a variety of ways to make amends. In the particular framework of transitional justice, however, restitution constitutes a form of reparation, so the terms ought not to be used interchangeably.

Even if the dictionary permits a broad interpretation, the term restitution typically suggests a more narrow concern with the return of specific items of real or personal property, something that comes clearly forward in the Pinheiro Principles. In contrast, the term reparations “has come to suggest broader and more variegated meanings.”

Compensation is another term often used in place of restitution and some authors even define restitution as a sub-category of compensation. Gloppen, for example, indicates that restitution can take many forms, considering compensation, rehabilitation, acknowledgement and healing as part of restitution; indeed she uses the terms restitution and restoration interchangeably. Other authors distinguish between the concepts. Mani, for instance, writes that “[w]hile restitution is often concrete such as land or property with, therefore a monetary value, compensation and indemnity are the directly monetary forms of reparation.” It is common to refer to restitution and compensation together, as the right to restitution is often referred to as a right to restitution of something that was lost or alternatively, as a right to compensation for a particular loss if restitution is not possible.

In this article, we propose a definition of restitution as a form of reparation distinct from compensation. Any specific definition of restitution, however, will have to take into consideration the scope of restitution and that which is to be restored, and so the array of choices abound. According to Bassiouni:

[r]estitution involves the situation where something has been taken from the victim, which either the State or the individual violator has the ability to return, such as cultural property, *objets d’art*, or confiscated lands. It would also include such intangibles as the restoration of the right to vote or own property.30

As can be seen, this is a broad understanding of restitution. From a more restrictive view, Roth-Arriaza states that ‘[r]estitution involves the return of property belonging to survivors that has been unjustly taken away from them’.31 At this point, let us look at what the Basic Principles on the Right to Remedy and Reparation have to say about restitution. We start with a brief presentation of the Basic Principles, followed by a discussion of victim reparations.

The process leading to the Basic Principles was initiated in 1988, with the commissioning by the United Nation of a study on reparations for victims of human rights violations.32 In 1993, Special Rapporteur Mr Theo van Boven delivered a report which became the basis for the process completed in 2005.33 The study, and later the Basic Principles, recognized that all victims of gross human rights violations and fundamental freedoms should be entitled to restitution, fair and just compensation, and the means for as full rehabilitation as possible for any damage suffered.

The Basic Principles establish that the right to remedy comprises two aspects, the procedural right to justice, and the substantive right to redress for injury suffered due to act(s) in violation of rights contained in national or international law.34 According to the Basic Principles, remedies include the victim’s right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Specifically concerning reparation, the Basic Principles establish that ‘in accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or...’

34  The next paragraphs draw on García-Godos (n 3).
serious violations of international humanitarian law’. The full and effective repa-
ration envisaged by the Basic Principles includes: restitution, compensation, reha-
bilitation, satisfaction, and guarantees of non-repetition, each explicitly addressed
in articles 19–23.

The Basic Principles operate with a broad definition of reparations, one which
addresses also alternative or complementary transitional justice mechanisms (that
is to say, the right to justice, the right to truth). It is important to emphasize that
the Basic Principles’ focus on remedy and reparations does not exclude the right
to justice, or the duty to prosecute violations that constitute crimes under interna-
tional criminal law. This reflects the current international trend promoting acco-
untability for past crimes in post-conflict societies and post-authoritarian regimes,
while taking into account that accountability can take various forms, some aimed
at fulfilling the requirements of international criminal law (prosecutions); others
focusing on the needs of victims and their families (as reparations).

In defining victim reparations, De Greiff suggests distinguishing between de-
finitions used in international law and the one used in reparation programs, as
they involve different choices and justifications.35 In international law, reparations
refer to all sorts of reparatory measures implemented to address human rights vio-
lations, without necessarily targeting specific violations. Such a broad definition is
needed in judicial processes in order to allow its adaptability to the individual case
and to encompass as many situations as possible. In the context of designing spe-
cific reparation programs, a narrow definition of reparations is needed, as it refers
to a specific target group (the victims) and a specific type of crime/human rights
violation. This definition does not include truth-telling, criminal justice, or in-
stitutional reform. Instead, it operates on the basis of two fundamental elements:
the types of reparation (material and symbolic), and the forms of distribution
(individual and collective). The narrow definition of reparation is, in a sense, an
operational one, suggesting certain limits to the responsibilities of those in charge
of designing reparation programs.

