'In safety and dignity':

Refugee returns, redress and post-conflict security

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Abstract

The repatriation of refugees is a critical component of contemporary peace processes, and essential to national and regional stability and prosperity. Although international law requires that refugees be able to return to their homes 'in safety and dignity', in practice repatriation brings with it a host of risks for refugees, from lack of access to land and livelihoods to violent reprisals from former neighbours bearing unresolved grievances. In light of the mounting political and development challenges surrounding the return of refugees and the pursuit of post-conflict justice, this paper will draw on international law, social contract theory and analyses of contemporary repatriation movements to examine how the tools of redress, including restitution, compensation, trials and truth and reconciliation commissions, can be applied to recast the fractured relationship between the state and the refugee, while fostering the security and socio-economic conditions essential to sustainable, dignified return. The concern of this paper is to demonstrate that the redress of the historic injustices at the root of displacement is not simply an abstract question of morality; rather, it is an ethical and legal challenge with direct implications on the reduction of poverty and the establishment of security in return communities. Since the signing of the Dayton peace agreement, considerable attention has focused on the restitution of housing and property rights for returnees. However, this paper argues that a successful return process requires that returnees and their neighbours have access to a wider range of reparations that address both material and moral wrongs.

Introduction

Refugee advocates are wont to quote the ancient Greek philosopher Euripides (431 BC), who reflected that 'there is no greater sorrow on Earth than the loss of one's native land'. Conversely, for many of today's 9.2 million refugees, there is no greater joy than the opportunity to return home from exile. While many refugees returning to countries from Sudan to Afghanistan are elated by the prospect of repatriation, this joy does not come without risks. Many refugee homecomings are marked by trepidation, impoverishment and insecurity, and are motivated by a lack of other options beyond indefinite confinement in destitute camps.

Although the right to return is set out in numerous United Nations General Assembly Resolutions and Article 13(2) of the Universal Declaration of Human Rights, historically 'the right of return has not figured prominently in general discussions of refugee rights. The major thrust of these discussions has been on the right *not* to be returned'.[1] The Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR) identifies three 'durable solutions' to displacement: local integration in the country of asylum, resettlement to a third country, and voluntary repatriation. Hypothetically, repatriation has been the 'preferred' solution to displacement since the establishment of the modern international refugee regime in the 1950s. However, during the Cold War the use of repatriation as a durable solution was limited as hundreds of thousands of refugees were offered permanent resettlement in the West. The resettlement of refugees was motivated not only by humanitarian concern, but also by a particular Cold War logic: refugees were welcomed because they were seen to be 'voting with their feet' against oppressive Communist forces. With the end of the Cold War, the political logic underpinning the large-scale resettlement of refugees evaporated, and permanent resettlement opportunities 'largely withered away'.[2] At the same time, local integration waned as the developing countries hosting more than 70% of the world's refugees adopted increasingly restrictive asylum policies, in part as a protest against inadequate progress in establishing 'burden sharing' mechanisms to distribute responsibility for refugee protection more equitably between the global North and South. As a result, for many of today's refugees, repatriation represents their best opportunity to rebuild their lives.

As United Nations Secretary-General Kofi Annan argued in 2005, 'The return of refugees and internally displaced persons is a major part of any post-conflict scenario. And it is far more than just a logistical operation. Indeed, it is often a critical factor in sustaining a peace process and in revitalising economic activity'.[3] This paper will argue that the long-term success of return operations requires that governments, inter-governmental agencies and non-state actors confront and respond to the questions of justice the repatriation process puts front and centre, from the resolution of land disputes to accountability for the atrocities and inequalities that fuel forced migration. Drawing on international law, social contract theory and analyses of contemporary repatriation movements, this paper will examine how the tools of redress, including restitution, compensation, trials and truth and reconciliation commissions, can be applied to recast the fractured relationship between the state and the refugee, while fostering the security and socio-economic conditions essential to sustainable, dignified return. My aim is to demonstrate that the redress of the injustices at the root of displacement is not simply an

abstract moral concern; rather, it is an ethical and legal challenge with direct implications on the reduction of poverty and the establishment of security in return communities.

In support of this view, Part I will introduce the principles of voluntary, safe and dignified return, and explore the connections between poverty, security and the post-conflict return of refugees. I will address the need to enable sustainable refugee returns in order to consolidate peace and stimulate development, but will also highlight the considerable risks intertwined with return. These dangers include 'human security' concerns such as insufficient aid, shelter and economic opportunities, and more traditional security threats such as the re-ignition of violent conflict over land disputes and unsettled inter-communal hostilities. In Part II I will argue that reparations play an indispensable role in affirming returnees' dignity and establishing legal, physical and economic security for both returnees and their neighbours. I will discuss the right to reparations under international law, and will set out a theoretical argument grounded in social contract theory for using reparations to uphold state responsibility for forced migration and create just conditions for return. Since the signing of the Dayton peace agreement in 1995, considerable attention has focused on the restitution of housing and property rights for returnees. However, I will argue that a successful return process requires that returnees and their neighbours have access to a wider range of reparations that attempt to rectify both material and moral wrongs.

