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The operational tensions in using compensation to resolve wartime mass property claims

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Abstract

The inclination to pursue monetary compensation to solve difficult large-scale housing, land and property (HLP) claims problems resulting from wartime population dislocation as part of peacebuilding efforts has become common in recent years. Certain donors, countries, militaries, NGOs and policy organisations see compensation as a relatively quick, easy and conclusive solution to massive numbers of destabilizing HLP claims. This article examines such a preference and finds that while the international legal, human rights and moral foundations for using compensation in this way are significantly developed, a series of operational tensions exists that preclude compensation from being the easy remedy it is often thought to be.

Introduction

Large-scale forced dislocation of civilians from housing, land and property (HLP) is a primary feature of armed conflict, with refugees and internally displaced persons (IDPs) numbering in the millions in contemporary wars. In response, two remedy sets are currently pursued by the international community to manage mass-claims of HLP subsequent to wars in the context of peacebuilding--restitution and compensation. While restitution is the favoured political remedy for a segment of the international community, in many circumstances restitution is difficult or impossible, leaving compensation as the perceived most straightforward and easily achieved option. The advantages of compensation as a remedy for dealing with loss of access to HLP in war-affected scenarios are often thought to be significant. However despite its presumed utility for resolving difficult HLP issues and the seeming ease of implementation, there are actually a set of fairly significant operational tensions to the wished for role of compensation in addressing post-war HLP problems. While the literature on the different approaches, legalities, strategies and techniques for using compensation in a wide variety of (usually stable) settings is large--albeit dated--this paper focuses instead on the challenges involved in attempting to actually implement compensation schemes for HLP claims in war-affected scenarios. The examination highlights that such challenges exist as a set of unresolved operational tensions involving opposed needs, goals, forces and processes. Recognition of such tensions is important because the idea of HLP compensation currently has an inordinately strong appeal to certain audiences—a good number of international agencies, most secondary occupants, some governments, but particularly the displaced. As a result there is a need for greater clarity on how practicable and achievable just com-

pensation can be as a sustainable remedy. Subsequent to an overview of compensation versus restitution, forms of compensation, and mass claims processes; the paper groups the primary tensions into two broad categories: political/policy, and technical. This is followed by a concluding section.

Compensation versus restitution

The distinction between HLP restitution and compensation is an important one, given the strong preference of international law and convention for HLP restitution instead of compensation. Restitution is broadly understood to mean the return of dislocated persons to their original HLP. Compensation on the other hand is payment of some kind usually in lieu of returning home. While some of the literature can use the term restitution to describe an overall HLP remedy process which can include compensation, this paper separates the two, as does much of the work on the topic. This separation is relevant because returning home and being paid to foreclose any further possibility of returning home, are two profoundly different options with different repercussions.¹

The priority for restitution in international law and convention exists to a significant degree because restitution creates the conditions for displaced persons to exercise the human right of return (e.g. Hurwitz et al. 2005). The Pinheiro Principles, a broadly accepted set of benchmark approaches to war-affected HLP, asserts that restitution should be the priority over compensation. However as elaborated below, problems can arise when the preference and intention of those who are displaced runs counter to this priority. From the viewpoint of international convention, compensation for loss of HLP runs the risk of solidifying and making legal, human rights violations involving forced dislocation from HLP (e.g. GIZ, 2018). From this perspective only when restitution is not possible, may compensation be more viable (e.g. Hurwitz, et al. 2005; Leckie, 2003a).²

Apart from the preferences of the various parties involved, other distinctions between restitution and compensation are important. The two remedies comprise different types of capital. For HLP restitution to take place political capital is spent, for compensation financial capital is spent (Williams, 2007). However indicating to those who do want their land back that they will instead receive compensation, can be costly politically. Which is easier to gather and spend in specific cases? And importantly which is favoured by the agendas of the (often numerous) different actors who may stand to gain or lose if one option is pursued over the other? Both compensation and restitution can be seen as ‘rights’ in different contexts, thus obliging governments and the international community to respond. The invoking of compensation as a right, can, if the numbers of claimants and the amounts to be compensated are large, position governments and the international community in some difficulty. This is because compensation is usually impossible to deliver in a timely, appropriate way for all claimants who feel they deserve it, in the

¹At times compensation is seen as augmenting restitution such as for damage to HLP (Leckie 2003b). This paper focuses on the use of compensation in lieu of restitution, which is the primary distinction.

² However even when restitution is pursued as the priority, there can be compensation issues, such as in the event of evictions of either good faith purchasers or secondary occupants who occupy due to shelter needs (IOM, 2008).

amounts deserved; particularly given that compensation funds are frequently promised without certainty that they will in fact be available (e.g. Hurwitz, et al. 2005).

