

Rethinking Restitution: Commentary



By Terry Rempel

Writing about housing, land, and property restitution in the western neighborhoods of Jerusalem may seem somewhat detached from present realities as Palestinians elsewhere in the city, other territories occupied by Israel in 1967, and across the “Green Line” are struggling to remain in their homes, on their lands, and in possession of other properties. This past June alone, OCHA reported that Israeli demolition of Palestinian-owned structures displaced 108 people (affecting nearly 2,700 others) in the occupied West Bank, including the eastern neighborhoods of Jerusalem, a sevenfold increase over May and the second-highest monthly total this year. Significant as these statistics may be, they likely underestimate the scope and scale of ongoing displacement and dispossession; a more comprehensive accounting would need to consider other causes of forced displacement – eviction, revocation of residency rights, denial of family reunification, confiscation of land, etc. – in addition to the vulnerability of Palestinian citizens of Israel to displacement through application of similar measures.

Yet, as Huda Imam observes in her “Journey through Sheikh Jarrah” in the June issue of *This Week in Palestine*, efforts by settlers to evict Palestinian residents from Jewish claimed properties in the eastern neighborhood of Jerusalem over the past fifty years raise the obvious question of why the state of Israel prevents displaced Palestinians from the western part of the city – including Imam, whose family has title to property in the Baqa’ neighborhood – from repossessing their homes, lands, and other properties. Before answering that question, it is perhaps useful to consider briefly the workings of restitution in Jerusalem since the 1967 war, that is to say, how Jews are able to repossess homes, lands, and properties in one part of the city while Palestinians are denied the same opportunity in the other. A few additional words about developments in the law and practice of housing, land, and property restitution for refugees and displaced persons elsewhere will help place Palestinian claims in broader context.



West Jerusalem

“There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity. The liability of the Provisional Government of Israel to restore private property to its Arab owners and to indemnify those owners for property wantonly destroyed is clear, irrespective of any indemnities which the Provisional Government may claim from the Arab States.”

Count Folke Bernadotte,
UN Mediator on Palestine,
Progress Report,
September 1948.

The legal mechanism for restitution in this particular case can be found in the 1968 Legal and Administrative Matters Law (a consolidated version appeared two years later). The law essentially aimed to address certain anomalies arising from Israel’s military occupation and subsequent application of its law to the eastern neighborhoods of Jerusalem after the 1967 war. This included the status of Palestinian residents, most of whom held Jordanian citizenship, who suddenly became absentees with regard to their homes, lands, and properties under Israel’s 1950 Absentees’ Property Law. Transfer of this property to the state through the Custodian of Absentees’ Property and the Development Authority, the body set up to launder refugee properties after the 1948 war,

may have been desirable from a Zionist perspective. Enforcement of the 1950 law in the eastern part of the city, however, created what Israeli foreign minister Yair Lapid recently described in reference to the demolition of the Bedouin village of Khan al-Ahmar as “international

challenges.” While it remains to be seen how Israel will handle the pending erasure of Khan al-Ahmar, the Legal and Administrative Matters Law provided a solution of sorts to the earlier problem by stipulating that Palestinian residents of eastern Jerusalem – i.e., those registered in Israel’s 1967 census – shall not be regarded as absentees in respect of property situated in “that area” (the significance of the quotes will soon become apparent) of the city. This seemed fair enough, although it should be noted that the Absentees’ Property Law still applied to Palestinians not registered in the census, those whose residency status was revoked by Israel, property owners who resided outside the city, and those who for other reasons were considered enemies of the Jewish state.

The Legal and Administrative Matters Law further stipulated, moreover, that housing, land, and other properties in the city, with few exceptions (e.g., public purpose), had to be returned to their original owners. It was this provision that enabled Jewish property owners to repossess homes, lands, and properties in the Old City and eastern neighborhoods of the city which had been administered since the 1948 war by the Jordanian Custodian of Enemy Property. This again seemed fair enough. Whether Jewish organizations intent on colonizing eastern Jerusalem, rather than the original property owners, should be entitled to claim properties in “that area” of the city before the 1948 war is another matter. More practically, enabling Jews to repossess homes, lands, and properties in the eastern neighborhoods of Jerusalem raised the prospect that Palestinian residents of those same neighborhoods who

originated from the western parts of the city – estimated to comprise around a quarter of the population of eastern Jerusalem in 1995 – would use the law to claim their own homes, lands, and other properties in the western neighborhoods. In short, Israel prevented this from happening by restricting the application of this provision in the Legal and Administrative Matters Law to the eastern part of Jerusalem, which the law referred to discretely as “that area” of the city. Incidentally, it was the non-application of the 1950 Absentees’ Property Law to Jewish absentees after the 1948 war that prefigured the differential and discriminatory treatment of Palestinian claims in the western neighborhoods of Jerusalem two decades later.