To place these arguments in a practical context, Part III will consider how reparations have been used to facilitate the return of refugees to Bosnia and Herzegovina. I will discuss the work of the Dayton-mandated Commission for Real Property Claims, as well as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and local coexistence and reconciliation programs, and will examine why this diverse range of initiatives often failed to increase security and mitigate poverty in return communities. In conclusion, I will highlight the practical and theoretical obstacles to effective redress for returnees, and the insights the Bosnian experience holds for other return and reparations processes.

While there are a plethora of legal and theoretical definitions of redress, this discussion will be based primarily on a comprehensive political conception of reparations as the 'entire spectrum of attempts to rectify historical injustices'.[4] Albeit broad, this definition is salient because it encompasses the diverse yet interrelated approaches taken to remedy injustice and create fair conditions for the repatriation of refugees. In order to keep the scope of this discussion manageable, I will limit my discussion to reparations for returning refugees, although I recognize that internally displaced persons (IDPs) and refugees often face similar challenges in the return process, and share comparable claims for redress. Although there are numerous competing and compelling definitions of the term 'refugee', I will focus on people who have fled their countries because of persecution and the state's unwillingness or inability to offer protection, particularly in the context of armed conflict.

Part I: The risk of return: Poverty, security and the repatriation of refugees

Since 2002, more than five million refugees have returned to their countries of origin through 27 internationally-supported, large-scale repatriation programmes to countries such as Afghanistan, Iraq, Sierra Leone and Somalia, where insecurity is

pervasive and poverty rife.[5] UNHCR and national governments are quick to point out that refugees themselves typically favour repatriation as the durable solution to their displacement, despite the risks that accompany return. These risks range from lack of humanitarian assistance and development opportunities to landmines and retaliatory violence from former neighbours. Ideally, returnees' exposure to these dangers should be minimized by strict adherence to the principles of voluntary return in conditions of safety and dignity, which are to guide all repatriation processes supported by inter-governmental organizations such as UNHCR and the International Organization for Migration (IOM).

Although the 1951 Refugee Convention does not address the question of voluntary repatriation, it bans the forced expulsion of asylum seekers and refugees (*refoulement*). The UNHCR Statute and regional agreements such as the 1969 OAU Convention and the 1984 Cartagena Declaration recognize repatriation as a key durable solution to displacement, and emphasize that returns must only be undertaken voluntarily. UNHCR Executive Committee Conclusion No. 40 of 1985 advances the notion that return should take place in 'conditions of safety and dignity'. This language is repeated in the Guiding Principles on Internal Displacement, and in many peace agreements. Indeed, virtually all of the dozens of peace agreements concluded since 1995 contain provisions to facilitate the safe and dignified return of refugees, not only to their country of origin, but to their original homes.[6] Translating these legal provisions and political agreements into policy and practice has sparked intensive debate on questions such as how the voluntary nature of return is to be ascertained; the involvement of UNHCR in 'temporary protection' and 'mandated return' programs; and the level of security that must be established before repatriation should be facilitated or encouraged.[7] UNHCR admits that 'the concept of dignity is less self-evident than that of safety', but the agency's *Handbook on Voluntary Repatriation* does little to clarify this concept beyond reminding UNHCR staff of the dictionary definition of dignity.[8] The lack of a consistent, clear and detailed framework to guide the repatriation of refugees is deeply concerning, given the high stakes involved in the return process.

Understanding the risks associated with repatriation demands a clear, operational definition of security, yet security remains a fundamentally contested concept. Nonetheless, the term 'carries with it a history and a set of connotations that it cannot escape. At the heart of the concept we still find something to do with defence and the state'.[9] Historically, repatriation has not been seen as an issue with significant consequences for state security. However, repatriation movements are now complex, multi-billion dollar enterprises that can 'make or break' peace processes, as well as the prestige of the international actors backing return. Since the return of displaced persons from minority groups undermines the ethno-nationalist logic that has fuelled many of the most brutal wars of the past decades, return has come to be seen as an indicator of the traction of a peace process. This is of course a risky test of the strength of a peace process: upon return, refugees from genocidal conflicts may encounter militant community leaders who are unwilling to see the results of ethnic cleansing undone, and may face discrimination from the local authorities and police officers responsible for their protection. In spite of these risks, donors typically require local and national authorities to welcome (or at least tolerate) returnees in order to secure financial support for key transitional security processes such as disarmament and demobilisation, as well as longer-term development programs. Return is also regarded as a sensitive security issue because

refugee camps in countries such as the Democratic Republic of Congo and Tanzania have often been used as hubs for arms trading and bases from which exiled rebels launch cross-border incursions. These attacks compromise humanitarian actors' ability to provide protection to unarmed refugees, and provide a major impetus for governments to encourage return so that the camps can be closed.

