

## LAND RESTITUTION IN TRANSITIONAL JUSTICE – AN OVERVIEW

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*“Only by dealing upfront with restitution  
can wars and conflicts come to a permanent end.”*

- Theo Van Boven<sup>1</sup>

## Introduction

The aim of this report 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.

Victim reparations are gaining increasing international attention in both academic and political arenas. This is partly due to an increased focus on victims' rights from a victim-oriented perspective, as observed in the practice of the ICC and in the adoption of the *Basic Principles on the Right to Remedy and Reparation* 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 is restitution, which includes the “return to one's place of residence, restoration of employment and return of property” (Art. 19).

Concerning the rights of refugees and displaced peoples, restitution has long been considered a preferred measure of redress (Williams 2007). In the transitional justice literature, the issue of land/property restitution for 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 (Cox and Harland 2002; Bradley 2007). The primacy of restitution however ought to be scrutinized in terms of policy and implementation, as well as victims' views and optional forms of redress.

## 1. What is ‘restitution’?

In the framework of transitional justice, restitution constitutes a form of reparation. Although the term *restitution* is sometimes synonymously used as *reparations*, these terms can both be interpreted expansively to include a variety of ways to make amends. They are not, however, interchangeable. “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. In contrast, the term *reparations* has come to suggest broader and more variegated meanings.” (Torpey 2006)(46-47). *Restitution* is sometimes used interchangeably with *compensation* as well. Some even define restitution as a sub-category of compensation, where “the good to be made up is precisely the good that was lost” (Satz 2007)(178). Gloppen

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<sup>1</sup> From the foreword to *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, (Scott Leckie, ed.), Transnational Publishers, 2003.

(2005) argues that restitution can take many forms, considering compensation, rehabilitation, recognition and healing as part of restitution; furthermore, she uses the terms *restitution* and *restoration* interchangeably (Gloppen 2005). 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”(Mani 2005)(76). It is common to refer to restitution and compensation together, as the right to restitution is most often referred to as a right to restitution of something that was lost, or compensation for the loss if restitution is not possible.

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. The measure of restitution has traditionally been a return to the *status quo ante*. Thus, once whatever has been denied, deprived, or confiscated is restored, this form of reparation would be complete” (Bassiouni 2002)(267). 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”(Roth-Arriaza 2002)(108).

The issue of land restitution has been almost absent from the transitional justice literature until recently fairly recent. The International Centre for Transitional Justice itself issued a report on the subject first in 2007. This contrasts greatly 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 unavoidable.<sup>2</sup> According to Williams (2007),

“In contemporary transitional settings, reparations and restitution should be understood as functionally separate but complementary responses to human rights violations, each of which should be available in proportion to manifest need. Restitution is of little use in addressing many common patterns of human rights violations, but where such acts include confiscation of land, homes, businesses, or other assets, as well as forced evictions or arbitrary displacement, restitution is likely to be a crucial component of any remedy worth the name. (...) [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 (Williams 2007) (48-49).

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 Habit International Coalition played a significant role advocating the property restitution rights of refugees and IDPs (Thiele 2000). In the UN system, these efforts led to the adoption of two important legal

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<sup>2</sup> The literature on land restitution in the field of refugee studies is rich and extensive, both in terms of conceptual and legal framework and in documenting country-based experiences. A detailed review of this literature is outside the scope of this report. For good overviews of the field, see among others, Leckie, S., Ed. (2003). Returning home: housing and property restitution rights of refugees and displaced persons. Ardsley, N.Y., Transnational Publishers. Leckie, S., Ed. (2007). Housing, land, and property restitution rights of refugees and displaced persons: laws, cases, and materials. Cambridge, Cambridge University Press., Bagshaw, S. (2000). "Property restitution and the development of a normative framework for the internally displaced." Refugee Survey Quarterly 19(3): 209-223, Thiele, B. (2000). "Recent developments in United Nations policy on housing and property restitution for refugee return." Refuge 19(3): 3-7, Paglione, G. (2008). "Individual property restitution: from Deng to Pinheiro - and the challenges ahead." International Journal of Refugee Law. Land restitution is a recurrent theme in the Journal of Refugee Studies, Forced Migration Review, and International Migration, among others.

instruments since the late 1990s: the *Guiding Principles on Internal Displacement* (adopted by the Commission on Human Rights, Economic and Social Council on 11 February 1998), and the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons* (known as “The Pinheiro Principles”, approved by the Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights-ECOSOC on 11 August 2005). Also in 2005, the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (also known as “The Van Boven/Bassiouni Principles”) were approved both at the Commission on Human Rights and on December 16, by the UN General Assembly. The Basic Principles clearly formulate victims’ right to reparation, and restitution being one of its forms.

