

Return and Compensation

This paper aims to highlight rules and principles of international law relevant to two, necessarily inter-linked questions arising in Palestinian–Israeli relations: the right of return of those Palestinians displaced and dispossessed by the events of 1948 and thereafter “to return to their homes”; and the relation of such right to the payment of compensation “for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.” (UNGA res. 194(III), 11 Dec. 1948, para. 11)

This paper focuses on the principle of self-determination and return, the relation of return to compensation, compensation principles, and compensation mechanisms. Given its intended purpose as a guide in negotiation, background and documentary references have been kept to a minimum. Moreover, this paper does not address a number of key issues:

- The legal status of UN General Assembly resolution 194 (III) and the principles stated therein;
- The legal entitlement of the Palestinian Authority/PLO to 'represent' Palestinians generally in regard to issues of return and compensation, including Palestinians resident in other States and/or possessing the nationality of other States;
- The status of Palestinians returning either to Israel or to Palestine;
- The relation of any general, negotiated agreement on return and compensation to individual claims.

1. Background: Self-determination and Return

The legal questions arising in regard to the return of Palestinians are quite unlike those arising in other situations of population displacement, and it is important not to allow the relevant legal arguments to be diluted by too close an association with examples and practices deriving either from the treatment of refugees generally, or from instances of expulsion, either of nationals or aliens.

What distinguishes the Palestinian situation from others is the linkage to the principle of self-determination. For example, UNGA Resolution 3236 (XXIX), 22 November 1974 and many other resolutions reaffirm the “inalienable rights of the Palestinian people... including... the right to self-determination without external interference... (and)... to return to their homes and property from which they have been displaced and uprooted”. Persecution or conflict are generally what drive refugees to leave their country of origin. Self-determination may also be an issue, but in the case of the Palestinians, it is a central factor.

In accordance with the principle of self-determination, a people is entitled freely to determine its political status and freely to pursue its economic, social and cultural development. Article 1, common to the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, links the principle of self-determination to national wealth and resources. The collective aspect of the territorial link is emphasised, too, in article 21(2) of the African Charter of Human and People’s Rights, which provides that a dispossessed people is entitled to lawful recovery of its property and to adequate compensation. (See also article 1(1), United Nations Declaration on the Right to Development: UNGA res. 41/128, 1986; and on the juridical link between people and territory, see the Advisory Opinion on the International Court of Justice in the Western Sahara case).

It is therefore misleading to view 'return' solely in terms of a right to be exercised by a 'refugee', a 'displaced person', or a citizen expelled from his or her State. The individual human rights dimension remains relevant, but it is

not the exclusive issue when regard is had to the broader question of national self-determination.

Self-determination puts the issue of return into context, linking exercise of this right inextricably to a measure of territorial delimitation, and implicitly recognizing the people's relationship to the land of which it has been dispossessed. In addition to material value, this land is relevant to national identity, and may also have religious and cultural significance. So far as return is integrally linked to territory, national identity and self-determination, it follows that the objective of "restitution", discussed further below, may not be met by offers of equivalent land or monetary compensation.

In situations of loss or displacement where self-determination plays little or no part, the link to the land may become attenuated. For example, the 1990 German Unification Treaty had to deal with the possibility of claims by "west Germans" to properties in the "east" which might have been expropriated or transferred to others in the time of the German Democratic Republic; it made substantial provision for compensation instead of repossession, for example, where it was impossible, impractical or inequitable to restore the property to its former owner, or if it had been "honestly" acquired by third parties, or was otherwise required for investment purposes.

Where displacement, national identity and self-determination are involved, however, failure adequately to link return and property rights may prejudice the prospects for political settlement. For example, in his "Set of Ideas on an Overall Framework Agreement on Cyprus" (UN doc. S/2472, Annex, 1992), the UN Secretary-General proposed a territorial separation along ethnic lines, limited return of the displaced, and compensation for those who did not go back. The insufficient weight attached to return and property rights may well explain why a solution is still lacking.

A number of historical examples exist where populations have been displaced and no right of return and repossession has been recognized, such as the case of the population exchanges between Greece and Turkey in the 1920s. Such "solutions", however, are now seen as exceptions and, indeed, as illegal under international law.

Palestinians are entitled to return to their land, in the exercise of the right of the Palestinian people to self-determination. In principle, this right is independent of any additional and incidental right to compensation.

2. The Relation of Return to Compensation

2.1 UNGA Resolution 194 (III)

Paragraph 11 of General Assembly resolution 194 (III) refers to compensation for the property, among others, for "those choosing not to return". Clearly, this is an option (compensation for property in the event of non-return) which can only be exercised by the displaced and the dispossessed themselves. It is not an option available to the authority responsible for the loss of property; that is to say, such authority may not offer compensation as a substitute for the right of return.