Part of the problem in the delivery of compensation can be the overlooked but important difference between compensation processes built for stable settings and those to be used in scenarios of recovery from armed conflict. For the former, the stability of law, economics and politics, but particularly the planned and precise nature of the dislocation, allow for the use of a wider array of techniques for compensation. Such HLP dislocations are usually due to an eminent domain or development activity where the government (or government together with an international investor or donor) is clearly the initiator of the dislocation and so is plainly the party that should provide compensation and often has planned for it. For the latter (war-affected scenarios) the dislocations are much larger, occur over a much bigger area, and are usually forced (often violently), sudden and unplanned, and occur over time. As a result the numbers of claims to be compensated are much greater, as is the variation in types of HLP affected, and the party responsible is often unclear or one or more of the belligerents in the conflict with no intention or motivation to provide compensation. As well the socio-political situation is much more unstable and fraught, requiring types of security, livelihood support, diplomacy and pressure not needed in stable settings. Further, a variety of issues can be brought to the fore over the course of a war that can greatly complicate compensation programmes in recovery scenarios—ethnic, tribal, geographic, militia, religious and class animosities; the collapse of institutions; the calls for retribution by constituents to the different sides in the war; and the presence of foreign interests and agendas. This distinction is particularly problematic when approaches, techniques, and calculations for compensation programmes designed for stable scenarios are imported into war-affected settings (e.g. ADB, 2007). The poor fit of such approaches can complicate and even aggravate efforts at using compensation in recovery efforts (Iraq, Colombia and Syria are arguably examples of this). At the same time there is almost always a lack of national laws in affected countries able to facilitate wartime-related compensation at the magnitude, breadth and speed needed in volatile contexts (e.g. NRC, 2018); highlighting the need for either new laws to be derived and passed, or for international (transitional justice) law to be applied.

Forms of compensation

Cash is the most direct form of compensation and arguably what most dislocatees who desire compensation consider best. Practice has shown however that rarely is cash compensation used by recipients to acquire replacement HLP, and can instead become a reason for being homeless (Leckie, 2003b). And providing cash compensation to those whose livelihoods depend on access to specific types of land, such farmers, pastoralists or forest dwellers, does little to resolve displacement problems, as compared to compensation in the form of alternative land access (Bagshaw, 2003). Provision of alternative HLP as a form of in-kind compensation can be tempting, particularly if a country appears to have an abundance of land to offer as alternative farmland or to build housing on. However, such initial appearances are often misleading. In countries afflicted by armed conflict, there are frequently already pronounced information and administrative deficits that makes reallocating lands extremely complicated and confused. Often there is a lack of cadasters, maps and land surveying services. Databases, if they exist, can be poorly functioning. There can be disorganisation and non-cooperation between different government institu-

tions responsible for land allocation, resulting in the same land being allocated to different parties. And because indigenous and customary claim and control of lands are usually not recorded, they can appear to be unoccupied and so available to be used in alternative land compensation schemes. The result is that the government cannot control, allocate, or use for compensation, lands that it does not know exists and are not mapped or registered.

Mass claims programmes for HLP

Few countries emerging from conflict are legally and administratively prepared for processing large numbers of war-related HLP claims, whether for compensation or restitution. As a result the international community has developed specific approaches to conducting mass claims HLP processes (e.g. Holtzmann and Kristjansdottir, 2007; van Houtte, et al. 2008; IBPCA, 2006). While internationally supported processes have become the norm, this does not prevent individual countries from attempting to conduct the process on their own (NRC, 2018). However there can often be a trust issue when there is use of only domestic compensation and restitution institutions, laws, and governance, particularly if the state was a party to the conflict and hence dislocations. Claimant suspicions regarding fairness, hidden agendas, capacity and corruption can negatively impact domestic compensation programmes (Cano, 2009).

The international and national legal foundations for engaging in large-scale HLP claims programmes has become significantly established, and contemporary peace-building efforts have highlighted the importance of rapid, transparent and just claims processes in order to attend to population-wide grievances and secure an enduring peace (e.g. Schwebel, 2007; Das and van Houtte, 2008). The claims process itself is based on a set of transitional justice measures involving the application of legal concepts and procedures tailored to the transitional nature of postwar HLP claims application from thousands to hundreds of thousands of returnees (e.g. IOM, 2008; Karrer, 2005; Hurwitz, et al. 2005). The usual approach for operating a mass claims programme for HLP is through a specialised 'land commission' or similar institution. Often derived by decree or as part of a peace accord and comprised of judges, advisors and technical legal personnel, a land commission in a war-affected country is usually recommended and supported by the international community; with legitimacy and legal basis drawn from both domestic and international law (Das and Van Houtte, 2008; Holtzmann and Kristjansdottir, 2007).

A brief review of the tension which exists between the ideals of the current rights-based approach to HLP mass claims and the technical realities of operating the claims process itself is relevant to the compensation remedy. While the international actors seeking to establish and promote best practices for HLP mass claims are clear that the overall purpose of the process is,

to provide real justice to the victims of the events which gave rise to the claims, and to allay the disruptive discontent within a nation or society that unresolved wrongs perpetuate (IBPCA, 2006),

the operational objective is to close out as many claims as possible as quickly as possible, in order to mitigate the negative repercussions that large numbers of open HLP claims have on society and governance. While the two goals are similar there is considerable tension between providing justice to all that deserve it, versus managing the volume of claimants in balance with

available funds in order to provide ‘just enough’ compensation to satisfy a claimant and close the claim. The practical constraints of a mass claims programme with compensation as a primary remedy (limited time and money, limited alternative HLP, large numbers of claimants, high operational costs) means that the funds and alternative HLP that are available must be stretched as far as possible, primarily by reducing the volume of claimants and providing as little as possible to each claimant in order to satisfy (and close) claims (e.g. Toal and Dahlman, 2011; GPC, 2020). As Karrer (2005) notes, “rough justice is inevitable in mass claims. The only question is how rough? How can one maximise justice for the available money?” Pursuing compensation as a primary remedy in a claims process will make this tension particularly acute, given that the gap between the aspirations of a compensation scheme to resolve difficult large-scale HLP problems together with the expectations of claimants, versus the reality of actually making it happen is usually always quite large.