### **An emerging right to restitution**

According to Bagshaw (2003), ongoing developments in international law and practice, in particular at the regional level, clearly point towards an emerging right to restitution of property and compensation. The Guiding Principles on Internal Displacement (GPID) (UN 1998) 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 therefrom (Bagshaw 2003).

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 place in the position he or she would have been in had the violation not occurred (Bailliet 2002):107). Looking at the contents of the Basic Principles on the Right to Remedy (Basic Principles), 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” (Shelton 2005)(22).

On the same line, Prettitore argues that (2003) “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.” (Prettitore 2003) 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. Thus, the *right to restitution of property* is 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 (Bailliet 2002). 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 word “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 (Leckie 2003).

In sum, despite considerable advances in human rights and humanitarian law in recent years, the right to land, housing and property restitution is only gradually gaining recognition. “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” (Vagle and de Medina-Rosales 2006). Indeed, until recently, the lands, homes and other possessions of those defeated in an armed conflict were widely regarded as part of the ‘spoils of war’ by the victors (Aursnes and Foley 2005; Leckie 2006). The restitution of housing, land and property is, however, rising rapidly up the political agenda (Leckie 2006), a development much due to “The Pinheiro Principles”, which establish the protection of the right to property restitution in international law. Article 2 on “the right to housing and property restitution” state that:

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/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.

The Pinheiro Principles 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.<sup>3</sup> The 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 (Leckie 2006). NGOs and UN agencies working on these issues have developed guidelines and handbooks to ensure the effective implementation of the Pinheiro Principles.<sup>4</sup> If this is so, what is the value-added of transitional justice in terms of framing and securing the restitution rights of victims? To answer this question, it is pertinent to get a closer look at the Basic Principles on the Right to Remedy and Reparation.

## **2. What do the ‘Basic Principles on the Right to Remedy and Reparation’ say about restitution<sup>5</sup>**

On December 16 2005, the General Assembly of the United Nations approved 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*.<sup>6</sup> This document had previously been adopted by the UN Human Rights

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<sup>3</sup> The Pinheiro Principles will be discussed in more detail in a separate report prepared by Malcolm Langford and Khulekani Moyo.

<sup>4</sup> See for example, (2007). Handbook on housing and property restitution for refugees and displaced persons: implementing the "Pinheiro Principles." Turin, Multimedia Design and Production. (2001). Housing and property restitution for refugees and internally displaced persons: international, regional and national legal resources. Geneva, COHRE, (2007). Handbook on housing and property restitution for refugees and displaced persons: implementing the "Pinheiro Principles." Turin, Multimedia Design and Production.

<sup>5</sup> This section is based on García-Godos, J. (2008). "Victim Reparations in Transitional Justice – What is at Stake and Why." *Nordic Journal of Human Rights* 26(2): 111-130.

<sup>6</sup> GA Res. 147, UN GA, 60<sup>th</sup> Session, UN Doc A/RES/60/147 (2005). *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*. To be referred as the *Basic Principles*.

Commission in April that year, concluding a process that started in 1988.<sup>7</sup> In 1993, the Special Rapporteur Mr Theo van Boven delivered a study which became the basis for the process completed in 2005.<sup>8</sup> The study and later on 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.

As stated in the Preamble, the *Basic Principles* are directed “at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity.” Taking into account that the Basic Principles are based on the “obligation to respect, ensure respect for and implement international human rights law and international humanitarian law”<sup>9</sup> the question arises as to whether there is a tension between reaffirming respect for both bodies of law, and choosing the categories of “gross” human rights violations and “serious” IHL offences as target areas. As Marten Zwanenburg has pointed out, the document does not include clear definitions nor an explicit list of which human rights violations are considered “gross” and which IHL offences are “serious”. After a careful analysis of the relationship between human rights law and IHL, Zwanenburg concludes that the absence of clear cut definitions need not be a limitation, but rather provides these types of concepts with much needed flexibility, as they are constantly evolving in legal theory and practice.<sup>10</sup>

The *Basic Principles* establishes 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. According to the *Basic Principles* “remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law”: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and, access to relevant information concerning violations and reparation mechanisms.