The choice, whether to return or not, reflects recognition of the fact that the traumatic experiences of some among the displaced may cause them to refuse to return; a provision to similar effect is contained in article 1C(6) of the 1951 Convention relating to the Status of Refugees.

The principle of return to land and property is not subject to substitution at the option of the authority responsible for displacement and dispossession.

2.2 Return and Compensation

Paragraph 11 of UNGA resolution 194 (III) also makes it clear that "return" and "compensation" are complementary, not mutually exclusive. Palestinians exercising their right to return are thus also entitled to compensation "for loss of or damage to property...under principles of international law or in equity". The General Assembly has recognized

that Palestinians “are entitled to their property and to the income derived from their property in conformity with the principles of justice and equity” (UNGA res. 34/146C, 16 December 1981).

The principle of return to land and property is complemented by the right to compensation for damage and loss.

3. Compensation Principles

The claim of Palestinians to return and to compensation is uniquely linked to the question of self-determination. Although the law of international responsibility may not always be directly on point, relevant principles can be relied on by analogy, so far as the purposes of compensation include the provision of satisfaction for wrong done to States, other subjects of international law, and individuals.

3.1 Liability

In international law, the obligation to make reparation is premised on liability, that is, the attribution or imputability of an internationally wrongful act to the responsible State. In the present case, the wrong done comprises flight or expulsion, followed by dispossession. According to Principle 4 of the International Law Association’s Cairo Declaration of Principles of International Law on Compensation to Refugees, “a State is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated to compensate an alien” (87 AJIL 532 (1986)). Article 3 of the Hague Convention respecting the Laws and Customs of War on Land provides that a “belligerent party which violates... the (Regulations) shall, if the case demands, be liable to pay compensation” (Hague Regulations annexed to Convention No. IV respecting the Laws and Customs of War on Land, 1907: 1 Bevens 631).

It is further argued that violations of human rights entail the obligation to provide for compensation as a means to “repair a wrongful act or a wrongful situation”; see van Boven, T., ‘Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’: UN doc. E/CN.4/Sub.2/1990/10; see also article 14, 1984 United Nations Convention against Torture.

In general, liability can expect to be disputed, however, and effective compensation mechanisms will need to be predicated on an admission of responsibility, a determination of liability by a competent international organ, or an agreement to pay compensation without prejudice to the formal question of liability.

By resolution 687, the UN Security Council established that “Iraq... is liable under international law for any direct loss, damage... or injury to foreign Governments, nationals and corporations’ as a result of its unlawful invasion and occupation of Kuwait.” The major historical examples of compensation payments to refugees and the displaced (German indemnification of the victims of Nazi persecution: Federal Republic of Germany–Israel Agreement, 162 UNTS 205; detention and dispossession of Canadian and United States citizens of Japanese ethnic origin during the Second World War; payments to Ugandans expelled under the dictatorship of Idi Amin) have been based on either an explicit or implicit admission of liability.

So-called ‘lump sum agreements’, discussed further below, are commonly concluded on the basis of no admission of liability.

In principle, a State may only be required to pay compensation where it is liable in international law; that is, where an internationally wrongful act is attributable to the State and causes damage to another State or subject of international law.

3.2 Reparation and Restitution

In the Chorzow Factory case in 1928, the Permanent Court of International Justice, on an issue involving

expropriation, emphasized that reparation for an illegal act “must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” This could be achieved by way of restitution in kind, or, if that is not possible, payment of a sum corresponding to the value which a restitution in kind would bear, or the payment of damages for loss sustained which would not be covered by restitution in kind. (Chorzow Factory Case, (Germany v. Poland), 1928, PCIJ, Ser. A, No. 17)

The Court emphasized the priority of restitution (*restitutio in integrum*). Only if such restitution is not possible does the obligation become that of paying the value of the property and compensation for such loss as results therefrom.

Central to the Court’s reasoning was the distinction between a lawful expropriation, which required fair compensation, and the “seizure of property, rights and interests which could not be expropriated even against compensation”. In the Chorzow Factory case, the act of expropriation was illegal because it violated a treaty provision; in the case of Palestinian land claims, the dispossession is illegal, in part, because it violates the right of self-determination. In neither case can the wrong be put right by the payment of “fair compensation”.

The International Law Commission has maintained these basic principles in its Draft Articles on State Responsibility. The injured State is entitled to claim, according to article 42(1), I Restitution in kind, according to article 43, means that the wrongdoing State has to re-establish the situation that existed before the illegal act was committed, provided that this:

1. Is not materially impossible;
2. Would not involve breach of an obligation arising from a rule of *jus cogens*;
3. Would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or
4. Would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act.

