BOOK REVIEW


Refugees and other forcibly displaced persons (herein collectively referred to as forced migrants) constitute a very vulnerable group in society in need of special protection. One of the important rights that forced migrants have is the right of return in safety and dignity to their countries and homes of origin. This right, however, is not simply restricted to returning to their original homes in an atmosphere devoid of actual, or the threat of, violence and other forms of harm, but it also extends to the restoration of property rights or interests to their previous position (status-quo ante): the legal principle of restitutio in integrum. In the Velasquez Rodriguez case, the Inter-American Court of Human Rights held that

[r]eparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.

The United Nations Committee on the Elimination of All Forms of Racial Discrimination, in its General Recommendation No. XXII in respect of Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), has stated that

All … refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.

In post-conflict situations, restitution is now widely viewed as a quintessential condition in the processes of peace-building, reconciliation and reconstruction that is vital to securing the post-conflict nation’s future social, political and economic stability. It is regarded as a core component of the right of refugees and internally displaced persons (IDPs) to return voluntarily to their original countries and places of origin; and as a key element of restorative

2 The right to return is guaranteed in Art 13 of the Universal Declaration of Human Rights (UDHR) and Art 12(4) of the International Covenant on Civil and Political Rights (ICCPR). See also Art 10(1) of the ‘Pinheiro’ Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005).
3 See Chorzow Factory (indemnity) case PCIJ (Ser A) 17 (Judgment of 13 September 1928) 47.
6 Ibid.
The right is not only restricted to instances of actual physical return, it may also be exercised by forced migrants who remain in another country of refuge but seek restitution.

Housing, Land, And Property Restitution Rights Of Refugees And Displaced Persons: Laws, Cases And Materials is a brief but highly informative and useful resource book, with 240 cases and materials on the rights of forced migrants, covering this important subject in respect of housing, land and property restitution rights of this vulnerable group of people around the world. The compendium’s uniqueness and importance is underscored by the fact that it stands out as the first consolidated resource-book on the subject. It is divided into four major parts: (1) Housing and property restitution standards at the international level; (2) Housing and property restitution standards at the regional level; (3) Housing and property restitution standards at the national level; and (4) Housing and property restitution case law.

Whilst its importance is considerable, there are a number of areas where the compendium, considering its aims, is either lacking in some respects, or leaves some questions unanswered.

Firstly, one feature of the compendium is that, in sharp contrast with most legal texts on cases and materials, it does not have any specific commentary on the cases and materials covered, apart from brief and general introductory remarks in the preface. Whilst this seems to have been deliberate, brief commentaries on at least some of the major, specialised or recent material texts, such as the ‘Pinheiro’ Principles on Housing and Property Restitution for Refugees and Displaced Persons, or landmark cases such as the ICJ’s Advisory Opinion on the Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory (p.361), could have rendered the text more attractive and relevant to the user, especially student or lay readers. In addition, the general and truncatory reference to the ‘Pinheiro’ Principles in the preface, to the effect that they represent ‘a high point of international standard-setting on these issues’ (p.xix) and ‘provide the most comprehensive and consolidated international norm outlining the rights of forced migrants to have full restitution of the housing, land and property rights they held before their displacement’ (p.xix), falls short of the form that such analytical commentary should take. The commentary on such seminal instruments needed to, among other things, have referred to specific aspects of the principles, such as what new standards or concepts they bring to the restitution rights discourse. For instance, the editor might have engaged the question of the

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7 See Art 2(2) of the ‘Pinheiro’ Principles (note 2 above).
8 Thus Art 10(3) of the ‘Pinheiro’ Principles (note 2 above) provides, among other things, that ‘[r] efugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property’.
10 The ‘Pinheiro’ Principles (note 2 above) 13.
11 Advisory Opinion on the Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory 361.
extent to which, if at all, the principles have addressed the issue of restitution in matters of prescription title relating to land rights, i.e. the tension between the property rights accruing from long use by a bona-fide purchaser without notice of historical forfeiture; and historical or trans-generational inheritance claims to property restitution. Is strict *restituo in integrum* advocated by the principles in such cases?

Secondly, although the book largely covers the major legal instruments on its subject matter, it appears that a number of important instruments that are relevant to the subject under study have not been included. At the international level a major instrument conspicuously omitted is the Statute of the Office of the United Nations High Commissioner for Human Rights (UNHCR). The Statute remains an important instrument in international refugee law.\(^\text{12}\) It is especially important in relation to those states that have not yet ratified the major refugee protection treaties. Some major refugee producing countries such as Myanmar and Iraq are yet to ratify any of the refugee conventions including the 1967 Protocol Relating to the Status of Refugees. Thus the mandate of the UNHCR in seeking permanent solutions for the problem of refugees and IDPs in these countries, especially with regard to voluntary repatriation and the attendant issues of restitution, derives from the UNHCR Statute. On the regional plane, the African Charter on Human and People’s Rights,\(^\text{13}\) the African Charter on the Rights and Welfare of the Child,\(^\text{14}\) the Protocol to the African Charter on Human and People’s Rights on the Rights of Women\(^\text{15}\) and the European Social Charter among others, all of which contain relevant provisions, have also been left out. Whilst it is appreciated that the question of space in the compendium must have been a key consideration in deciding to

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\(^\text{12}\) Under Chapter 1, Art 1 of the Statute, the UNHRC is tasked with the responsibility of ‘[p]roviding international protection, under the auspices of the UN, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and … private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities’.