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 serious violations of international humanitarian law.” The full and effective reparation envisaged by the *Basic Principles* includes: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These forms of reparation are described in articles 19 to 23 of that document.<sup>11</sup>

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<sup>7</sup> Dinah Shelton: “The United Nations Draft Principles on Reparations for Human Rights Violations: Context and Content”, in Marc Bossuyt et al. (eds.): *Out of the Ashes: Reparation for Victims of gross and Systematic Human Rights Violations* (Antwerpen – Oxford: Intersentia 2005) 11–33

<sup>8</sup> UN CHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45<sup>th</sup> Session, UN Doc E/CN.4/Sub.2/1993/8 (1993). *Review of Further Developments in Fields with which the Sub-Commission has been concerned. Study Concerning the Right to Restitution, Compensation and Rehabilitation for Gross Violations of Human Rights and Fundamental Freedoms: Final Report by Mr. Theo van Boven.*

<sup>9</sup> *Basic Principles* supra n 7 at Section 1.

<sup>10</sup> Marten Zwanenburg: “The Van Boven/Bassiouni Principles: An Appraisal” (2006) 24 *Netherlands Quarterly of Human Rights* 4, 641–668. Zwanenburg provides an extremely well informed and thorough analysis of the *Basic Principles* from a legal perspective, thus addressing a number of legal issues (such as the relation between human rights law and IHL) that fall outside the scope of this article.

<sup>11</sup> The *Basic Principles* operate with a broad definition of reparations, one which addresses also alternative or complementary transitional justice mechanisms (i.e. 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

‘Victim reparations’ is itself complex concept, one that encompass a number of related issues referring to different settings. De Greiff (2006) suggests distinguishing between definitions of victim reparations as used in international law and the one used in reparation programs, as they involve different choices and motivations.<sup>12</sup> In international law, reparations refer to all sorts of reparatory measures implemented to address human rights violations, 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 specific reparation programs, a narrow definition of reparations is needed, as it refers to a specific target group (the victims) and a specific type of crimes/human rights violations. This definition does not include truth-telling, criminal justice, or institutional reform. Instead, it operates on the basis of two fundamental elements: the types of reparations (material and symbolic), and the forms of distribution (individual and collective). The narrow definition of reparations 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 reparations 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. For this reason, the debate between jurists active in international law and reparation “officers” and advocates seems to be more a matter of form and scope rather than content. There is no inherent contradiction between juridical and operational definitions, as they both focus and acknowledge the victim’s right to redress. Most debates on reparations centre on the applicability and implementation of juridical definitions to specific cases, particularly those involving massive human rights violations – which is usually the case in situations of transition from armed conflict and authoritarian regimes. The same distinction between a juridical and operationalised understanding of reparations may be applied to the issue of restitution. In other words, while there is certain international consensus on the right to restitution as constitutive of victims’ rights to reparation, this emerging right usually narrows down to physical assets when it comes to operationalisation and actual implementation.

From the five forms of reparation distinguished by the Basic Principles, restitution, compensation and rehabilitation are the one most commonly used in the context of victim reparation programs. While restitution aims to restore the victim to the original situation before violations were committed (addressing mainly personal but also material suffering), compensation refers to economically assessable damage, and rehabilitation to medical and psychological care. 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:*

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duty to prosecute violations that constitute crimes under international criminal law. This reflects the current international trend promoting accountability for past crimes in post-conflict societies and post-authoritarian regimes,<sup>11</sup> while taking into account that accountability can take various forms, some aimed to fulfill the requirements of international criminal law (prosecutions), others focusing on the needs of victims and their families (as reparations).

<sup>12</sup> Pablo De Greiff: “Justice and Reparations”, in Pablo De Greiff (ed.): *The Handbook of Reparations* (Oxford: Oxford University Press 2006) 451–477

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." (Par 19)

As it 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 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 Principles, namely satisfaction and guarantees of non-repetition. For example, 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. While it can be discussed whether family life is defined on the actual presence/existence of family members or on the 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 it effective and accessible.

Based on the above, a discussion of restitution should be explicit about whether we are dealing with restitution in its restorative dimension or in its returning functions. Similarly 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 more narrow definition found in *restitution programs*; programs aiming for the return of displaced populations to their place of origin, the return of lost property, and alternative measures when these options are not viable.