There are a variety of approaches to managing (reducing) the volume of people who are due compensation in mass claims programmes. And while there is usually operational pressure to reduce the volume as much as possible, there is a balance between reducing the number of people to be compensated (and/or reducing amounts awarded) so as to not run out of funds, versus excluding so many people (or paying so little) that socio-political problems result. Determining this balance can be difficult, and the cost for getting it wrong can be high. One common way to manage the numbers are to derive rules for eligibility, such as to insist that formal legal title to HLP be held in order to receive compensation. This excludes many customary, informal and indigenous claimants but makes proof and evidence much more simple (ADB, 2007). Other approaches include, establishing cutoff dates for submitting claims, or cutoff dates for dislocation events (becoming dislocated prior to or after a specific date disqualifies a claim), or excluding claims from certain geographic areas. Other approaches include failure to pay court fees or placing an onerous burden of proof or other conditions on the claimant (NRC, 2008). In Ukraine there was a rule that titles to HLP needed to be transferred to the state in order to receive compensation funds. Many claimants were unwilling to do this and so their claims were rejected on this basis, thus reducing the volume of claims (NRC, 2008). From a strictly operational point of view, there is an optimal space where perceived justice, available compensation funds, ease of claims processing, time, and minimal social unrest at being excluded, come together to facilitate closing as many claims as possible as quickly as possible. Attaining and operating within this space in a mass claims process however is not what claimants expect. Instead claimants often expect a windfall, particularly if international actors are involved. And in scenarios where compensation is provided in lieu of restitution, claimants may still assume future access to their HLP, not understanding fully that such HLP will be in the hands of others and there may be little legal recourse available to them. This disconnect between the expectation of claimants and the realities of compensation in HLP mass claims programmes can become unwieldy and difficult to resolve, and produce significant socio-political repercussions particularly if claimant numbers are high.

Political and policy tensions

Buying a political solution to displacement versus solidifying HLP violations

A particular tension that can accompany compensation as a form of HLP claims resolution is the relationship between resolving political problems involving HLP with compensation,

versus solidifying HLP human rights violations. Forms of ethnic, sect, or geographic cleansing, while clear HLP human rights violations, are also significant political problems and can in reality be difficult to reverse. While the temptation can be to try to use compensation to resolve the overall HLP dilemma by paying those who have been dislocated, the argument that this would solidify (and possibly reward) HLP human rights violations is a real difficulty, particularly for some international actors who will be influential when it comes to sourcing compensation funds. A variation of this problem occurs in cases where evictions of large numbers of secondary occupants would create additional political or social problems, with this becoming more important after long periods of time as HLP is occupied by others over the course of generations and claims solidify, facts on the ground increase, and HLP changes hands multiple times in a good faith context. The case of Cyprus is an example of this, where the status quo in terms of HLP occupation is seen by some parties as the preferred way forward (ICG, 2014).

Politicisation of displaced populations can also take place--with different actors using such populations as pawns in a broader political contest, thereby either opposing or supporting compensation. In Bosnia certain Bosniak politicians worked against compensation because they needed displaced Bosniaks to return to their HLP in order to pursue political agendas. At the same time certain hardline Serb and Croat actors were against restitution so as to consolidate the gains made in ethnic cleansing.

International and national political and legal alignments

The ease with which compensation can be recommended belies the difficulty of the international and national alignments that must occur for HLP compensation to actually occur. While international bodies may support compensation as an appropriate remedy, the more operational aspects of eligibility and amounts to be paid (while influenced by international actors) must usually be decided in national fora (commissions, courts) due to issues of sovereignty (Tomuschat, 2005). The alignment needed between international and national institutions, law, politics, financing, and responsibility can, depending on the case, be quite difficult, time consuming, and encounter contradictory modes of operating and objectives. Part of the difficulty can be that the granting of compensation to individuals, particularly to nationals of a state where the government engaged in the act for which compensation is due (forced HLP dislocations, destruction, confiscation) can be based in international law, but must be carried out by national laws and institutions and with national legal decisions regarding eligibility (Tomuschat, 2005). The tension can arise when a government which was one of the belligerents in a conflict is reluctant to take political or financial responsibility for its actions but the international community desires it. In such cases government participation in a compensation programme can be considered an implicit acknowledgment of guilt and responsibility for forced dislocation, and thereby a commitment to compensation, at least in principle (Baldo and Magarrell, 2007). This reluctance can also be an issue when a new government subsequent to a war is unwilling to take responsibility for the actions of its predecessor (Tomuschat, 2005). The lack of political alignment between national and international actors can present a range of problems involving: international sourcing of funds, accountability, and a lack of progress in resolving large numbers of outstanding claims. The case of Cyprus is an example of the role of political alignments in compensation efforts. There is considerable non-alignment between the Greek and Turkish sides to the problem in terms of where

claims should be lodged, amount of compensation due, how other forms of redress should occur, and what the role of the international community along with the governments of Greece and Turkey should be. The result has been a longstanding and nearly intractable problem with multiple attempts at compensation proving very problematic (ICG, 2014). And in Sri Lanka there is considerable international and national non-alignment in terms of responsibility for HLP dislocations and confiscations, and hence compensation (Unruh, 2019).