The distinction between a juridical and an operational conceptualization of
reparation might prove useful at the analytical and operational level, yet it should
also be said that the operational definition is not only grounded on the broader
juridical one, but it becomes itself a legal category which determines many aspects
of the reparation involved. There is no inherent contradiction between juridical
and operational definitions; they both focus and acknowledge the victim’s right to

redress. While most debates on reparations centre on the applicability and implementation of juridical definitions to specific cases, the same distinction between a juridical and operational understanding of reparation may be applied to the issue of restitution. In other words, while there is certain international consensus on the emergent right to restitution as constitutive of victims’ rights to remedy and reparation, this emerging right usually narrows down to physical assets when it comes to operational programming and actual implementation.

From the five forms of reparation distinguished by the Basic Principles, it is restitution, compensation and rehabilitation that are the one most commonly applied in the context of victim reparation programs. In the wording of the Basic Principles, compensation refers to economically assessable damage, and rehabilitation to medical and psychological care. On restitution, the Basic Principles state that:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

Looking at this definition, Shelton notes that ‘[g]iven the long-standing preference for restitution in the law of state responsibility, it is surprising that the text does not adopt the mandatory ‘shall, whenever possible’ or indicate that restitution is the preferred remedy.’ Despite the weaker formulation chosen (‘should, whenever possible’), the definition used in the Basic Principles explicitly indicates that restitution aims to restore the victim to their original situation before violations were committed, addressing mainly personal but also material suffering. As can be observed, the Basic Principles provide a broad definition of restitution which includes both tangible and intangible assets. This definition actually addresses two aspects that ought to be highlighted and differentiated: restoration and return.

While restoration refers to specific qualities or status (the restoration of liberty, enjoyment of human rights, identity, family life, citizenship and employment), return refers to the action of effectively going back to one’s place of origin as well as the actual return of property lost. The restorative aspect of restitution bears strong similarities and linkages to other two forms of reparation identified by the Basic

36 Shelton (n 32) 22.
Principles, namely satisfaction and guarantees of non-repetition. For instance, the effective restoration of liberties and enjoyment of human rights cannot take place in a context where the rule of law is limited; restoration of employment cannot be fulfilled in the absence of jobs; and so on. While it can be discussed whether family life is defined as the actual presence/existence of family members or as a way of life, the absence of housing – let alone appropriate housing – can render this right ineffective. Similarly when it comes to the exercise of citizenship rights, an institutional framework based on the rule of law needs to be in place to make such rights effective and accessible.

Based on the above, a serious discussion of restitution should be explicit about whether we are dealing with restitution in its restorative dimension or in its ‘returning’ capacities. Similar to De Greiff’s differentiation of reparations as used in international law and the one used by reparation programs, we may suggest differentiating between a broader, all encompassing definition of restitution as restoration and a narrow definition referring to restitution programs aimed to the return of displaced populations to their place of origin, the return of lost property, and alternative measures when these options are not viable. In what remains of this article, we will focus our discussion on the ‘returning’ capacities of restitution, opting for a narrow definition of restitution as used in restitution programs.

IV. The Subject of Restitution Programs: Victims of Arbitrary Displacement

The establishment of restitution programs in the framework of transitional justice and victim reparation is based on political decisions expressing the need and will to address the needs of victims of human rights violations suffered during armed conflict and/or authoritarian regimes. The first step in the development of such programs is the identification of a target population, that is, the target beneficiaries of measures provided by the program. In terms of transitional justice, the target beneficiaries are commonly referred to as victims, their status often being defined in terms of the violation(s) suffered. As a legal category in a given reparations program, the victim status is at the basis of any claims the victim may put forward and eventually have access to from the relevant agencies. Given that victims are identified by virtue of the violations suffered, it is important to identify which types of violation qualify a person as a victim-beneficiary entitled to take part in a reparations program.
In the case of restitution of land and property, the development and implementation of restitution programs imply the identification of refugees and internally displaced peoples as victim-beneficiaries of restitution programs. What are the violations that entitle refugees and IDPs to lodge restitution claims? According to the Pinheiro Principles, arbitrary displacement from one’s own home, land or place of habitual residence constituted the basic condition that calls for the need of ‘the right to be protected from displacement’ (Principle 5). The principles also request that ‘states shall prohibit forced eviction, demolition of houses, and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war’. These same arbitrary actions would then constitute the type of violation that defines refugees and IDPs as victim-beneficiaries. Looking back to the Basic Principles, arbitrary displacement can thus constitute a ‘gross violation of international human rights law’ and/or a ‘serious violation of international humanitarian law’. This is more than a nuance in legal terminology; the operational implication of this is extremely important, because it makes possible the inclusion of large numbers of people in the universe of victims subject to the benefits of reparation – and restitution – programs. A good example of this is Colombia, where the internal armed conflict has caused massive internal displacement, and the number of IDPs has been estimated to be between 2.6 and 4.3 million people. Including IDPs in the category of victims of the Colombian reparation program is of great consequence.