If restitution in kind is not available, compensation for the damage caused by the act must be paid. Compensation covers any economically assessable damage suffered by the injured State and may include interest and also, in certain circumstances, lost profits. (International Law Commission, Draft Articles on State Responsibility, Part Two: Content, forms and degrees of international responsibility, Chapter II: Rights of the Injured State and Obligations of the State which has committed an internationally wrongful act; Articles 41-46).

The duty to make reparation also applies where there is no direct taking of property, but such an interference with property rights as to render them useless, such as deprivation of the effective use, control and benefits of property: *Tippets v. TAMS-ATTA* (1985) 6 Iran-US CTR 219, 225.

The basic principle of reparation in international law is restitution in kind.

Whereas in certain circumstances, restitution in kind may be replaced by payment of the value of the property in question, in the case of land comprising the territorial dimension to a recognized self-determination unit, this alternative is not generally available.

3.3 Property and Other Heads of Compensation

According to the Harvard Draft Convention: 55 AJIL 558-9 (1961), and with expropriation of foreign-owned assets in view, property includes “all movable and immovable property, whether tangible or intangible, including industrial, literary and artistic property, as well as rights and interests in property”.

According to article 44(2) of the ILC Draft, “compensation covers any economically assessable damage... and may

include interest and, where appropriate, loss of profits”.

The United Nations Compensation Commission, established to deal with claims against Iraq, dealt with some 2.4 million claims out of 2.6 million lodged up to October 1997, including claims for death, personal injury, and mental pain and anguish; on the latter, see Decision of the UNCC Governing Council, 18 October 1991: UN doc. S/AC.26/1991/3.

In *Loizidou v. Turkey* (40/1993/435/514), the European Court of Human Rights awarded compensation for loss of use of land in Cyprus and the consequent lost opportunity to develop or lease it, and also “in respect of the anguish and feelings of helplessness and frustration which the applicant must have experienced over the years in not being able to use her property as she saw fit”: Judgment of 28 July 1998, paras. 27, 33, 34, 39.

Property and interests for which compensation may be due include movable and immovable, tangible and intangible property, death, personal injury, mental pain and anguish. 3.4 Quantification

The assessment of compensation due involves frequently complex questions of

1. Entitlement, that is, identification of the beneficiaries, and
2. Evaluation of the loss or damage, in itself and over time. Both issues in turn invite attention to the requisite standard of proof (what evidence is required, and what exactly must a claimant “prove” in order to receive payment?).

Claims for the “loss of or damage to property which, under principles of international law or in equity, should be made good” is quite likely, where the question individual entitlement to compensation is excessively individualized, to result in denial and injustice. In the case of Palestine, records of registration in the land registry during the period of the Mandate are incomplete, while other sources may show a “community” interest in land, rather than individual ownership. The reports of the United Nations Conciliation Commission for Palestine (see, for example, UN doc. A/AC.25/W.84, 1966) give some indication of the limited range of registration data.

Experience suggests that compensation arrangements are most successful, either where well-documented commercial relations are in issue (for example, most of the cases before the Iran-US Claims Tribunal), or where guidelines and assumptions (backed by a measure of corroboration of data and minimal evidential standards) are employed in the decision-making process, as in the case of individual claims before the United Nations Compensation Commission.

International practice reveals a measure of variation and uncertainty in regard to the valuation of property and loss. In the case of an illegal taking of property, the Court in the *Chorzow Factory* case stated that if restitution is not possible, the wrongdoing State is obliged to pay the value at the time of indemnification, together with compensation for the loss sustained as a result of the seizure, such as loss of profit. In *Amoco International Finance Corporation v. Iran* (1987) 15 Iran-US CTR 189 it was held that “if the taking is lawful the value of the undertaking at the time of dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is, or may be, only a part of the reparation to be paid.” Thus, restitution would include both the value of the property plus the profits which would have been earned up to the day of judgment, unless included (as profit potential) in the initial valuation. (See also American Law Institute, *Restatement of the Law (Third)*, paragraph 721, which refers to “just compensation”, and to the criterion of “fair market value” or “going concern value”, if appropriate.

The 1962 UN Declaration on Permanent Sovereignty over Natural Resources appeared to challenge the developed world view that compensation for expropriation of foreign owned property must be “prompt, adequate and effective”. Instead, it proposed a question-begging standard of “appropriate compensation”: UNGA res. 1803 (XVII). General Assembly resolution 36/148, establishing the UN Group of Governmental Experts on Measures to Avert New Flows of Refugees, used the term “adequate compensation”. The tribunals in *Aminoil* and *Amoco* both referred to “appropriate compensation”, but the results indicate that this is a highly flexible and context-dependent notion.