### **3. The subject of restitution programs: Victims of arbitrary displacement**

In this report, we opt to focus on a narrow definition of restitution as restitution programs, aimed as it were 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.

The establishment of restitution programs in the framework of transitional justice and victim reparation are based on a political decision that express the will to address the needs of victims in human rights violation post-conflict and/or post-authoritarian regimes. The first step in developing such programs is the identification of its 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 that the victim may put forward and eventually access from the relevant agencies. Given that victims are identified by function of the violations suffered, it is important to identify which types of violations 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 present restitution claims? According to the Pinheiro Principles, arbitrary displacement from one's own home, land or place of habitual residence constitute 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 violations that define refugees and IDPs as victim beneficiaries. In the language of the Basic Principles on the Right to Remedy, arbitrary displacement can thus constitute a 'gross violation of international human rights law' and/or a 'serious violation of international humanitarian law'.

#### **4. Critical issues in restitution programs**

Identification of victims of arbitrary displacement as the target beneficiaries of restitution programs is only a first step in the design of such programs. There are, several challenges that are need to be addressed; some of which are presented below.

**First versus subsequent 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. What if subsequent owners 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 to restore the property rights of an original owner. One possibility could be to include evicted subsequent owners in the category of victim-beneficiaries, as they will become indirect victims of arbitrary displacement.

**Effective versus formal occupancy.** The Pinheiro Principles open for the right to restitution of property held in possession, without limiting access to formal property rights. The background for this is that in many countries in the South, 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. How to prove effective possession? How to protect effective possession without undermining respect for formal property rights?

**Formalization of property rights.** Closely related to the previous issue is that of the legal status of land and property in countries that have faced armed conflict. In many cases, property rights or possession have not been formalized, and so restitution programs might be a first step towards the formalization of land and property rights. The organization of institutions to deal with these matters requires knowledge and resources, which many countries obviously lack in post-conflict situations. Are restitution programs a good opportunity to formalize and/or legalize occupancy/ownership rights previously solved by other means, such as customary law or traditional practices?

**Restitution versus agrarian reform.** In many countries where agrarian structures are uneven, the issue of restitution is bound to collide with more structural issues of agrarian reform and inequality. Indeed, restitution programs can be seen by governments as a way to embark into deep structural reforms of 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 a form of compensation rather than restitution. How to balance the need for structural reform and the effective implementation of the right to restitution?

**Intergenerational issues.** In cases of protracted conflicts, how far back can we trace occupancy and/or property rights? Do younger generations have the right to claim land and property previously owned or used by their parents, years after displacement took place? To what extent should preferential treatment be given to specific groups in vulnerable situations, such as ethnic minorities or indigenous peoples? How does this relate to a ‘historical injustice agenda’? Can these claims be incorporated in a transitional justice perspective?

**Collective versus individual restitution.** While “restitution has come to be seen as an individual act of redress that can contribute to the resolution of larger conflicts, both through its reparative aspect and by means of facilitating durable solutions to displacement.” (Williams 2007) (11), 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. This particular consideration will have to be addressed carefully in those cases where restitution programs have a second aim of formalizing individual property rights, disregarding traditional practices that may prefer collective rights. The protection of individual rights may thus be contrary to the collective rights of communities. This aspect must also be considered when two or more collective victim groups or communities make claims over the same territories.

**Alternatives to restitution.** While restitution is still considered as the preferred form of remedy for victims of arbitrary displacement, there are cases where return to and restitution of the land of origin of victims will no be possible, that is, then the loss of land and property can not be reversed. These may be the case of land/property that has been used to infrastructural and/or industrial development, or been put to use in ways incompatible with a reversal of the situation. A restitution program can therefore explore alternative forms of remedy such as relocation into new areas or property, monetary compensation amounting the actual value of the property lost, corporatism, or amnesty of property claims during for specific time periods and places. Collective relocation can also occur, a process known in Africa as ‘villagisation’. Alternatives to restitution are likely to be a highly contested issue. It is therefore important to consider the process leading to the choice of options and identification of victim-beneficiaries eligible for alternative measures. Participation in this process by the target population will most likely determine the success or failure of alternatives to restitution.<sup>13</sup>

**Indigenous peoples right to restitution.** International law, and particularly the right to self-determination, has increasingly been recognized as a tool to be used to advocate for restitution and compensation for indigenous peoples. The newly adopted Declaration on the Rights of Indigenous Peoples (UN 2007) 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 lieu of restitution when the latter is not possible:

*Article 28*

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

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<sup>13</sup> For a detailed and thorough study of relocation of repatriated refugees in Ethiopia, see Hammond, L. (2004). This place will become home: refugee repatriation to Ethiopia. Ithaca, N.Y., Cornell University Press.

