Post-conflict property restitution in Croatia and Bosnia and Herzegovina: legal rationale and practical implementation

by Rhodri C Williams

A human-rights based approach to post-conflict property restitution is likely to produce results that are more consistent, fair, effective and sustainable than those based purely on the 'right to return'.

Legally, the right to post-conflict property restitution derives from two independent rationales. The most commonly cited rationale is the 'right of return' whereby refugees and IDPs are entitled to return voluntarily not only to their country but to their actual home of origin. A parallel – rights-based – rationale derives from the necessity of providing adequate remedies to the victims of human rights violations. Paulo Sérgio Pinheiro, the UN Special Rapporteur on property restitution, has noted that "restitution as a remedy for actual or *de facto* forced evictions resulting from forced displacement is itself a free-standing, autonomous right."[1]

While these two rationales are not mutually exclusive, practice in the former Yugoslavia indicates that the relative emphasis placed on the return vis-à-vis the human rights rationale for property restitution can greatly affect implementation. First, it can significantly influence choices about the inclusion (or exclusion) of various categories of property, an issue of particular importance where, as in the former Yugoslavia, some properties that clearly constituted pre-war 'homes' of displaced people were held under forms of tenure that fell short of outright ownership. Second, the rationale chosen for property restitution programmes can affect the procedural fairness with which property claims are handled.

Occupancy rights and double standards

In both Bosnia and Herzegovina (BiH) and Croatia, private homes will largely have been restored to their owners by the end of 2004. However, restitution of a second category of property – socially-owned apartments – has been far more problematic.

Although such apartments constituted a lower percentage of the housing stock than private homes, their urban location and general high standard made them highly desirable. Most apartments were allocated by public employers to employees on the basis of an 'occupancy right', contingent on a 'use requirement' forbidding prolonged absence of the occupancy right holder. This was rarely enforced but was then revived in wartime regulations allowing empty apartments to be declared abandoned and re-allocated – typically on the basis of ethno-political cronyism – without regard to the wartime conditions that may have necessitated the flight of the previous residents.

In post-war BiH, new domestic property repossession laws again revived the use requirement as a 'return requirement', forcing apartment claimants to fulfil three conditions:

- claim within a set period (initially identical to that triggering cancellation under the pre-war use requirement)
- seek enforcement of a positive decision within a set period of receiving it
- physically reoccupy the apartment within a set period of its becoming available.

In the immediate post-war period, many displaced people were fearful of returning. The international community's initial support for measures ostensibly designed to force return waned as it became obvious that they were being applied in a manner meant to permanently cancel pre-war occupancy rights, pre-empting any possibility of return in individual cases. By imposing amendments the Office of the High Representative removed most of the requirements in 2001, clearing the way for completion of a restitution process that has seen the return of almost 100,000 apartments in BiH. However, the original deadlines for claiming remained in force, thus preventing restitution and pre-empting return for as many as 9,000 displaced families. The question remains as to whether, from a human rights law perspective, the continued exclusion of those who failed to meet the claim deadlines represents a permissible limitation on the right to property restitution.

In Croatia, approximately 25,000 apartments occupied by minority Serbs before the war were reallocated during the conflict. Croatia refuses to consider restitution or even compensation for terminated occupancy rights based on its position that they are not 'property', despite contrary law and practice in neighbouring BiH.

Human rights interpretations applied in BiH are not binding on Croatia and the European Court of Human Rights in Strasbourg has not required Croatia to provide a remedy for terminated occupancy rights.[2] In any case the international community has no power to override the Croatian political system, as it can and does in BiH. Yet, the international community's apparent unwillingness to link restitution of lost occupancy rights to Croatia's candidacy for such multilateral institutions as the EU represents an apparent double standard, considering that BiH has faced unyielding international pressure to resolve property claims for apartments and private homes alike.

Ironically, Croatia's success in avoiding liability for terminated occupancy rights may rest in its portrayal of the issue as a matter of return, rather than human rights. Croatia has recently offered pre-war apartment residents eligibility for housing assistance programmes on the condition that they are willing to return to Croatia. In failing to provide restitution or compensation for lost apartments, the Croatian authorities have almost certainly minimised the likelihood that their pre-war residents would return. However, because Croatia is seen to offer assistance to those who, nevertheless, come back, low rates of return can be attributed to reluctance on the part of those displaced rather than failings of the authorities.

Return and procedural considerations

In BiH, the property restitution laws implicitly required claims to be processed in chronological order. International monitors in BiH endorsed chronology in keeping with general attempts to de-politicise return by emphasising the impartial 'rule of law' nature of property restitution. However, international monitors also demanded, as a matter of policy, that certain categories of claimants be 'prioritised' to repossess their homes, based on arguments that this encouraged return. The efficacy of this policy in promoting return was debatable and evidence mounted that the discretion given by the international community to allow policy-based exceptions to chronology was being abused in order to protect politically-connected temporary occupants from eviction. Beginning in 2001, the international community espoused processing in strict accordance with law, clearing one of the last lines of obstruction to completion of the property restitution process.[3]

Conclusion

Practice in BiH and Croatia demonstrates two risks involved in basing post-conflict property restitution on a pure return rationale.

Firstly, it can foster conditionality of restitution on actual return, particularly where pre-war homes were held in conditional or informal tenure forms. In BiH, the resulting choice between immediate return to an uncertain security environment or permanent loss of one's pre-war home posed a risk of actually pre-empting return. In Croatia, placing conditions on benefits which then fall short of restitution has both discouraged return and distracted attention from the failure to provide a human rights-based remedy for mass dispossession of pre-war homes.

Secondly, the logic of promoting return can result in attempts to identify and prioritise repossession of property for groups deemed likely to return or encourage return. Such policies can undercut the transparency, perceived impartiality and effectiveness of property restitution processes.

On the other hand, it should be emphasised that property restitution justified as a remedy to human rights violations presupposes free choice as to whether or not beneficiaries actually return. However, given that coerced return would in any case simply subject victims of human rights violations to further harm, property restitution programmes should be based on principles likely to ensure speedy, full and fair restitution of homes. BiH and Croatia may be seen as evidence of the effectiveness of a human rights-based approach.

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[1] 'The return of refugees' or displaced persons' property' by Paulo Sérgio Pinheiro, online at: www.unhchr.ch/Huridocda/Huridoca.nsf/0/7893f45a0a2853a8c1256c080031227a/$FILE/G0213998.pdf

[2] See www.echr.coe.int/Eng/Press/2004/July/ChamberJudgments290704.htm

[3] See '12/9/2002 A New Strategic Direction' under Key Documents at www.ohr.int/plip.