Closer analysis demonstrates that the traditional security concerns associated with return are deeply intertwined with pressing human security risks. The human security paradigm shifts the focus of the security debate from the state to the individual, and emphasises the need to use protection and empowerment strategies to ensure 'freedom from want, freedom from fear, and freedom to take action on one's own behalf'.[10] With its focus on issues of economic development, gender equity, health and education, as well as the threat of armed violence, the concept of human security resonates with many of the concerns facing returnees. The conflicts that wracked major contemporary return destinations such as Sudan and Angola were in many cases so destructive that there are simply no social services or infrastructure to which refugees can return. The displaced may lack the coping mechanisms developed by those who remained in their home communities throughout the conflict, and the small grants or assistance kits returnees receive from humanitarian agencies rarely last long enough to enable the displaced to reintegrate and re-establish livelihoods. This gap between humanitarian assistance and the instigation of viable, long-term development programs is well-documented, but rarely bridged. The resulting impoverishment exacerbates social grievances, hinders the establishment of law and order, and heightens the prospect of fragile post-conflict societies returning to violence.

In short, although the repatriation process rests on the assumption that the refugee's state of origin is willing and able to assume responsibility for safeguarding the rights of all its citizens, including returnees, in practice repatriating refugees often find themselves impoverished and devoid of effective protection for their rights—that is, in the same circumstances that caused their displacement in the first place. No single strategy can comprehensively address the multifaceted risks posed by return. However, the following section will argue that reparations represent a crucial plank in efforts to ensure the long-term success of contemporary return movements.

Part II: Return, redress and security

Repatriation made its way onto the international agenda as a serious security and development concern at the same time as a 'global frenzy to balance moral ledgers' was brewing in courtrooms, NGO offices, legislatures and newsrooms from Zurich to Seoul.[11] To discuss the returnee's right to reparations in a meaningful way, it is first necessary to ask where the state's responsibilities to its citizens come from, and what becomes of these responsibilities when a citizen is made a refugee. While there are numerous ways to explain the origins of the state's duty to make amends for violations of individual rights, the account offered by international law is the most explicit, while that provided by social contract theory one of the most compelling.

The right to redress: Legal foundations

Legally speaking, the right to redress evolved out of the post-World War II human rights regime, and is reflected in agreements such as the International Covenant on Civil and Political Rights. The right to a remedy is grounded in the notion of state responsibility, one of the core tenets of international law. State responsibility is 'simply the principle which establishes an obligation to make good any violation of international law producing injury'.[12] State responsibility arises out of the legal maxim stated by Grotius in 1646 that 'every fault creates the obligation to make good the loss'.[13] As states are the conventional subjects of international law, historically the principle of state responsibility applies only on the state-to-state level. The International Law Commission (ILC) Articles on State Responsibility affirm a traditional, state-centric definition of state responsibility, however, many jurists argue that the principles underlying the ILC Articles also pertain to the obligations states owe their citizens, reflecting the relatively recent but fundamental shift in international law towards recognition of the rights and duties of individuals.[14]

The 1928 Permanent Court of International Justice *Chorzów Factory* ruling lay down the basic remedial norms for violations of international law. The court ruled that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed'.[15] Under international law, reparation encompasses three main types of remedy: restitution, compensation and satisfaction. Restitution aims to restore the conditions that existed prior to a violation, and often involves the return of homes, artefacts or land.[16] The 'first form of reparation', restitution is 'required of the responsible state unless it is materially impossible' or 'involves a burden out of all proportion to the benefit deriving from restitution instead of compensation'.[17] It is often impossible to restore the conditions that existed prior to the human rights violations that cause citizens to seek asylum, such as torture. In these cases remedy is often achieved through compensation, which involves monetary payment for material or moral injury. Satisfaction addresses non-material injuries and may involve official apologies; assurances of non-repetition of the offence; and judicial proceedings or truth and reconciliation commissions.[18] The relevance of these remedies to individual victims of human rights violations are discussed in detail in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, which were prepared under the auspices of the UN Special Rapporteur on the Right to Restitution. The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons elaborate on the state's responsibility to ensure that returnees can regain access to their homes and land.