An additional political tension is that HLP compensation schemes, like restitution, can be caught up in wider peace process issues, which can significantly complicate, delay, and make more costly HLP compensation efforts. Fischbach (2006) describes how Palestinian refugee claims for compensation have been frozen for decades because HLP claims have been attached to wider issues involving the peace process. This can also be a problem if HLP issues are part of peace negotiations, particularly if the prospect of moving forward with compensation has become part of the negotiations themselves—with preventing compensation as much a part of negotiations as supporting them. This can be especially the case where the constituency to one side of the war will clearly gain by a compensation programme and another side will need to pay (Fischbach, 2006). Along similar lines, enlarging HLP compensation to include forms of reparation (punitive payments by a guilty party) likewise will complicate purely HLP claims for compensation (Fischbach, 2006). HLP compensation also can become problematic when it is connected to or confused with compensation for non HLP issues—such as over personal harms, damage and loss of movable property, or loss of income or livelihood (Fischbach, 2006). The degree to which types of non-HLP compensation are tied to HLP issues can significantly complicate, delay and make more costly compensation objectives.

Additional tensions can be problematic. The differences in how HLP is viewed (commodity or social good), estimations of value, amount of damage or destruction to be compensated, the amount of compensation due, along with the legalities involved (often a mix of national and international) can become so bound up in wider political and historical issues that the compensation process can be held up for decades, or indefinitely (Fischbach, 2006; ICG, 2014). And to the significant displeasure of international actors who promote compensation on moral and legal grounds or because it appears straightforward, HLP compensation processes can embody (and attract) a wide variety of actors whose agendas and actions to influence the process are well outside of the control of well planned programmes—with significant repercussions.

Low capacity institutional and administrative settings with heavy bureaucratic burdens

A common feature of many HLP compensation programmes has been that the bureaucratic burden of organizing and implementing a large-scale claims and compensation programme can be well beyond the institutional and administrative capacities of national (and at times international) organisations that are to carry it out. Such programmes require a capacity significantly different than that needed during peacetime. Without a large and quick increase in capacity, the result can be long delays, poorly organized and implemented procedures, poor disbursement of funds, and opportunities for corruption. Bureaucracies then become overwhelmed, bogged down and non-functional; with claimants losing confidence and trust in the programme (ADB, 2007; Hay, 2017). This can then encourage claimants to pursue their own forms of remedies

(some of which can compromise stability) and allows for the entry of certain political actors seeking to take advantage of a large number of disgruntled claimants.

While an adequate increase in capacity (both scope and speed) can be realized with sufficient international support, engineering such support can be complicated and political. The primary tension here is that, the process needs to be nationally owned due to issues of sovereignty, history, legality and sustainability of decisions, while at the same time international support can come with agendas or conditions that seek to influence the overall approach, decisions and outcomes. Ultimately the degree and type of international support provided is the result of negotiation between national and international actors which is more ongoing than definitive in nature. The outcome of such negotiations frequently results in an inadequate overall capacity to effectively implement the claims - compensation programme.

A related problem is the creation of overly bureaucratic procedures and processes in a low capacity setting. Darfur is an example where the proposed bureaucratic structure of determining eligibility and amounts to be compensated for the large-scale dislocation was well beyond the administrative capacity of the government to enact. With a Legal Committee and a Commission of Voluntary Return comprised of three branches--Commission of Return, Compensation Fund, and Repatriation--the programme had the added burden of significantly insufficient funds (RW, 2011). Iraq is another case of a very heavy bureaucratic burden in a relatively low administrative capacity setting, resulting in a “tremendous backlog” of cases (GPC, 2020). One manifestation of this problem is poor communication with recipients, resulting in a low understanding and hence trust in the compensation scheme. If dislocatees are unaware of a plan, or do not believe the plan they are aware of, or believe it to be unachievable due to their own experience with the government’s low capacity, then their engagement will be problematic (Hay, 2017). This communication capacity can be particularly important in war-recovery settings, where HLP owners can be widely scattered in different countries, in different states of isolation, and of highly varying education and ability to engage in communication. In the case of Iraq the majority of IDPs, returnees, and stayees in one study indicated that they were unaware of the procedures for filing claims and obtaining compensation, did not understand their rights, and thought that the laws of compensation did not apply to them (GPC, 2020). Such a communication deficit is then ripe for rumour and political manipulation, which in the Iraq case included the notion that pursuing claims would come at a financial cost for claimants and anger the authorities, or that astronomical amounts were being given for compensation (Hay, 2017).

A common feature in such a mismatch in administrative capacity and bureaucratic burden occurs when national procedures are set up to examine claims one at a time, as opposed to organizing claims into categories so that a single legal decision can be rendered for each category. Such situations can focus on the integrity of the law and investigating the veracity of individual claims, and do not take into account the administrative capacity needed to do this quickly for thousands or hundreds of thousands of claims, or the socio-political repercussions of not engaging in mass claims in a timely manner (RWG, 2020). In the Iraq case, arduous and time consuming procedures are in place for a case-by-case examination of claims, just to be selected for eligibility. And once eligible, compensation is to be paid to claimants only when funds become available (RWG, 2020). Such delays or ambiguity in providing compensation to recipients risks disaffecting the general recipient population (Haersolte, 2006). Cyprus is a case where declining

compensation claims applications over time made to the Immovable Property Commission was most likely due to the long delays in the payment of compensation (Erdem and Greer, 2018).