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 in quality, size and legal status or of monetary compensation or other appropriate redress.

General Recommendation No. 23 on Indigenous Peoples, adopted at its 51<sup>st</sup> session (18 August 1997) by the UN Committee on the Elimination of Racial Discrimination (CERD) recognizes an additional requirement for the use of compensation as a remedy, namely that restitution must be impracticable for *factual*, rather than simply legal reasons. A lack of political will cannot, therefore, be an excuse to favour compensation over restitution (Thiele 2003). It is widely acknowledged that “with respect to indigenous peoples, the typical form of restitution per equivalent, i.e. compensation, is generally inadequate and ineffective to 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”. (Lenzerini 2008). Thus, only where the return of the lands and territories of the indigenous for factual reasons is not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of land and territories (Chingmak 2008).

## **5. Concluding remarks**

Earlier we asked what the added value of transitional justice was in understanding and promoting the right to restitution. One could argue that the right to restitution does not need transitional justice to enhance itself. In fact, the advocacy of the right to restitution has been relatively successful in framing this right and developing legal instruments to secure implementation. What transitional justice brings to the debate on the right to restitution is first, a larger framework of accountability, and second, the focus on victims. With regards 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 then be seen as part of a larger framework of claims seeking redress and accountability for human rights violations committed in the past. In terms of 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 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 identification of arbitrary displacement as a serious and/or gross violation, as well as the set of rights 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 moral value that the concept of victim has in the public debate; this can enhance the framing of claims in the public arena.

From this brief overview, we can see that the issue of land restitution in transitional justice often overlaps with other important debates, most notably as restitution for historical injustices, and restitution to address redistributive justice (‘the agrarian question’). While transitional justice mechanisms must be aware of parallel debates, it is important to keep in mind that transitional justice mechanisms aim 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. Another issue is the existence of contested claims from various groups in society; are the rights of victims more important than the rights of (other) disadvantaged groups in society? In post-conflict societies, who should be prioritised and why? Overlapping debates and competing rights are to be expected in dealing with land restitution; this calls for a need to develop and use concepts and operational definitions that address specific claims and contexts in a very restrictive manner, while keeping in mind the larger picture.

The number of unresolved land and property restitution claims in the world today is larger than the one being actually addressed. 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 (Jennings and Birkeland 2009). In the course of preparing this report, we have identified a number of restitution programs in post-conflict and post-authoritarian societies. Compared to the scope of arbitrary displacement, however, the number of programs implemented is not impressive. The following list shows the countries where previous or contemporary implementation of restitution programs has taken place:

<b>Europe</b>	<b>Latin America</b>	<b>Africa</b>	<b>Asia</b>
West Germany	Honduras	Rwanda	Afghanistan
Croatia	Guatemala	Burundi	Timor-Leste (East Timor)
Georgia	Chile	South Africa	
Czech Republic	Colombia		
Bosnia and Herzegovina			

The comparative analysis of land and property restitution programs across countries is still pending on the research agenda. There is some literature on single country-cases, and a few studies that include a handful of cases. In developing a comprehensive comparative analysis of land and property restitution programs, we suggest the following as a starting point:

- Name of program(s), country
- Time frame
- National legal framework
- Victim-beneficiaries (definitions, specific characteristics, numbers)
- Period of implementation
- Implementing agency
- Any other relevant victim groups not included in program
- Type of measures:
  - Return
  - Repatriation
  - Restitution of land
  - Restitution of property
  - Resettlement/relocation
  - Compensation / bonds
  - Other

A database on land and property restitution programs is yet to be developed, hopefully as a continuation of our current research. Updated information on IDPs and refugees from the IDCM and UNHCR respectively could be the source for such an instrument. The elaboration and analysis of such database would allow us to make an overall assessment on land and property restitution programs, and at the theoretical level, to support the identification of restitution claims and to understand the complexities of stated *and* implicit aims of restitution.

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