This was not what the United Nations Mediator, Count Folke Bernadotte, had in mind when he recommended in his September 1948 *Progress Report* that the UN affirm “the right of the Arab refugees to return to their homes” and that a conciliation commission be set up “to supervise and assist their repatriation, resettlement and economic and social rehabilitation and payment of compensation for the property of those choosing not to return.” These recommendations also covered the comparatively smaller number of Jews displaced within and from Palestine as a result of the 1948 war, including those who owned homes, lands, and other properties in the eastern neighborhoods of Jerusalem. To what degree the Swedish diplomat who negotiated the release of prisoners from German concentration camps only a few years earlier was influenced by precedents being set in Europe regarding the restitution of property after the Second World War

Principle 2 - The right to housing and property restitution

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.

United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005)



is unclear, although it is likely that his small team of advisers, including Ralph Bunche, principal secretary, and legal adviser Constantin Stavropoulos were well aware of these precedents. Bernadotte's recommendations formed the basis of a series of American, British, and UN draft texts that eventually coalesced on December 11, 1948 into General Assembly Resolution 194. In its *Analysis of Paragraph 11 of the General Assembly's Resolution of 11 December 1948* (1950), the UN Conciliation Commission for Palestine (UNCCP), the body set up to facilitate the implementation of Resolution 194, observed that "if refugees not returning are to be compensated for their property, those returning would re-occupy their homes and be compensated for losses and damages." During the debate, the British representative, when asked, specifically stated that these provisions applied to refugees from the western neighborhoods of Jerusalem.

Paragraph 11 in many ways prefigured developments in law and practice governing solutions for refugees and displaced persons fifty years later when the Palestine Liberation Organization and the state of Israel signed the 1993 Declaration of Principles. From the beginning of the 1990s, a plethora of UN bodies – the International Law Commission, human rights treaty committees, the Commission on Human Rights and its Sub-Commission on the Protection and Promotion of Human Rights, the Security Council, the General Assembly, the Economic and Social Council, the Office of the High Commissioner for Refugees, and peace-building missions – addressed a range of issues relating to housing, land, and property restitution,

including its application to refugees and displaced persons. Restitution principles and procedures could also be found in peace agreements around the world as part of a standard package of elements widely recognized as central to durable solutions for refugees and displaced persons. While the 1990s may have been the decade of repatriation, as then High Commissioner for Refugees Sadako Ogata described the period, the 1990s might also be described as the decade of housing, land, and property restitution. The difficulties which refugees and displaced persons encountered along the way and an assessment of the outcome of their efforts to return to their homes, reclaim lands, and repossess other properties are significant matters that have been elaborated by others elsewhere.

These were among the precedents for Palestinian claims referred to in *Jerusalem 1948: The Arab Neighbourhoods of the City and their Fate in the War* (1999, 2002), an edited collection of studies published by the Institute of Jerusalem Studies and the BADIL Resource Center for Palestinian Refugee and Residency Rights on the eve of final status talks between Israel and the PLO. The project aimed to shed light on a chapter in the modern history of Jerusalem which is often overshadowed by the ongoing struggle of Palestinians to remain in their homes, on their lands, and in possession of their properties in the eastern neighborhoods of the city since the 1967 war. Presenting initial findings from the joint initiative along with information about a related film entitled *Yoom Ilak, Yoom Aleik: Palestinian Refugees from Jerusalem, 1948: Heritage, Eviction & Hope*, BADIL's newsletters from

Land Ownership in the Western Area of Jerusalem under Israeli Control

| Type | Area (dunums) | Percent of total area |
|-------------------------------|----------------|-----------------------|
| Palestinian Arab | 5,478 | 33.69 |
| Jewish | 4,885 | 30.04 |
| Other (Palestinian religious) | 2,473 | 15.21 |
| Government & Municipal | 402 | 2.47 |
| Roads & Railways | 3,023 | 18.59 |

Land Ownership in the Villages of Western Jerusalem

| Village | Palestinian Arab (dunums) | Jewish (dunums) |
|-------------|---------------------------|-----------------|
| 'Ayn Karim | 13,667 | 1,362 |
| Deir Yassin | 2,704 | 153 |
| Lifta | 5,396 | 756 |
| al-Malha | 5,906 | 922 |

■ Source: Jerusalem 1948: *The Arab Neighbourhoods and their Fate in the War*, Jerusalem: Institute of Jerusalem Studies and BADIL Resource Center for Palestinian Residency & Refugee Rights, 1999, 2002.

the period also carried stories about the colonization of Sheikh Jarrah and Silwan, revocation of residency rights, and denial of family reunification along with Palestinian efforts to prevent the destruction of what remained of the village of Lifta, one of four villages depopulated during the 1948 war and subsequently annexed to the western part of Jerusalem. The book also sought to provide context for concepts and realities – e.g., the

terms "East" and "West" Jerusalem and demographic division of the city (before colonization of the eastern neighborhoods) – which appeared beyond question – at least in terms of the discourse in which the Middle East peace process was framed – by the time Palestinians and Israelis gathered around the negotiating table in the 1990s to resolve their deep and long-standing differences.