Efforts to secure redress for victims of human rights abuses under international law are marked by a tension between state and individual responsibility. The judges at Nuremberg famously concluded that 'international wrongs are committed by individuals and not by abstract entities'.[19] While the importance of individual accountability cannot be underestimated, it is equally crucial that *states* be held liable for abuses, particularly as an individual, no matter how far beyond the moral pale, cannot shoulder sole responsibility for large-scale crimes such as genocide. Individual leaders may mastermind atrocities, but both the individual and the institution must be held accountable for state-sanctioned crimes if only because the duty to make amends for these crimes cannot be discharged by an individual. Yet states can often evade their duty

to make amends for past injustices because although the principle of state responsibility 'is well established in law and functions reasonably well in practice' on an inter-state level, '…with regard to individual victims of violations of human rights law…the position remains much more uncertain' and needs to be enhanced through more robust enforcement mechanisms.[20]

Breaking the bond and the imperative of repair: Theoretical foundations of state responsibility and the right to redress

Although moral arguments are perhaps even less likely than international human rights law to hold sway over states, social contract theory offers a compelling explanation of the origins of the state's responsibilities to its citizens and may be used in concert with international law to mount a forceful case for the state's obligation to use reparations to enable their exiled citizens to return in conditions of safety and dignity. In its most basic form, social contract theory suggests that individuals sacrifice a significant degree of their personal liberty to the state in return for increased security and wellbeing, which individuals could not guarantee for themselves if acting alone. Thus the social contract creates mutual obligations between the citizen, who promises to respect the rule of the sovereign, and the state, which pledges to protect its citizens.

Albeit a powerful explanatory device, classical social contract theory struggles to address the problem of consent. 'There is no denying the attractiveness of the doctrine of personal consent (and of the parallel thesis that no government is legitimate which governs without the consent of the governed)', as the notion of consent highlights the reciprocal nature of the contract and the individual agency of the 'signatories'.[21] Yet the contract is a fiction. At best, consent is therefore tacit or hypothetical, but 'a hypothetical promise is no promise at all, for no one has undertaken an obligation'.[22] Furthermore, 'the nature and consequences of… expressing dissent [to the contract], namely emigration, seem to be far too severe' for it to be maintained that the contract was undertaken voluntarily.[23] Ironically, however, it is in addressing cases of forced migration that social contract theory is most persuasive: when the state transforms from a protector to a persecutor, it is difficult if not impossible to forward a convincing moral justification for the state's existence. If the state fails in its primary duty to guarantee citizens' wellbeing, the contract is void. Yet the significance of the contract is illustrated by its very invalidation: although the contract between citizen and state is only a 'moral artifice', the citizen turned refugee soon discovers that this link is ironclad compared to the ephemeral relationship the refugee has with foreign states, a relationship based on little more than unenforceable international laws and fleeting compassion.[24]

How is the social contract broken? Shacknove's discussion of the refugee definition illuminates the contractual relationship between the citizen and the state, and provides a starting point for examining the distinctive implications of social contract theory for reparations and the return of refugees. Shacknove argues that the refugee definition offered in the 1951 Refugee Convention is predicated on the assumption that 'a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society' and that 'in the case of the refugee, this bond has been severed'.[25] Persecution, conflict and alienage are physical manifestations of this severed bond. 'It is the absence of state protection', the state's core obligation under the

social contract, 'which constitutes the full and complete negation of society and thus the basis of refugeehood'.[26] Shacknove insightfully notes that 'in exchange for their allegiance, citizens can minimally expect that their government will guarantee physical security, vital subsistence, and liberty of political participation and physical movement. No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning'.[27] The consequence of Shacknove's argument is that if every state subverted its responsibilities by creating refugees, the justification for the state system itself would crumble.

Although this outcome seems extreme, millions of refugees are currently denied the chance to forge new bonds of citizenship with another state and are thereby left outside the logic of the state system. These refugees are compelled either to continue in limbo with only limited rights in their country of asylum, or to return to their state of origin. This reality forces the question of rectifying the relationship between states and their exiled citizens onto the political and moral agenda. The implications of this question are ethically and politically significant, because in the repatriation process the terms of the social contract, typically tacit, can be made explicit. Those refugees who gain the opportunity to become citizens of a new state also effectively enter into an explicit social contract, albeit one they do not get to negotiate. For instance, refugees who find permanent asylum in Canada participate in citizenship ceremonies during which they are required to swear allegiance to the state but in so doing have conferred upon them the special rights enshrined in the Canadian Charter of Rights and Freedoms.

In comparison to refugees who manage to resettle in affluent democracies, returnees face much more serious obstacles in re-establishing themselves as 'signatories' to a just social contract as refugees are often members of minority groups which the dominant powers prefer to remain estranged from the state. However, both international law and social contract theory clearly conceive of the state as 'constituted by a set of duties owed to its citizens that are integral to its authority to act'.[28] When these duties have been violated through the creation of refugees, the state must repair the broken bond between itself and its exiled citizens if it is to regain legal and moral legitimacy. Indeed, Principle 1 of the Cairo Declaration of Principles of International Law on Compensation to Refugees affirms that 'responsibility for caring for the world's refugees rests ultimately upon the countries that directly or indirectly force their own citizens to flee'.