Another feature of this mismatch is non-coordination between different parts of government, and between government and international organisations. The siloing and non-coordination in national institutions can lead to dysfunction in claims programmes--such as when one governmental institution decides on eligibility and instructs another to find money or alternative HLP for compensation, with the latter having no real ability to do this. The Southern Yemen Land Commission's efforts to engage in HLP compensation with alternative lands (prior to the Houthi incursion) is an example of this, with low administrative and coordination capacity resulting in decisions made by the Commission being passed to certain ministries to implement by coming up with alternative lands. But with the ministries having no ability to know where lands were located, how much land is involved or claimed by whom, or the proximity of any alternative lands to services, this resulted in significant discord between government units involved in the process and no progress on compensation.

Similar coordination capacity problems occur with the existence of both national and international laws and institutions attending to compensation. This can result in duplication of payments to individuals as specific HLP owners seek compensation from more than one institution, level, law, or organisation (GPC, 2020). Avoiding this requires capacity and bureaucracy in order to coordinate the different compensation efforts and screen out duplicate claims. Legal coordination is likewise needed between the claims process and domestic law. If the claims process operates by a special temporary commission designed and implemented just for the processing of HLP claims due to a recent conflict, then the interactions between the temporary legislation (e.g. decrees, etc.) with existing national law regarding HLP will need to be delineated; such as which laws prevail in which circumstances, the end date of a decree, etc. If however the new legislation is intended to be permanent, then the contradictions, overlaps, and other relevant interactions with existing laws will need to be dealt with. Failure to resolve such interactions then opens the door to manipulation of the claims process, corruption and confusion. In both cases the challenge is that significant capacity, time and money are needed for this legal reconciliation to occur (IOM, 2008).

International preference for restitution versus dislocatee preference for compensation

As briefly noted earlier one of the broader policy challenges is the apparent disconnect between the preference of international (and at times national) law, policy and refugee/IDP hosting countries and communities for the return of dislocatees to areas and HLP of origin (restitution) on one hand, and the preference of many of the displaced to remain where they are on the other—with the implication being that they prefer compensation instead of restitution.

However this international priority does not focus on the preferences of dislocatees themselves. The UN Sub-Commission on the Promotion and Protection of Human Rights makes a point of noting that compensation should only be considered for, “any housing, land and/or property that is factually impossible to restore” (UNSCPPHR, 1998); not, it should be noted, according to the preference of the dislocated. However a variety of intention surveys and profiling exercises carried out among dislocatees from a number of refugee producing countries (Kosovo, Somalia, Colombia, Honduras, Guatemala, Ukraine, Iraq, Afghanistan, and Serbia among others)

have revealed a strong preference for staying in the locations they were dislocated to or moving to new locations instead of returning to areas of origin and pursuing restitution (JIPS, 2018, 2015a, 2015b; NRC, 2020; JIPS, 2016; JIPS, 2012; Williams, 2007). In such cases compensation would be the preferred approach to resolving their HLP claims due to their forced dislocation. In Iraq the focus of the relevant laws (Law 20 of 2009; 57 of 2015 and 2 of 2020) is only for compensation for IDPs whose properties “were affected by war-related incidents” (GPC, 2020), and does not include an IDP ‘preference’ for compensation instead of restitution. This means that if one’s HLP is intact but there are no services—water, schools, food system, security—then there is no eligibility for compensation, but also no reason to return and pursue restitution (GPC, 2020).

This disconnect between the preference of international convention and the displaced, presents several tensions. Dislocated persons often have unrealistic expectations regarding their preference for compensation when it comes to the amount they may receive, how fast they will get it, who it will go to, and the form it will take. They can be promised forms and amounts of compensation that are not possible or not forthcoming, and can often be poorly informed about the prospect of having a restitution claim to their original HLP closed permanently if they accept certain forms of compensation—thinking that both are possible. And in a good number of cases both will be possible if a compensation recipient subsequently decides to exercise their position within a locally powerful tribe, lineage or militia and retake their HLP by force after receiving compensation in lieu of restitution. In areas where rule of law, governance and enforcement has been weak, and international presence transient, displaced persons can officially agree to accept compensation in lieu of restitution, knowing that such low capacity and transient presence will not prevent forced restitution in the future. In such scenarios either the compensation programme then fails and money is wasted, or money and capacity must be spent on enforcement; with the latter difficult to sustain over time.

As well there can be significant intra-family and inter-generational tensions when different family members (often involving extended families) disagree over the acceptance of compensation and the resulting ‘closed’ status of their common HLP claim; with some family members choosing to not respect the closed status of a claim and instead pursue restitution. Additionally, descendants can claim that their parents or grandparents had no right to close out HLP claims (particularly for lands with strong identity connections to lineage, family or tribe), and so seek to reverse the closed nature of claims long after the fact, as has occurred in West Africa. Resolving such issues are a significant challenge, and can greatly complicate the claims process, at times with significant political repercussions.