Also notable in terms of restitution principles, though hardly mentioned in the literature on Palestinian refugees during the period, including my own contributions, was the 1993 Abuja Proclamation adopted by the first Pan-African Conference on Reparations for African Enslavement, Colonization and Neo-Colonization. Sponsored by the Organization of African Unity and its Reparations Commission, the proclamation captures the essence of what many Palestinians today refer to as their *ongoing Nakba*. Conference participants declared that they were “fully persuaded that the damage sustained by the African people is not a ‘thing of the past’ but is painfully manifest in the damaged lives of contemporary Africans from Harlem to Harare, in the damaged economies of the black world from Guinea to Guyana, from Somalia to Surinam.” German reparations to Jews (individuals, organizations, and the state of Israel) after the Holocaust recalled in the proclamation were also among the precedents that the UNCCP identified as important to Palestinian refugee claims after the 1948 war. Significant here, of course, is that the precedent-setting Luxembourg Agreement between Germany, the state of Israel, and Jewish organizations was being negotiated at the same time that the UNCCP was seeking an agreement to repair the losses suffered by refugees as a result of the 1948 Arab-Israeli war. Sami Hadawi, who worked in the Department of Land Settlement during the British administration of Palestine and as a land specialist with the UNCCP, along with the Arab economist Atef Kubursi drew upon the same precedent some thirty years later in *Palestinian Rights and Losses in 1948: A Comprehensive Study* (1988). Emphasizing that no financial award, however large,

could compensate fully for the loss of a homeland, they argued that an accurate assessment, which included both material losses and human suffering, would provide an indication of the magnitude of the 1948 *Nakba*. Notably, they added that assessment of losses suffered since then would require a separate investigation. The establishment of a World Jewish Restitution Organization to pursue claims in post-Communist eastern Europe in the 1990s, along with campaigns for the release of dormant accounts in Swiss banks and reparations from German companies for slave labor, reignited interest in German reparations as the Middle East peace process got under way. It was these precedents that refugee activists, Palestinian unionists, politicians and personalities in national institutions, researchers, NGOs, and independent figures in Palestine also drew upon in a petition entitled *Restitution: A Basic Human Right*, issued on the eve of final status negotiations between the PLO and Israel. The petition continued a long and diverse tradition of Palestinian resistance to displacement and dispossession, much of which has been overlooked and ignored in conventional accounts of high-level negotiations that have attempted to find solutions to the so-called refugee problem – not necessarily the problems faced by refugees.

The losses suffered during the *Nakba*, as Sami Hadawi, Atef Kubursi, and so many others have

pointed out, extended well beyond the loss of homes, lands, and other properties. This is evident in the descriptions of pre-war life in the western neighborhoods of Jerusalem and surrounding villages of the city found in the chapters of *Jerusalem 1948*, many of which rely upon memoirs and oral history interviews with displaced residents. The displacement and dispossession of Palestinians from Baq’a, Qatamon, Talbiyeh, the Greek Colony, and the many other neighborhoods that make up the western parts of the city marked “the loss of an entire world that exemplified Jerusalem and Palestine” before its conquest during the 1948 war and subsequent dissolution. As Salim Tamari observes in the introduction to the book, Jerusalem was “a city of considerable social mobility, of ethnic diversity, and of communal conflict that was tempered by a fair amount of mutual dependence on local solidarities.” The map of real estate holdings in

the western neighborhoods (attached to the book), which Sami Hadawi, himself a refugee from Qatamon, first prepared for the New York-based Palestine Arab Refugee Office in the late 1950s (one of the numerous initiatives mentioned above), reflects the emerging realities in Jerusalem as described in the book on the eve of the 1948 war. Tamari’s further observation that the portrait of the city is one that today is unrecognizable – an observation that can hardly be overstated – further underscores the limitations of a narrow definition of restitution centered on the return of homes, lands, and other properties, as significant as these may be.