Security implications of redress

How does the provision of redress translate into greater security for returnees and post-conflict societies in general? UNHCR's background paper for the Global Consultations on International Protection provides a helpful framework for thinking about the ways in which reparations contribute to increased security for the displaced. In this paper, UNHCR classifies the risks facing by returnees in terms of threats to legal safety, physical safety and material safety. Physical safety entails a safe return environment, including protection from attacks and harassment, freedom of movement, and access to de-mined or at last demarcated land. Legal safety involves the equal recognition of returnees as citizens before the law, and 'non-discriminatory access and exercise of civil, economic, social, political and cultural rights'.[29] Material safety implies access to humanitarian assistance and essential services in the early phases of the return

process, and, in the longer term, sustainable reintegration and economic development programs.[30] Levels of physical safety, legal safety and material safety are interdependent, and have repercussions not only for returnees but also on the wellbeing of other members of return communities.

Reparations are clearly not a 'quick-fix' to all the physical, legal and material insecurities associated with return. Reparations cannot neutralize the threat of landmines, or ensure the success of disarmament processes; however, they can combat physical insecurity and impoverishment in a variety of ways. Firstly, by considering the individual human rights violations experienced by the displaced, reparations establish returnees as equal citizens before the law. Processes such as real property restitution and criminal trials contribute to the establishment of the rule of law in post-conflict communities, which can in turn avert a resurgence of violence, and stimulate foreign investment and stable conditions for development.

Real property restitution processes can also be used as an opportunity to clarify complex land tenure systems, and to extend security of tenure to marginalized groups such as women and indigenous peoples with undocumented collective or customary claims over their traditional lands. If implemented in a timely manner with effective community consultation, real property restitution processes can avert violent conflict over land rights. This may require a delicate balancing act between the forward-looking and backward-looking aspects of redress. Attempting to return conditions to the *status quo ante*, as required by a simplistic reading of legal standards, may not promote physical and material security in the long run. The distribution of land prior to displacement may have been unfair, excluding certain groups and concentrating power in the hands of an elite minority. In order to ensure that the return and reparations processes increase the security of both returnees and their neighbours, the responsible authorities should aim to provide equitable access to land in a manner that takes into account both historical claims and future needs. Restoring access to land is a core component of building security in impoverished post-conflict environments, although it raises difficult questions about the rights of secondary occupants who moved into refugees' empty homes, and often have nowhere to go after being evicted from returnees' properties. Yet housing and property restitution is essential insofar as it helps meet returnees' immediate need for shelter and can also reaffirm identity, fostering a stronger sense of psychological security.[31] Important economic interests are also at play. For many returnees, property is a crucial financial asset and source of livelihood, while financial compensation may also significantly affect development prospects. For example, Germany's restitution payments to Jewish refugees resettling in Israel 'helped to rehabilitate one country morally and to set another one up economically'.[32] Similarly, compensation from Israel may eventually play a role in enabling Palestinian refugees to return to and prosper in a future Palestinian state.[33]

Yet, reparations programs must extend beyond housing and property restitution and compensation if they are to effectively promote legal, physical and material security for returnees. While remedies such as apologies and truth and reconciliation commissions are sometimes regarded as 'morally second best', or as attempts to avoid the high price tag attached to compensation schemes, in the absence of apologies and public discussion of past injustices and the need for reconciliation, material reparations programs have floundered. For example, the Korean *ianfu* ('comfort women') who were

sexually enslaved by the Japanese military during World War II turned down financial reparations offered by the Japanese government in the late 1990s. Although many of the *ianfu* were elderly and impoverished, they rejected the Japanese compensation package because it was not accompanied by a full, official and public apology and acknowledgement of the injustices committed against them. The safe return of refugees depends on the resolution of the problems that originally forced them from their homes. Public apologies for and renunciation of the discriminatory and persecutorial policies that forced refugees from their homes may be a prerequisite for the return of refugees displaced by ethnic violence. Equally, apologies and the entrenchment of refugees' experiences in the national historical record through the investigations of truth and reconciliation commissions may also be key to making the return process a dignified one.

Where deterrence is concerned, reparations do not yet have a strong track record. Clearly, however, the greatest contribution reparations could make to the establishment of security would be if they could be used to dissuade state leaders from committing the types of violations that turn citizens into refugees. As long as reparations are awarded haphazardly, their ability to bolster the security of individual victims and deter potential violators will be diminished. However, initiatives such as the establishment of the International Criminal Court may go a long way towards increasing access to reparations for victims of egregious crimes, and convincing state leaders to abide by international human rights norms.

Part III: Reparation and return to Bosnia and Herzegovina

Efforts to provide redress to Bosnian returnees illustrate the difficulty of bridging the typically 'grotesque gap between norms and facts', and have generated key lessons for future reparations and return processes.[34] My analysis of the Bosnian case will begin with a brief discussion of the Dayton Peace Agreement's provisions for reparations and return, followed by an examination of the contributions to the reparations process made by the Commission for Real Property Claims, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and grassroots reconciliation and coexistence projects. In conclusion I will reflect on the obstacles to the return and redress process in Bosnia, and the theoretical implications of this case.