V. Critical Issues in Restitution Programs

The identification of arbitrary displacement as the defining violation of the target beneficiaries of restitution programs is only a first step in the design and implementation of restitution programs. There are a number of challenges likely to be addressed differently at the national level by reparation programs, and some of these have already been identified in the Pinheiro Principles. Here we focus only on three issues that are particularly relevant from a transitional justice perspective: (i) the question of time in establishing restitution rights (first versus subsequent occupancy, inter-generational issues); (ii) the forms of tenure at the basis of restitution (effective versus formal occupancy, formalisation of property rights, collective versus individual restitution); and (iii) alternatives to restitution.
Time in the Establishment of Restitution Rights

A first issue to be addressed in restitution programs is that of first versus subsequent/secondary occupancy. Who is the rightful claimant of a property, the original owner, or subsequent owners? How to define or identify the original owner? This is a particular challenging issue in contexts where formal/contractual property rights are lacking. Subsequent owners may have acted in good faith when acquiring the property. In such situations, it is difficult to make a moral and legal argument for the eviction of subsequent owners in order to restore the property rights of an original owner. One possibility could be to include evicted subsequent owners in the category of victim-beneficiaries, on the basis that through restitution (to the original owners) they themselves become indirect victims of arbitrary displacement. Principle 17 of the Pinheiro Principles addresses these issues, calling for the protection of secondary occupants against arbitrary or unlawful forced eviction.

Inter-generational issues also play a role in establishing occupancy/ownership rights. In cases of protracted conflict it is difficult to ascertain how far back in time occupancy and/or property rights should be established and protected. Do younger generations have the right to claim land and property previously owned or used by their parents years after displacement took place? According to Principle 2.2, the right to restitution cannot be ‘prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution’. In practice, the protection of rights of non-returning populations might be experienced as ‘unfair’ by people actually living there, either out of their own choice or for lack of alternatives. This is a very common case in post-conflict societies, where the interest of those who fled and those who stayed behind often collide once the conflict is over. Where the younger generations belong to specific groups in vulnerable situations, such as ethnic minorities or indigenous peoples, one can find many valid arguments for their preferential treatment. This will, however, not necessarily remain uncontested by other social actors and vulnerable groups. However, according to Veraart, the systematic deprivation of property rights of specific groups constitute a great injustice that deprives people of their agency as economic actors; such injustices defy the passage of time and require legal responses. As we can see, the boundaries between

37 See also the discussion on restitution by negotiation in Knut Andreas Lid and Jemima García-Godos’ article in this issue.
restitution and the ‘historical injustice agenda’ become blurred in this type of cases; we will return to this later.

Forms of Tenure and Restitution

Restitution programs are confronted with a choice regarding the forms of tenure to be considered as a legitimate base for restitution claims: effective versus formal occupancy, or both? According to Principle 16 of the Pinheiro Principles, the right to restitution of property is also applicable for land and property held in possession, and is not be limited by the absence of formal property rights: tenants, social-occupancy right holders and other legitimate occupants or users of housing, land and property ought to have their right to restitution protected. The background for this is that in many developing countries, formal property rights might not be sufficiently developed as to guarantee effective ownership and possession. Even in the presence of formal deeds and titles, other factors such as security and socio-political conditions can make actual possession impossible. The question is then how to prove and protect effective possession without undermining respect for formal property rights.