This difference in preference for restitution versus compensation can influence funding for compensation programmes, in that the international donors who fund programmes may be reluctant to do so because it would go against the larger political and human rights goals of returns and restitution, the stated goals of peace agreements, and reversing HLP rights violations (IOM, 2008). At the same time however, dislocatees as HLP owners, renters, lineage members etc., are in a position to best know their own livelihoods as they occur on the ground in their home areas should they return, and what is viable and not in the context of safe and sustainable returns. If the preferences for restitution versus compensation go unresolved, the risk is that neither happens, aggravating grievances of injustice. In Bosnia there was an overtly human rights-

based focus on restitution by the international community. Restitution in this case was seen as a way to facilitate international positions on ethnic cleansing and the policies of countries that hosted refugees from the 1992-1995 conflict (Williams, 2007). While the Dayton peace accord noted that there was a beneficiary choice between return of property or compensation instead of return, in reality donors feared that compensation instead of restitution would hinder the political objective of the peace accord, which was to reverse ethnic cleansing and return displaced persons to their HLP of origin (IOM, 2008). In another example Williams (2007) notes for the South African land restitution programme that,

considerable questions remain as to utility of restitution in a context where political conceptions of justice through the reconstitution of a class of black agriculturalists do not always mesh with the manifest preferences of individual beneficiaries.

Technical tensions

Calculating compensation

Never enough

Securing adequate funding is one of the central problems of all compensation programmes (e.g. IOM, 2008). Funds provided by a national government for compensation will need to be taken from other public spending, such as postwar reconstruction, securing basic rights and food security (Pablo, 2014). International financing is frequently required to fund compensation efforts, even when high-value natural resources or other means may be at the state's disposal (Kuwait, Iraq, South Africa, Angola). Such international funding often operates through pledges made, but often only a percentage of the amount pledged by international donors is actually made available; with donor fatigue and short term focus always a concern (IOM, 2008). The Cyprus case highlights the sums of money that can often be needed to resolve claims. With approximately 200,000 people displaced from their HLP in the 1970s, the overall problem is modest in size compared to other displacement scenarios. Yet it has been estimated that between 25-30 billion euro is needed for HLP compensation (Morelli, 2019).

In addition to the funding needed for compensation payouts, funding to cover administrative costs can be significant but difficult to calculate when the total numbers of claims applications is unknown or when the processing of unexpectedly large numbers of claims that have no merit result in large expenditures--although sometimes such costs are passed on to claimants as fees (IOM, 2008). Administrative costs can include: staff, expenses of decision-makers, offices, equipment purchase and maintenance, communication and supplies, and outsourcing services such as auditing, recruitment and relocation, etc. (Holtzmann and Kristjansdottir, 2007). And there is always tension between spending funds on administrative needs versus payouts to beneficiaries. In some cases the total amount to be spent, or amounts to be awarded are determined before the total number of eligible claims is known, resulting in a significant gamble with regard to money spent on administration versus payouts. The Darfur Doha Peace Agreement stipulated that US\$300 million would be the total compensation amount to be used for all Darfuri dislocatees, with specific amounts to be determined by legal committees. The US\$300 million was not in hand at the time of the agreement, instead appeals were made to the international community (RW, 2011). In other cases there can be a desire to decide all claims first (thus spend-

ing money on administration) before dispersing remaining funds to claimants in order to decide how far available funds will go and how much each claimant will get—leading to extremely frustrated claimants over the long wait and low amounts (IOM, 2008). In such cases there is a need for a management of expectations as to the amount of money that is realistically forthcoming, the timing, the distribution process and eligibility.

Valuation challenges

While there are a wide variety of approaches to determining the value of HLP to be compensated (e.g. van Houtte, et al. 2008; IBPCA, 2006) the focus here is on the primary challenges of HLP valuation. Calculating appropriate and acceptable amounts for compensation is always a difficulty, particularly in cases where the numbers of claims to be compensated are high, expectations are high, but available funding is low and time is short. Determining compensation amounts can be greatly complicated by high degrees of inequity and variation in size, value and location of war-affected HLP, in that values must be attached to very different forms of HLP and how they were held (e.g. Hurwitz, et al. 2005). How to do this quickly and fairly, and therefore acceptable to claimants is the difficulty, requiring significant money, research, implementation infrastructure, personnel, and legal and institutional capacity. The degree to which these elements may not exist in the magnitude needed, at the time required, increases the challenge. While grouping similar claims into categories allows for set values to be attached to categories, the values must still be calculated with high variation in HLP type, modes of dislocation, and distinctions between damage, destruction and loss. In cases such as Bosnia, with functioning pre-conflict statutory tenure systems and largely uncontested pre-conflict claims, compensation may be much easier to calculate than in cases such as Afghanistan where numerous tenure systems operate, there are significant institutional deficits, high rural landholding inequities, mass landlessness and homelessness due to sequential conflicts, longstanding disputes over grazing lands, variation in political access, and HLP disputes which frequently turn violent (e.g. Hurwitz, et al. 2005).

The research that is needed into the form and quantity of compensation that will be acceptable to the claimant population is an important (but often neglected) aspect of valuation (e.g. Hurwitz, et al. 2005). The information needed for the valuation of HLP to be compensated can be difficult to come by. For the calculation of fair market value or replacement value, there can be large information deficits which preclude using such calculations.³ In many settings HLP markets are not sufficiently developed or active to provide price information that is reliable (ADB, 2007). In postwar settings prices can be distorted, and pre-war information can be difficult to come by. Where markets are able to provide reliable information as to price, it may not be possible to locate comparable HLP for purchase. As well market value is never a constant and demand and supply factors fluctuate over time, which leads to the question of which timeframe is to be used in calculating market value. Market value can be greatly affected by the war-affected nature of the market, reflecting damages to HLP, impoverishment, dislocations, tenure insecurity, lack of buyers, etc. (ADB, 2007).

³ Market value focuses on the value of the asset that is lost; whereas replacement value focuses on what it would cost to replace the lost asset (ADB, 2007).