\(^\text{13}\) The African Charter guarantees the right to property under Art 14, and also guarantees under Art 12(3), ‘the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions’. Read together, these rights have a strong bearing on the question of land, housing and property restitution rights for refugees, in particular in Africa.

\(^\text{14}\) Article XXIII of the Charter expressly provides for the rights of refugee children, and goes further to provide in para (4) that the Article applies ‘mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused’. Article 12.2 of the ‘Pinheiro’ Principles (note 2 above) emphasises, among other things, that states are under an obligation to ensure that housing, land and property restitution procedures, institutions and mechanisms reflect the overarching principle of the ‘best interests’ of the child. This underlies the importance of bringing out excerpts from this regional convention that has a refugee children-specific provision.

\(^\text{15}\) The African Women’s Protocol has a number of provisions of direct relevance to the subject matter of this compendium. Article 10(2) of the Protocol for instance provides that ‘[s]tates Parties shall take all appropriate measures to ensure the increased participation of women: b) … in the local, national, regional, continental and international decision making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women’; and ‘in all aspects of planning, formulation and implementation of post conflict reconstruction and rehabilitation’. These post-conflict measures necessarily have to engage issues relating to land, housing and property restitution rights.
leave out some materials, concise excerpts from these instruments would not have taken much space and their inclusion could have been easily managed. One of the added values of such inclusion would have been the strengthening of the claim of the book to international representivity (which issue is further addressed immediately below).

Thirdly, one observes that the compendium seems to have been intended to be broadly representative of the situation of housing, land and property restitution rights for refugees and displaced persons around the world. Thus it is stated that

any additional laws, cases and materials on these themes are also in place throughout the world, but the selection found here attempts to provide an accurate and reasonably detailed picture of the current state of affairs with respect to these rights set within their various normative contexts (p.xix).

However, a critical examination reveals that the text has a clear bias towards the European situation. For instance, on the national frameworks included, the text lists the following countries: Afghanistan (Asia), Albania (Europe), Armenia (Europe), Azerbaijan (Europe), Bosnia-Herzegovina (Europe), Bulgaria (Europe), Colombia (South America), Estonia (Europe), Georgia (Europe), Germany (Europe), Iraq (Asia), Kosovo (Europe), Romania (Europe), Rwanda (Africa), South Africa (Africa) and Tajikistan (Asia). Thus of the countries covered, ten are European, three Asian, two African and one South American; yet it is axiomatic that Africa and Asia bear the biggest burden of refugees and internally displaced persons in the world. One therefore questions the book’s claim to painting a broad and representative picture of the state of affairs with regard to these rights around the world. This European bias is also evident in the jurisprudence covered. All the cases in all categories, with the exception of the Advisory Opinion on the Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory, relate to developments or experiences in European countries. One would have expected that some leading decisions of the African Commission on Human and People’s Rights in relation to property and housing rights, such as the celebrated case of SERAC and CESR v Nigeria (the Serac Case), as well as some regional and national jurisprudence from the Americas, such as the Velasquez Rodriguez Case, could have been included. The lack of a truly

16 According to the UNHCR, at the end of 2007, Asia hosted 55 per cent of the world’s refugee population whilst Africa hosted 22 per cent. The others were split among the remaining continents. See UNHCR Statistical yearbook 2007 Trends in Displacement, Protection and Solutions (December 2008) 7, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=4981c4812&tbl=STATISTICS>.

17 Social and Economic Rights Action Centre & Another v Nigeria, African Commission on Human and People’s Rights, Communication No. 155/96. The Serac case is probably the most famous decision of the African Commission that has generated a lot of scholarly interest because of the wide-ranging human rights issues it brought to the fore. These included the rights of people displaced from their homes in the Ogoniland in Rivers State in Nigeria. The Commission emphasised their right to effective remedies in respect of the violations and deprivations and these include restitution measures.

18 Note 4 above.
global picture of the situation of land, housing and property restitution rights of forced migrants is a major flaw in this otherwise good compendium.

In conclusion, notwithstanding the apparent shortfalls pointed out here, this compendium is a significant contribution to the growing literature on the rights of forced migrants, and their land, housing and property rights in particular. Leckie must be highly commended for coming up with this consolidated compendium of materials that facilitates research by scholars, students, practitioners, activists and government officials.

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