The legal status of land and property in countries emerging from armed conflict has an important role to play in the development of specific restitution programs, as acknowledged in Principle 15. In some countries property rights or rights of possession have not been formalized for a large number of properties, and so restitution programs might be considered a first step towards the formalization of land and property rights. The organization of institutions to deal with these matters requires not only technical capacity and resources, but also political will and support (or at least non-opposition) of landholders. The contemporary debate on the formalization of property rights highlights the importance of formal titles to provide security of tenure and other potential benefits for landholders.39

Although restitution programs may provide good opportunities to formalize and/or legalize occupancy/ownership, such formalization can involve the dislocation of alternative forms of tenure and property management at the local level, such as customary law or traditional practices. Restitution programs may indeed have a second aim of formalizing individual property rights, disregarding traditional practices that may prefer collective rights. While ‘restitution has come to

39 See Francisco Gutiérrez’s article in this issue, where he explores the relation between the political regime and the development of property rights in Colombia, questioning many of the assumptions attributed to the positive correlation between property rights and distributive reforms.
be seen as an individual act of redress’, 40 we must be aware of other practices where collective rights over land and property are exercised, such as in indigenous communities, peasant societies and/or ethnic minorities. Although not necessarily unattractive for individual landholders, the protection of individual rights may be contrary to the collective rights of communities. 41 This said, one must not take for granted that all forms of traditional or customary law practices regarding conflict resolution on land tenure disputes are respectful of property rights and rights of possession; in fact, the opposite might be the case. 42

Alternatives to Restitution

While restitution is still considered a preferred form of remedy for victims of arbitrary displacement, there are cases where the return and restitution to the land of origin of victims will not be possible, that is, when the loss of land and property cannot be reversed. These may be the case of land and property used for infrastructural or industrial development, or in ways incompatible with a reversal of the situation, such as mining projects or dams. A restitution program ought therefore to explore alternative forms of remedy such as individual or collective relocation into new areas or property; monetary compensation for the actual value of the property lost; or amnesties over property claims valid for specific time periods and places. Principle 21 of the Pinheiro Principles indicates that compensation is ‘only to be used when the remedy of restitution is not factually possible’, preferred by the victims instead of restitution, or in combination with restitution. Alternatives to restitution are likely to be a highly contested issue. It is therefore important to consider the processes and mechanisms leading to the choice of options and identification of victim-beneficiaries eligible for alternative measures. According to Buyse, compensation benefits were not fully considered as a viable

40 Williams (n 6) 11.
alternative to restitution in Bosnia and Herzegovina mostly due to a ‘one-sided emphasis on restitution’, rather than a consideration of ‘beneficiaries’ preferences and actual possibilities to effectively return and reassume their property. Participation in this process by the target population will most likely determine the success or failure of alternatives to restitution.

Given the complexity of the challenges outlined above, it is not surprising that the number of restitution programs implemented in post-conflict and post-authoritarian societies is not impressive, particularly when compared to the scope of arbitrary displacement. Restitution programs in West Germany and Kosovo, Guatemala and East Timor, Colombia and Afghanistan, all face(d) similar challenges. A comparative analysis of land and property restitution programs transnationally is emerging in the research agenda, which is a welcome development with the potential to contribute both with an overall assessment of land and property restitution programs for policy-makers, and at the theoretical level, to understand the complex connections between stated and implicit aims of restitution and the various forms and shapes that restitution takes – and not – in practice.

VI. Competing Rights and Overlapping Debates

As it can be observed from the above discussion, the issue of land restitution in transitional justice often overlaps with other important debates, in particular, restitution for historical injustices, and restitution to address structural inequalities in access to land (often referred to as ‘the agrarian question’ or ‘the land issue’). These issues move beyond practices and understandings of retributive and restorative justice into the realm of distributive justice, raising the question of whether these realms ought to be treated separately or not.

The need for structural reform and the effective implementation of the right

43 Buyse (n 19).
44 For a detailed and thorough study of relocation of repatriated refugees in Ethiopia, see L Hammond, This Place Will Become Home: Refugee Repatriation to Ethiopia (Cornell University Press, NY 2004).
45 Leckie’s Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations is an important contribution in this direction. The cases presented therein focus on land and property restitution rights in the particular context of United Nations peace operations, providing a firm empirical base for the development of policy recommendations.
to restitution constitute therefore a major challenge. In those countries where agrarian structures are uneven, the issue of land restitution is bound to collide with more structural issues of inequality and the need for land redistribution and agrarian reform. Indeed, restitution programs can be seen by governments as a way to embark on deep structural reforms in the agrarian sector by distributing state-owned land to the victim-beneficiaries of restitution programs. In the strict sense of the term, this may be considered more as a form of compensation rather than restitution per se. In the presence of large numbers of landless peasants in rural societies, it can be expected that the prioritization of IDPs and refugees in restitution programs – however legitimate this is – will be contested by other disadvantaged groups. The term ‘competing rights’ conveys a situation where the framing and struggle for the protection of specific rights are in competition with other legitimate rights – sets of rights competing with other rights. Even within the framework of a specific restitution program, equal access and treatment may not be secured if differences such as ethnicity, race and gender are taken into consideration.