Calculating the value of lost access to common property resources is yet another challenge. In many rural areas there exist combinations of HLP types used by any one person that can be difficult to calculate aggregate compensation for. While individual HLP (house and agricultural fields) can be the focus of compensation schemes, often equally important for rural livelihoods is access to commons land (forests, rangelands, water bodies) for hunting, fishing, water and firewood collection, gathering of building materials and medicines, and the location of religious areas. Such commons can also serve as a form of land bank for future generations. In such scenarios if the focus of compensation is only on the specific HLP that individuals were displaced from, and do not take into account other important forms of resource access, livelihoods may suffer to the point of collapse and abandonment. In this regard it can be quite difficult to calculate the monetary value of commons land access, particularly given that the value of this access is realized as a constant over time, and not as a lump sum. In more urban settings there are parallels in terms of livelihood—nutrition, income, status and credit access can be less tangible assets that will not be included in calculations based on the physical attributes of HLP (ADB, 2007). The Asia Development Bank has realized such a dilemma and focuses on the ‘replacement of assets’ (forward looking) as opposed to the more easily calculated market value of what was lost (backward looking); but acknowledges that most compensation standards worldwide are backward looking (ADB, 2007). Additionally, the rights to common property are usually customary and are not formally legally titled and so can be inadvertently excluded from compensation schemes (ADB, 2007).

Apart from the primary complications noted above there can exist a number of additional issues for which information or resolution is necessary regarding valuation of HLP:

- Laws can exist that prohibit sale of HLP, which sharply discounts market value, making it impossible for beneficiaries to replace their HLP.
- In some countries compensation strategies based on statutory law do not recognise customary HLP claims that are not documented formally (ADB, 2007). Similarly, use of market value or comparable sales approaches to calculating compensation amounts can be difficult to apply in tribal and other customary areas where sales by individuals are not allowed, leading to sharp decreases in the calculated amount (ADB, 2007).
- Approaches that use a comparable sales approach, can require market modelling which needs information on sales records, actual past transactions, demand and supply, land quality and fertility, HLP investments, crop values, valuation of structures, valuation of common property resources, and categories and restrictions on land use (e.g. ADB, 2007). While such parameters can be part of imported compensation schemes from developed, stable countries, unless the legal, administrative and financial means and capacity are in place to gather the local information needed (if it exists), they can be extremely difficult to apply.
- For compensation for HLP damage and destruction, proof can be needed in order to file claims, often in the form of photographs or assessments. If repairs are made by the HLP owner prior to obtaining photos or having a government assessment made, then compensation can be difficult to obtain (GPC, 2020). This then acts as a strong deterrent to making repairs by HLP owners, who wait, often for long periods in a low capacity administrative setting, for damage assessments to be made and verified (GPC, 2020). And in fact there can be procedures that recom-

mend not repairing HLP prior to making claims, with Iraq again notable in this regard (GPC, 2020).

- Sometimes a claims programme can change the way compensation is calculated during the operation of the programme, as funds become limited, operational procedures prove arduous and time consuming, and the number of claims exceeds expectations (IOM, 2008). At times certain approaches are abandoned and others pursued in different regions and for different types of claims, such as in South Africa (IOM, 2008).
- Increases in value due to investments by a secondary occupant over time, particularly where such increases are substantial, is an important consideration in valuation, as are increases in HLP value due to population growth in the area. The Sri Lankan case is an example where significant investment has been made on HLP confiscated at the end of the war, creating difficulties and a great deal of political debate with regard to calculating how compensation should occur, for whom, and for what (e.g., Unruh, 2019). For Cyprus, in the case of the Turkish Cypriot Immovable Property Commission, considerations as to amount to be awarded include: the market value of the HLP as of 20 July 1974, any increase or decrease in the value of the HLP since then, the possession of any HLP by the claimant in the south belonging to a Turkish Cypriot, if the claimant receives income from or pays rent for such property, and any damage to or use of the HLP in question (Erdem and Greer, 2018; Mehmet, 2005).

Inheritance issues: The multiplication of claims over time

A primary technical challenge in conducting compensation programmes is how to handle inheritance claims, given that such claims multiply over time. This occurs as the original owner becomes deceased and the descendants pursue claims to the same HLP, often in an uncoordinated manner. Compensating each legitimate descendent the value of the original HLP then duplicates the compensation paid for a given HLP, which can quickly exhaust compensation funds; although Iraq has a law explicitly allowing this (GPC, 2020). The real difficulty is not just screening for duplicate claims to the same HLP, but rather deciding between them—essentially deciding inheritance claims—which can be quite complicated and protracted even in stable settings. IOM (2008) describes at length the frequency and difficulty of these types of claims in war-affected HLP scenarios. A primary problem is that due to forced dislocation, claimant communities can be spread over a number of countries which can have very different legal approaches to compensation by heirs; meaning that the criteria for eligibility to file claims can differ. This is important given that inheritance rights of claimants are at least partially regulated by their countries of residence. Some HLP claims processes have attempted to get around this by establishing a standardized approach for inheritance claims, others not (IOM, 2008). In any case determinations need to be made regarding which heirs have a valid claim to compensation—direct heirs, adjoining (in-law) heirs, women, etc.—with the understanding that internationally influenced determinations may go against domestic cultural and legal norms.