The Bosnian returns process started from no easy position: due to a zealously systematic campaign of ethnic cleansing through murder, torture, enslavement and rape, over half of Bosnia's 4.4 million people were displaced between 1992 and 1995.[35] Known as the Dayton Agreement, the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in December 1995, and laid the ground for the return of displaced persons and the provision of redress to the victims of the conflict. A 'unique conclusion' to the war, the Dayton Agreement goes beyond the scope of most modern peace treaties in both its complexity and detail.[36] The Dayton Agreement created the sovereign state of the Republics of Bosnia and Herzegovina, which contains the Bosniak-Croat governed Federation of Bosnia and Herzegovina and the Bosnian Serb-controlled Republika Srpska. Although this political arrangement institutionalized the ethnic power divisions that arose during the war, the Dayton Agreement also reflects the international community's desire to 'reverse the tide of ethnic cleansing' by promoting minority returns throughout Bosnia and Herzegovina.[37]

The architects of the Dayton process understood that a minimum level of physical security would have to be in place before large-scale return could take place. Security was primarily addressed through military measures outlined in Annex 1-A of the Dayton Agreement. Annex 7 of the Dayton Agreement is specifically devoted to the issue of refugees and displaced persons, and placed the return of refugees and the provision of restitution at the heart of efforts to build peace in Bosnia. Annex 7 states:

> All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived… and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.

The first peace treaty to recognise refugees' specific right to return to their pre-war homes, the Dayton Agreement established the Commission for Real Property Claims (CRPC) to facilitate housing and property restitution. During the conflict, half of the region's housing stock was destroyed, and the homes refugees left behind were often taken over by secondary occupants. 'One of the most innovative elements of the peace settlement', the CRPC received property claims from refugees and IDPs, and issued binding rulings on ownership.[38] A temporary, 'quasi-international' structure, the CRPC worked with domestic courts and administrative bodies, and was composed of three international and six national commissioners. Although the commission had a slow start, the restitution process was reinvigorated in 1999 with the creation of the Property Law Implementation Plan (PLIP), which brought together to the diverse actors working on the Bosnian property restitution process. The PLIP increased local ownership of the process, promoted coordination, and stimulated donor support. By the end of the CRPC mandate in 2003, over 215,000 claims had been received, of which more than 200,000 or 93 percent were decided and enforced in favour of the displaced.[39] Although the international community was particularly optimistic about the capacity of restitution to enable return, experience has demonstrated that property restitution is not sufficient to enable return. Not surprisingly, sustainable returns also depend on progress in other aspects of the peace process, such as reconstruction and reconciliation.

To be sure, for many returnees, the property restitution process significantly improved conditions for return. For minority returnees in particular, CRPC rulings 'carried important symbolic and psychological as well as legal value', as other domestic remedies were often denied to them.[40] Seeing their complaints taken seriously by local and international authorities bolstered confidence in national institutions amongst returnees.[41] By entrenching property rights, restitution also helped lay a secure foundation for economic regeneration.[42] Nonetheless, property restitution in Bosnia was hardly a smooth process. The CRPC was beleaguered with problems from lack of telephones and electricity to entrenched ideological opposition. Garlick identifies three main obstacles to making property restitution work in Bosnia.[43] Firstly, the massive scale of displacement slowed the process enormously. During the first years of the under-staffed Commission's work, hundreds of returnees were left in limbo while the CRPC ploughed through backlogged cases. Secondly, the Yugoslavian socialist system left behind arcane property laws which were difficult to navigate, and had to be overhauled as

the CRPC worked. Lastly, the property issue was highly charged on several key levels. On the personal level, for refugees and evicted secondary occupants alike, the loss of 'home' was a traumatic experience involving psychological and physical insecurity. On the economic level, land is one of the few valuable assets left in tumultuous post-conflict conditions. And on the political level, property restitution was contentious because it undermined the war's rationale by reversing ethnic cleansing. Besides these hurdles, the CRPC also struggled to see its decisions enforced. As the CRPC lacked any enforcement capacity of its own, many properties were looted and destroyed before returnees could take up residence again. Nationalist local authorities often refused to carry out evictions until the International Police Force stepped in, although compliance with CRPC decisions increased greatly under the PLIP.

As originally conceived, the CRPC was to facilitate property return or 'just compensation' in lieu of return. The drafters at Dayton, Garlick observes, 'clearly sought to give dispossessed people a number of choices and to restore to them a degree of control over their destinies'.[44] Fearing ethnic violence, many minority refugees wished to forgo return to their original homes, and resettle in an area where they would be part of a majority group. However, funding was not made available to support relocation and compensation strategies, because they did not fit with the goal of 'reversing' ethnic cleansing.[45] Some refugees and IDPs who regained possession of their original homes but did not wish to return were able to sell the properties and use the money to begin new lives elsewhere in the country. However, it is unclear whether this was a viable option for all those who possessed deeds for properties to which they could not or would not return. Minority refugees' hesitance to return to their home communities highlights the importance of not limiting the reparation process to the restoration of housing and property rights. Ensuring accountability for past abuses, bolstering human rights protection mechanisms, and promoting reconciliation or at least coexistence was also essential to making return a viable option for the displaced.