Moreover, the International Law Commission has recognized certain inherent limits to the principle of restitution in kind, for example, where this would be excessively burdensome and out of all proportion to the benefit to the compensated State.

What is the “true value” of property is not a self-applying ordinance. “Productive value”, for example, or profit-earning capacity, necessarily depends on various factors and is liable to fluctuation.

In principle and in recent arbitral practice, the tendency is to consider that “full compensation” is to be calculated on the market value of the property; that in the case of income-generating property, such as a factory, mere “net book value” (that is, the value of the investment, less depreciation) is an inadequate scale, and that “actual market value” requires inclusion of the “goodwill”, such as the value of business contacts, etc.

In *Starrett Housing Corporation*, for example, the Iran-US Claims Tribunal used the following formula as a starting point in calculating the appropriate market value:

The price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximise his financial gain, and neither was under duress or threat. (21 Iran-US CTR (1989-1) 112, 201)

The United Nations Compensation Commission decides payments on the basis that Iraq is liable for “any direct loss or damage...” Its awards tend to reflect fair and reasonable compensation for direct damage, excluding consequential damage except where this is the natural and proximate consequence of the act complained of. So, for example, awards have been made to cover the expenses of removal and return, actual property losses, the interruption to established business, and actual pecuniary loss. So-called “moral damages” have not been awarded. In reaching decisions on awards, the Compensation Commission has adopted guidelines on evidential requirements generally helpful to claimants, actively engaged the assistance of those with loss adjusting expertise, and engaged in a primarily investigative, rather than adversarial role.

Recent arbitral practice reveals increasing acceptance of the principle that “full compensation” is indeed often required, although in State practice generally, especially where lump sum settlements are agreed, part only of the value may be paid. The disadvantage of the latter – only a portion of the value is paid – may be offset by the fact that if everything went to arbitration, many claims might fail for lack of proof, while considerable resources would need to be expended in the processes of adjudication. In such circumstances, the notion of what is ‘appropriate’ or “adequate” compensation may be calculated not only by reference to past losses, but also in the light of an assessment of present and future needs, for example, in the context of an overall political settlement involving elements of return, restoration of property, economic, infra-structural and political development. (See further below on “lump sum” agreements). At this point, collective or community interests require to be balanced against demands for individual justice.

In international law, the basic standard where restitution is not possible is that of “full compensation”, that is, the market value of the property in question, and such consequential loss of profit as may reasonably be found to flow from the loss.

Every State remains free to adopt a criterion of quantification of damage which it considers most appropriate to meet present and future needs, and to satisfy individual claims for compensation.

4. Compensation Mechanisms

The above brief review also provides an indication of possible compensation mechanisms, from the judicial to the administrative, and some of their advantages and disadvantages. The Iran-US Claims Tribunal, for example, has been successful mostly with commercial claims which tend to be fairly well documented; its overall failure to deal satisfactorily with individual claimants resulted in a lump-sum agreement between the parties, with individual

awards from such funds being made by the United States compensation authority to United States claimants.

The UN Compensation Commission, on the other hand, rapidly adopted expedited procedures to deal with relatively simple urgent claims, a task facilitated by the fact that Iraq's liability had been formally established.

Lump sum agreements between the parties, in "full satisfaction" of outstanding claims but generally without any admission of liability, have obvious attractions. The distribution of compensation falls to national authorities (in the United Kingdom, for example, this is in the hands of the "Foreign Compensation Commission", established and regulated by statute). The "wrongdoing" State avoids potentially embarrassing findings of responsibility, while both sides are able to "close" a conflicted chapter in their relations relatively quickly, and without the expense and inevitable delays attached to a comprehensive, international arbitral process.

The disadvantages for the party receiving compensation may be considerable, however. "Lump sum" settlements, by definition, fall short of full compensation; on this account, they may lack "credibility" and lead to or perpetuate a sense of injustice among individuals and communities. In the case of Palestinian claims, the entitlement of the Palestinian Authority/PLO to negotiate and accept a lump sum agreement on behalf of the dispossessed may be called into question, unless that authority can be confirmed in advance, for example, by referendum or other equivalent and representative vote or expression of political will.

In addition to the "traditional" compensation methods illustrated above, the possibility of integrating a compensation element into an overall political settlement, with a focus on return, development and a just solution, should not be ignored. Experience in Chile, Mozambique and South Africa, among others, offers a number of ideas for the promotion of these ideals in post-conflict situations, following periods of massive displacement and violations of human rights.