In an inheritance context the longer that HLP claims remain open, the greater the number of heirs who are able to claim compensation for the same HLP will be—which is one reason for closing claims out as soon as possible. In some cases where a good deal of time has passed, inheritance claims can comprise the majority of claims, and can add considerable processing time and complexity to the overall endeavour (IOM, 2008). As well there is the technical problem of

dealing with the many different documents and forms of evidence and proof of relationship between an heir and the original victim that the claims processing would need to deal with in order to establish consistency of criteria for eligibility (IOM, 2008). This evidence is different than that needed to establish the relationship between the original owner and the HLP in question.

Relevant here are cultural-legal notions of the role of women in inheritance claims—with some national practices going against international law and best practice. This was the case for Kuwaiti HLP claims against Iraq's invasion (IOM, 2008). Women, particularly those married into or divorced in village settings where HLP rights reside primarily with men, can be at a particular disadvantage in compensation schemes, especially in war-affected settings where the numbers of female-headed households are larger than normal. Both traditional approaches to HLP and legal loopholes can produce inequities (ADB, 2007).

Overall then a primary challenge with inheritance claims to compensation for HLP has to do with organizing the bureaucracy and capacity for deciding claims and awarding compensation for what can be very large numbers of claimants for quite small amounts of land. The Palestinian case is an example, where the numbers of heirs over time has increased greatly, each with a claim—with the overall effect of significantly increasing the bureaucratic and financial burden of processing claims over what will be, for each claimant, decreasing proportions of the original HLP (Fischbach, 2006).

Conclusions

While the legal, human rights and moral foundations for providing compensation as a remedy for HLP problems in war-affected states are considerably advanced, this progress has not been matched by the operational aspects, such that significant difficulties emerge in implementation. Arguably it is because so much work has been done on the foundations, that implementation can seem deceptively straightforward. Most broadly, the challenge is that with multiple political, policy and technical tensions to navigate; any partial, failed, compromised or commandeered compensation programme can actually have significant negative repercussions. While this is not to say that HLP compensation efforts should never be attempted, it does highlight that greater recognition is needed that HLP compensation is not straightforward and is not a panacea; and that considerably more time, effort, capacity and particularly money is usually needed than initially thought.

Greater awareness of the multiple tensions involved in implementation would allow more focused efforts on their mitigation. This paper has attempted a description of some of the primary tensions, summarized in Table 1. Finding which tensions pertain to a specific HLP compensation setting, and deriving ways to realistically navigate them, can increase understanding about the needed resources, time and capacity required. HLP compensation does have a role in addressing certain issues for war-affected populations. Such a role however should be considered with a well-grounded understanding of the challenges and limitations of implementation, and of the significant work still needed for the operational aspects of HLP compensation efforts to adequately serve the legal, human rights and moral aspects of wartime HLP dislocations.

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Table 1. Operational tensions involving opposed needs, goals, forces and processes (NGFP). The NGFP in the left column are grouped with their primary tensions on the right.

The preference for restitution by international law & convention	The preference for compensation by many national & international actors and claimants
<p>The need to reduce the volume of claimants.</p> <p>The need to close claims with as little compensation as possible, as quickly as possible, in lieu of restitution.</p>	Desire to provide justice to all who deserve it.
	Intra-family & inter-generational disagreement of closed status of claims.
	Excluding too many claimants risks socio-political problems.
	Incomplete understanding of what no return to HLP means.
	Claimants expect a windfall
	Attempt to retake HLP via tribe, militia, etc., after receiving compensation
<p>The need for government participation in compensation program.</p> <p>National ownership</p> <p>Sovereignty</p>	Government reluctance to participate in compensation program due to implicit acknowledgment of guilt, responsibility.
	Government engaged in HLP violations during war.
	New postwar government unwilling to take responsibility for predecessor.
	Compensation based on international law, but carried out by national law, institutions, decisions.
<p>The ease with which some compensation is promoted/requested by some donors and claimants.</p> <p>Buying a political solution with compensation</p> <p>Compensation processes derived for stable settings</p>	Conditional and agendas attached to international support & financing.
	The technical difficulties of organizing, financing, implementing compensation programs.
	Solidifying or rewarding HLP rights violations.
	Unrealistic & unmet expectations as to amount, timing and type of compensation received.
<p>The relatively narrow objectives of HLP compensation schemes.</p> <p>Well thought out and well funded compensation programs</p>	Compensation processes used in unstable war-affected settings.
	Compensation programs caught up in wider goals of a peace process or peace negotiations.
	Programs commandeered or negatively influenced by outside actors.
	Changes in programming mid-way through implementation due to changes in: donor interest, funding, rule changes, political objectives, number of claimants.
<p>The need to spend funds on compensation payouts.</p> <p>The need to adequately calculate HLP value.</p> <p>The desire to provide alternative HLP as compensation</p>	The need to spend funds on administrative costs.
	Large information deficit cripples adequate value calculations.
	Government does not have capacity to know the existence of, amount of, availability of lands to be used as alternative HLP.
	Certain HLP have identity, social or religious aspects that cannot be valued monetarily.
	Takes funds away from other reconstruction spending.
	Cash compensation rarely used by recipients to replace HLP; can be a reason for homelessness.
	Cash compensation to farmers, pastoralists, forest dwellers does little to resolve displacement
<p>The need to provide compensation to decedents of deceased claimants.</p>	Deciding between inheritance claims in order to provide compensation.
	Inheritance claims decisions can go against local cultural/legal or international conventions.
The heavy bureaucratic burden of implementing compensation programs.	Low institutional and administrative capacities