It is this broader loss that Palestinian representatives, such as jurist Henry Cattani, a refugee from the Baqa’ neighborhood, along with Arab and other allies, perhaps sought to redress through demands during the drafting of Resolution 194 that paragraph 11 also address the

■ Kassissieh family building in Qatamon.



economic, social, and political rights of the refugees. From their perspective, in addition to the individual rights of return, restitution, and compensation, the resolution should have also affirmed the right of Palestinians as a people to return to their homeland, a demand that took another twenty-five years of struggle to codify in General Assembly Resolution 3236 (only to be vetoed by the United States in the Security Council) and one which remains, in practice, unrealized to this day. It is this broader definition of restitution, that is to say, restitution as decolonization that resonates in the findings of a recent (2018) BADIL survey of refugee and internally displaced youth in Palestine, Israel, and major Arab host countries. While many youth struggled to conceptualize what return would look like in practice, something that the editors of the *Survey of Palestinian Refugees and Internally Displaced Persons* (vol. 9) attributed to inadequate or absent discourse of return, most respondents nevertheless “recognized that physical return alone is not enough; that return must be sustainable and create an environment that not only addresses the injustice, but fulfills the social and economic rights of the returnees.” In addition to property documentation and socioeconomic rehabilitation they also identified reparations for the various crimes and violations arising from colonization as the most important problems to be addressed once their return has been realized.

Reading news about the ongoing *Nakba* in Jerusalem over the past few months, from forced evictions and demolitions to revocation of residency rights along with Palestinian efforts to preserve what remains

of the depopulated village of Lifta, from the vantage point of Canada, where stories of the unmarked (and yet to be identified) graves of well over a thousand Indigenous children (and most likely many more) who perished in church-run residential schools funded by the government have filled (and fueled) the news over the summer, I am reminded of Tom King’s (2012) observation in *The Inconvenient Indian: A Curious Account of Native People in North America*. “Most of us think that history is the past. It’s not. History is the stories we tell about the past.” Summarizing his narrative journey through hundreds of years of Indigenous history, King, an Indigenous author, activist, and academic from the Cherokee Nation, concludes that “in terms of attitudes, in terms of dispossession and intolerance, nothing much has changed. [History] turns out to be our present. It may well be our future.” I am also reminded of the observation made by Elias Sanbar, the Palestinian historian and author of *Palestine 1948: l’expulsion* (1984), in the French language daily *Libération* on the eve of Israel’s 1982 invasion and the massacre of refugees in Sabra and Shatila that “Palestinians are the American Indians of the Jewish settlers in Palestine. In their eyes,” Sanbar writes, “our one and only role consists in disappearing.”

Why are these observations important and what do they have to do with Palestinian restitution in the western neighborhoods of Jerusalem? Simply put, they bring to fore an analytical framework that is absent from much of the scholarly and policy production in recent decades on housing, land, and property restitution for refugees and displaced persons, with the notable exception of comparative

work on South Africa. Of course, settler colonialism in Palestine has its unique features – the presence of an indigenous Jewish population that predates Zionist colonization, the impossibility of non-Jews to assimilate within the Jewish state, and one of the world’s largest refugee populations (exceeded only in recent years by Syria), to name a few – but this is no different from other settler colonies and should not preclude considered comparison of the phenomenon. Understanding settler colonialism as “structure and not an event” with land as its “specific, irreducible element,” as Patrick Wolfe so usefully explains in “Settler Colonialism and the Elimination of the Native” in the *Journal of Genocide Research* (2006), arguably helps to better explain Israel’s ongoing dispossession of Palestinians in Jerusalem, elsewhere in the territories occupied by the Jewish state since 1967, and across the “Green Line” since the 1948 war. The analytic also helps to explain the country’s domestic legislation – from the 1950 Absentees’ Property Law and 1970 Legal and Administrative Matters Law to the plethora of Basic (Constitutional) Laws governing Israel Lands (1960), Human Dignity and Liberty (1992), and Israel as the Nation-State of the Jewish People (2018) – under which restitution is virtually impossible.

While there is a rich body of early literature to draw upon, most notably, the writings of Fayeze Sayegh, complemented by an emerging corpus of new research, some of which can be found in the journal *Settler Colonial Studies*, the challenges of restitution for Palestinian refugees and displaced persons, including those who originate from the western

neighborhoods of Jerusalem, in a settler colonial context, whether historical or today, have barely been touched upon. Fruitful areas of inquiry might include a more critical consideration of international law, the colonial origins of important doctrines like sovereignty in particular; whether and how the handling of Indigenous claims by settler colonies like the United States and Canada impinge on their respective foreign policies regarding housing, land, and property restitution for Palestinian refugees; the roles that wider solidarity movements have and continue to play in reparations for colonialism (and its settler colonial variety); comparative research on restitution as decolonization in Africa (beyond post-apartheid South Africa), Asia, and the Americas; and, lastly, consideration and foregrounding of Indigenous resistance to dispossession and their struggles for reparation. This is not to dismiss the value of existing research, only to emphasize that in the absence of a settler colonial analytic, research on housing, land, and property restitution for Palestinian refugees is arguably ahistorical and incomplete, which in turn raises critical questions about its policy relevance.

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