Yet another arena where competing rights are at play is the restitution claims of indigenous peoples on the basis of historical injustice. International law, and particularly the right to self-determination, has increasingly been recognized as a tool to be used in advocating restitution and compensation for indigenous peoples. The newly adopted Declaration on the Rights of Indigenous Peoples contains a number of clauses relevant to the issue of restitution and compensation for lost lands. The Declaration reaffirms that compensation should only be used as a remedy in place of restitution when the latter is not possible:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal

46 As demonstrated in the articles by Stephen Karanja and Francisco Gutiérrez in this issue.
47 See Anne Hellum and Bill Derman’s case study of women’s right to restitution in post-Apartheid South Africa in this issue.
in quality, size and legal status or of monetary compensation or other appropriate redress. (art 28)

General Recommendation No. 23 on Indigenous Peoples\textsuperscript{49} recognizes an additional requirement for the use of compensation as a remedy, namely that restitution must be impracticable for \textit{factual}, rather than simply legal reasons. A lack of political will cannot, therefore, be an excuse to favour compensation over restitution.\textsuperscript{50}

It is widely acknowledged that:

with respect to indigenous peoples, the typical form of restitution per equivalent, i.e. compensation, is generally inadequate and ineffectiveto redress the tort suffered, on account of the limited value that economic assets usually have for these peoples. The choice of the forms of reparation should be made on a case-by-case basis.\textsuperscript{51}

Thus, only where the return of the lands and territories of the indigenous is not possible for factual reasons, the right to restitution can be substituted by the right to just, fair and prompt compensation. It has been argued that such compensation should as far as possible take the form of land and territories.\textsuperscript{52}

While it could be argued that historical injustices ought to be addressed in transitional justice if stable peace is to be achieved, it is important to keep in mind that specific transitional justice mechanisms seek to address violations committed during authoritarian regimes and armed conflict, and will not necessarily be the best approach to deal with historical injustice and agrarian reform. The existence of contested claims from various groups in society other than those of victims should not be ignored. Yet, in post-conflict societies, how to prioritise limited resources among many legitimate and just claims? The overall aim of transitional justice mechanisms might indeed be the reframing of new societies based on prin-

\textsuperscript{49} UN Committee on the Elimination of Racial Discrimination (CERD), ‘General Recommendation No. 23 on Indigenous People’ (18 August 1997) UNGA Res 16/295.


\textsuperscript{52} This is in line with Principle 21 of the Pinheiro Principles. See PS Chingmak, ‘International Law and Reparations for Indigenous Peoples in Asia’, in \textit{Lenzerini} (n 51).
Addressing Land Restitution in Transitional Justice

VII. Concluding Remarks

Earlier we asked what the added value of transitional justice was concerning the right to restitution. It could be argued that the right to restitution does not need transitional justice to be advanced. In fact, the advocacy of the right to restitution has been relatively successful in framing this right and developing legal instruments to secure protection and implementation. However, I argue that the contribution that transitional justice brings to the issue of restitution is first, the ability to frame restitution claims in the larger framework of accountability for past violations, and second, the focus on victims.

With regard to accountability for violations committed in the past, there is an increasing international consensus over the many forms that accountability can take, and that all of them are closely interrelated. Accountability in terms of justice, truth and reparation are complementary forms, not necessarily opposed to each other. The right to restitution can thus be seen as part of a larger framework of claims seeking redress and accountability for human rights violations. In terms of policy and implementation, this means the incorporation of restitution issues in the policy and programming agendas of public institutions dealing with transitional justice at the national level. The institutionalisation of the issue of restitution by way of transitional justice is a development that deserves close attention in the future.

The second contribution that transitional justice brings to the right to restitution is its focus on victims. The identification of victims of arbitrary displacement as subjects of reparation and restitution programs highlights both the identifica-
tation of arbitrary displacement as a serious and/or gross violation, as well as the set of rights, benefits and entitlements assigned to the victim status in specific country settings. Can the identification as victims be counter-productive for those seeking restitution? Possibly, but we must also consider the normative and moral value that the concept of victim itself and victim rights in general are gaining in the public debates and practice of transitional societies; this can indeed enhance the framing of restitution claims.