In comparison to the property restitution process, efforts to ensure accountability for injustices and respect for human rights in Bosnia have floundered. On paper, the provisions are strong: in terms of human rights, Bosnia's new constitution is one of the most progressive in the world. Human rights are mentioned no less than 70 times in the Dayton Accords, which created several mechanisms for the protection of human rights in Bosnia, including the national Commission on Human Rights, the Office of the Ombudsman and Human Rights Chamber, the Commission for Displaced Persons and Refugees, and the Human Rights Coordination Centre.[46] These mechanisms were intended to complement the ICTY, which prosecutes the masterminds of the Balkan crisis. Unlike the aforementioned Dayton institutions, the ICTY was formed by the Security Council in the heat of the conflict. Grounded in the view that 'peace and justice are, if not indivisible, at least close associates', the court was ostensibly intended to deter flagrant violations of international law during the war, although it is commonly recognised that the Tribunal was above all a face-saving mechanism established to compensate for the Security Council's lack of effective military and political intervention in the Balkans.[47] As a deterrence measure, the ICTY certainly fell disastrously short of its mark: for example, the court did not deter the architects of the Srebrenica massacre, which took place more than two years after the establishment of the ICTY.

In 1997 Bagshaw lamented that efforts to establish just conditions of return in terms of human rights had failed, 'unless one equates effective respect for and protection of human rights with the absence of gross and systematic violations'.[48] While armed conflict had abated, 'inadequate safety, harassment, intimidation, punishment, violence, and the denial of fair access to public institutions… and discrimination in the enjoyment of basic human rights [remained] the order of the day', particularly for minority returnees.[49] Although conditions have improved markedly since 1997, ensuring accountability through the ICTY remains problematic. The ICTY has made legal history by trying former head-of-state Slobodan Milosevic with genocide due to his complicity in the 'forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina' through the commission of crimes against humanity.[50] However, pursuing accountability solely through the ICTY has drastically limited the scope of the reparations project as the tribunal has only been able to try a handful of leaders, and the foremost war criminals, Ratko Mladic and Radovan Karadzic, have yet to be arrested and brought to The Hague for trials. Although many former refugees and IDPs have testified before the court, an experience many witnesses have found to be affirming and even therapeutic, Stover and Weinstein suggest that large-scale justice initiatives such as the ICTY have little relevance to the promotion of reconciliation and reintegration in return communities.[51]

Stover and Weinstein's pessimism about the potential of international and national courts to provide redress in a way that is meaningful for individuals at the local level may be challenged by new developments at another court in The Hague. In February 2006, the world's first trial of a *state* charged with genocide opened at the International Court of Justice (ICJ). The case was initially filed by Bosnia-Herzegovina against Serbia (then Yugoslavia) in March 1993 in a bid to pressure Belgrade to halt the killing and expulsion of Bosnian Muslims. Although the ICJ issued a prompt ruling ordering Yugoslavia to do everything within its power to prevent genocide in Bosnia, the verdict was ignored, and it has taken thirteen years of legal wrangling for the case to come before the court for a full hearing. If the court rules in favour of Bosnia it could order Serbia to make a formal apology to Bosnia, pay compensation, or both. Although Bosnia has not specified how much it is seeking in reparations, Croatia has filed a similar case against Serbia with the ICJ, and is claiming $29 billion in damages. Given the more extreme suffering of Bosniak civilians in the war, Sarajevo may seek three times as much.[52] Were it ever to be paid, such a large settlement could undoubtedly improve conditions in the Bosnian communities brutalized by the war, and may convince Bosnians of their neighbours' penitence for past injustices. At the same time, having to pay such a large settlement could exacerbate resentment amongst Serbians who feel that their grievances have been overshadowed by the international community.

As the ICJ ruling is unlikely to be issued until 2007, it will be some time before it can be determined whether this case will serve as a rebuttal to Stover and Weinstein's scepticism about the significance of international reparations procedures for citizens at the grassroots. In the meantime, observers of the Bosnian return and redress processes can ask: If property restitution programs and large-scale accountability initiatives such as the ICTY have not satisfactorily redressed displaced Bosnians' concerns and created just conditions for their return, have locally-based initiatives met with any greater success? In

the aftermath of the Bosnian conflict, UNHCR established an experimental initiative called Imagine Coexistence. The initiative was guided by former High Commissioner Sadako Ogata's view that if returns were to be sustainable and peace consolidated, 'the fabric of society would have to be stitched back together. This meant looking at individuals and their communities in the most holistic way and designing integrative projects that amalgamated social, economic, cultural and spiritual aspects into a cohesive whole'.[53] Through Imagine Coexistence, UNHCR encouraged members of conflicting ethnic groups to undertake joint peacebuilding activities and share public space such as schools, playgrounds and health clubs in an attempt to replace deeply rooted mistrust with cooperation. Imagine Coexistence spawned 26 projects in Bosnia implemented by 19 NGOs, and convened an international conference to assist in the development of 'best coexistence practices'. An evaluative study carried out on the Imagine Coexistence experiment concluded that UNHCR should continue supporting coexistence activities in the future, but needs to focus on identifying appropriate local implementing partners, and ensure that UNHCR's support is sustained for at least three years, as coexistence projects are unlikely to bear fruit in the short term.[54]

