

Guiding Principle 29 and the right to restitution

Rhodri C Williams

The emergence of a right to post-displacement property restitution represents a significant development in human rights law in the ten years since the Guiding Principles were submitted. While Guiding Principle 29 has contributed to the development of this right, significant obstacles remain to its consistent application in displacement settings.

Principle 29(2) states that:

“Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.”

At the time that the Guiding Principles were drawn up, the right of IDPs to reclaim abandoned property was not beyond dispute. Human rights law guaranteed a ‘right of return’ but it was limited to restoring people to the frontiers of their country of origin – a destination often far from their actual homes. Likewise, the right to legal remedies for violations such as property confiscation was defined as a procedural entitlement to a fair hearing, without pre-judging whether any specific substantive remedy such as restitution should result.

Accordingly, while the drafters of the Guiding Principles were aware that durable solutions for IDPs were inconceivable without the possibility of restitution and voluntary return, prevailing legal understandings necessitated a formulation focusing on state duties rather than individual rights. However, important progress on the ground came as a result of the 1995 Dayton Peace Accords, which ended the war in Bosnia and included rights for displaced persons “freely to return to their homes of

origin” and to “have restored to them property of which they were deprived.” The next five years saw a methodical push to restore the property rights of Bosnia’s displaced, resulting in the restitution of some 200,000 homes, the return of up to a million people and the first real precedent for large-scale post-conflict property restitution as of right.

The Bosnia experience helped shape such important developments as the 2006 adoption by the UN General Assembly of ‘Basic Principles and Guidelines’ affirming rights to substantive remedies such as restitution in addition to fair hearings.¹ The most specific support for a post-displacement right to restitution came in 2005 with release of the Pinheiro Principles,² which confirmed restitution “as the preferred remedy for displacement” and a “distinct right ... prejudiced neither by the return or non-return” of those entitled to it. Like the Guiding Principles, the Pinheiro Principles set out to reflect accepted principles of international law and have helped fill an important gap for countries serious about addressing displacement.

The UN General Assembly and Security Council have moved towards recognition of a right to restitution and the Secretary-General has called for a more effective response to post-conflict property issues.³ Restitution has also emerged as an increasingly standard component of conflict resolution, whether directly through peace agreements, as in Darfur and Nepal, or through ad hoc mechanisms in Afghanistan, Burundi, Kosovo and Turkey.

However, the acceptance of restitution in principle has raised new challenges in practice. The last decade has seen few examples of unambiguously successful restitution programmes, leaving Bosnia to represent as much an aberration as a precedent. This failure in implementation results in part from politics. Land and property are inherently valuable assets, and local and national authorities may resist their recovery by IDPs. In frozen conflicts, restitution is usually impossible. Thus, while the Security Council has issued a strong statement in favour of restitution with regard to breakaway regions in Georgia,⁴ the recent incursion by Russia has greatly complicated the chances that it will be respected.

Where political will exists, restitution programmes may demand a level of resources and legal capacity that many countries do not enjoy. In countries such as Afghanistan, where landlessness was widespread prior to displacement, or Burundi, where the population has nearly outstripped the available supply of land, restitution proposals should accommodate the imperative of securing equitable access to land for the population as a whole.

A further significant challenge to restitution efforts is the need to integrate customary tenure systems. In many countries, indigenous or tribal groups hold land in accordance with unwritten rules. While traditional systems should be respected, lack of state recognition and formal documentation often complicate restitution claims. Customary systems are often non-transparent or even discriminatory, complicating efforts to ensure that respect for collectively held customary rights does not harm individuals. This tension is reflected in the Great Lakes Pact’s Protocol on the Property Rights of Returnees,⁵ which affirms the right of women to own property without discrimination as well as the rights of rural and

pastoral communities to special protection of their property but fails to provide clear guidance where traditional inheritance systems discriminate against women.

These complications notwithstanding, a great deal has been achieved. Ambitious restitution plans are under discussion for Colombia and Iraq. Experience of the 2004 tsunami and other natural disasters has led to increased awareness that property rights must be respected

in the wake of all displacement. The promise of Principle 29(2) has yet to be completely fulfilled but it is encouraging that a rule that was once judged to be ambitious is fast becoming a routine part of the response to displacement.

Rhodri C. Williams (rcw200@yahoo.com) coordinated monitoring of property restitution in Bosnia with the Organization for Security Cooperation in Europe (OSCE). He drafted Protecting Internally

Displaced Persons: A Manual for Law and Policy-Makers
while working as a consultant for the Brookings-Bern Project.

1. <http://www2.ohchr.org/english/law/remedy.htm>
2. <http://www.cohre.org/store/attachments/Pinheiro%20Principles.pdf>
3. See 'Report of the Secretary-General on the protection of civilians in armed conflict', October 2007
<http://www.un.org/Docs/journal/asp/ws.asp?m=s/2007/643>
4. <http://www.un.org/News/Press/docs/2007/sc9142.doc.htm>
5. http://www.brookings.edu/fp/projects/idp/GreatLakes_IDP_protocol.pdf