In addition to these UNHCR-supported initiatives, civil society organizations in Bosnia have launched projects from peacebuilding studies and symposia to community development schemes and summer camps, designed to consolidate peace and lessen the suffering of those Bosnians who remain displaced. Efforts are also underway to establish a truth and reconciliation commission that could build on the ICTY's efforts to ensure recognition and responsibility for the crimes against humanity committed during the war.[55] These efforts have met with varying degrees of success in terms of enabling the sustainable return. Internal displacement rates in Bosnia have fallen to approximately 310,000, although the government claims numbers are down to 185,500.[56] While social marginalization and a lack of economic opportunity are amongst the principle obstacles to return for those who remain displaced, some still cite a lack of security as the primary barrier to return, indicating that the displaced do not perceive these reconciliation and redress initiatives to have rectified the ethno-nationalist attitudes that forced them from their homes over ten years ago.

Obstacles and insights: Moving forward from Bosnia

The musings of an elderly refugee woman from Banja Luka who regained her home through the CRPC reflect the mixed success of the Bosnian reparations effort: 'You must be persistent. If I hadn't been persistent, I would never have returned to my home. I still have lots of problems. My house needs repairs and the secondary occupants stole all my possessions. But I am home. I have my freedom'.[57]

Persistence is also essential to ensure that the lessons learned in Bosnia inform and improve return and reparations efforts elsewhere. The Bosnian experience affirms that real property restitution alone cannot achieve just conditions for repatriation. A wider range of reparations mechanisms must be used in an interconnected manner to establish security, accountability and reconciliation between returnees, their home communities, and the state. Whereas high-level accountability mechanisms such as the ICTY play an important precedent-setting role, they cannot replace grassroots reconciliation initiatives. Critics note that because CRPC deliberations were closed to the

public and did not involve individual testimony, a valuable opportunity to promote dialogue and reconciliation through the property restitution process was lost.[58] Experiences in Bosnia confirm the need to fuse efficiency in the restitution process with recognition of the fact that redress is a long-term undertaking that must flexibly accommodate new concerns as they arise. Certain issues of competing rights were poorly managed in the Bosnian process, especially regarding the rights of secondary occupants. During the war, moving into abandoned housing was not a crime, and indeed was the only option for many families who had lost their own homes. Yet when secondary occupants were evicted to make way for returning owners, insufficient resources were made available to help these families relocate. This downfalling was avoided in Kosovo, where humanitarian programs are in place to support evicted secondary occupants. A final lesson from this case concerns the role of the international community in redress. From ensuring refugees' interests were voiced at Dayton to funding the restitution process and using the International Police Force to enforce CRPC decisions, the international community played a crucial role in enabling the new Bosnian state to make good on its responsibilities to returnees. The property restitution process in particular demonstrated that cooperation between international actors and domestic institutions can build capacity while legitimising the process in the eyes of local people.[59]

Bosnia's experiences of redress and return have had repercussions far beyond the Balkans. The Dayton Agreement's provisions on reparations and return have been emulated in several other peace agreements and the expertise gained in Bosnia has been brought to bear to facilitate secure and sustainable returns in locations such as East Timor. The lessons that have emerged from the Bosnian return and reparations processes have also been harnessed by refugee advocates concerned with planning for an eventual return of the Palestinian refugees.[60] Albeit a source of valuable insights for human rights activists and humanitarians concerned with the wellbeing of refugees and the redress of historical injustices, the Bosnian case raises as many questions as it answers. The many unresolved questions sparked by this example include: In conditions of resource scarcity, should states prioritize funding for reparations even if it compromises the state's ability to provide other citizens with essential services such as health care and sanitation? Redress is achieved through negotiation, yet who should sit at the table with the state to determine what levels and types of reparation will enable refugees to return in safety and dignity? Can the rights of the individual refugee be circumscribed by the rights of a group? When a state does not recognise its responsibility to provide redress for returnees, how can other actors prompt compliance with this obligation? The legal principle of state continuity affirms that responsibility for past human rights violations continues to rest with the state even if regimes change. Yet is the obligation to remedy past violations of rights strengthened or weakened as time passes? How can the duty to provide reparations be upheld in conditions of state disintegration, or where international protectorates are established, such as in Kosovo? How can the deterrent potential of reparations be magnified? Definite answers to these questions may prove elusive, but serious reflection on these challenges is a first and essential step towards maximizing the ability of reparations to uphold the safety and dignity of returnees.

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