

Post-Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement

Rhodri C. Williams¹

TESEV International Symposium on “Internal Displacement in Turkey and Abroad”
Istanbul, 5 December 2006

Introduction

The conflict that raged in Bosnia from 1992 to 1995 was characterized by a pattern of ethnically motivated attacks on civilian populations that came to be known as “ethnic cleansing.” The motivation for these attacks was to physically remove all people of different ethnicities from areas militarily dominated by a particular ethnic group.² To a large extent, this tactic worked, with the population of Bosnia thoroughly “unmixed” and polarized into homogenous ethnic statelets by the end of the war. As a result, one of the central features of the internationally-led peacekeeping and civilian reconstruction mission in Bosnia was the extent to which it was concerned with facilitating the return of those displaced by the conflict and the reconstruction of a multi-ethnic society. The Dayton Peace Agreement (DPA), which ended the conflict in Bosnia, included an entire annex (Annex 7) regulating the return of refugees and displaced persons.³ While Annex 7 recognized the legal principle that displaced persons enjoyed the right to choose their destination, it also set out a clear policy preference for reversing ethnic cleansing through the facilitation of return.⁴

Property restitution was intimately connected with return in the text of Annex 7, beginning with the interlinked guarantees that “[a]ll refugees and displaced persons shall have the right freely to return to their homes of origin [and] to have restored to them

¹ Rhodri C. Williams received an M.A. in Geography from Syracuse University in 1996 as well as a J.D. from New York University in 2000 and is a member of the New York State Bar. He worked in Bosnia for five years, first with the Legal Department of the Office of the High Representative and later with the Human Rights Department of the Organization for Security and Cooperation in Europe. In the latter position, he coordinated legal policy and oversaw field monitoring of the post-war restitution process that assisted 200,000 displaced families to repossess their homes. Since leaving Bosnia, Mr. Williams has worked as a consultant focusing on forced displacement, durable solutions and refugee return, the right to a remedy, including restitution and compensation, and the right to adequate housing, in settings including Cambodia, Colombia, Georgia and Turkey. He wrote and presented this paper in his capacity as a consultant to the Brookings Institution-Bern University Project on Internal Displacement.

² Use of the term “ethnicity” is somewhat misleading in the Bosnian context. In fact, all three main parties to the conflict were ethnically Slavs and shared a mutually comprehensible language. The primary difference between them lay in their religious confessions, and associated cultural differences.

³ General Framework Agreement for Peace in Bosnia Herzegovina, 1995, 35 I.L.M. 75, Annex 7: “Agreement on Refugees and Displaced Persons.”

⁴ Id. Chapter One, Article I (1) of Annex 7 states that “[t]he early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina.” However, Article I (4) of the same Chapter clarifies that “[c]hoice of destination shall be up to the individual or family” and forbids the parties from interfering with such choices.

property of which they were deprived in the course of hostilities....”⁵ The DPA also foresaw an internationally supervised body, the Commission for Real Property Claims (CRPC), with a mandate to “receive and decide claims for real property [which] has not been voluntarily sold or otherwise transferred ... and where the claimant does not now enjoy possession....”⁶ However, despite these powerful mandate tools, the international community in Bosnia rightly saw restitution as an extremely challenging task. The CRPC was overwhelmed early on by the sheer number of applications, with over 200,000 properties claimed in some 130 municipalities; a bottleneck exacerbated by CRPC’s lack of a clear enforcement mandate.⁷

As a result, although it would be an important early repository of property claims, the CRPC never came to play the central role envisioned for it in Bosnia’s restitution process. Meanwhile, efforts to implement Annex 7 by other means than restitution made little progress. Although a number of agreements to accept mutual quotas of returnees were negotiated among the parties to the DPA, these were hard to monitor and faced stiff resistance from local authority figures invested in maintaining ethnically pure political constituencies. As a result, enforcement of the domestic authorities’ Annex 7 obligation to facilitate restitution ultimately came to be the central tactic of the international community in facilitating return.

The harnessing of restitution to the overarching objective of return was probably the only practical means of achieving either goal in Bosnia. However, it was also based on conceptual confusions that would have serious practical implications for the implementation of restitution programming. Strictly speaking, restitution is a form of reparations – a legal remedy for victims of violations of international law. From this perspective, refugees and displaced persons are entitled to restitution of the rights they enjoyed over their homes as a legal remedy corresponding to the human rights violations that previously uprooted them. By extension, once such rights are restored, displaced persons are free to exercise them as they see fit and cannot be forced to return to homes that they no longer wish to live in. Thus, while restitution is an appropriate legal remedy for ethnic cleansing, it is unreliable as an instrument for facilitating return. Moreover, by focusing on return per se, the international community in Bosnia effectively limited the availability of early reparations to those whose suffering involved displacement. This approach appears to have contributed to the failure, to date, to remedy entire categories of human rights violations beyond displacement.

In seeking to analyze the role of restitution in post-conflict settings, this paper will begin by discussing restitution as it is currently understood under international law in the context of human rights violations. The next section of the paper describes the evolution of restitution from a return context to a broader reparations context during Bosnian peace implementation. This section also includes an overview of parallel reparations efforts for

⁵ Id. Chapter One, Article I (1).

⁶ Id. Chapter Two, Article XI.

⁷ Id. Chapter Two, Article XII (7): Although the parties to the DPA are obligated to recognize CRPC decisions as “lawful throughout Bosnia”, no consequences are foreseen in cases where they fail to honor this obligation.

other categories of war victims in Bosnia, all of which have remained largely unimplemented. The conclusion builds on lessons learned on Bosnia in setting out an analysis of how restitution might best be conceived of in other post-conflict settings.

Restitution as a Remedy for Human Rights Abuses

The concept of reparations has a long history in international law. At their most basic level, reparations are steps that must be taken by a party responsible for a breach of international law in order to make whole those who suffered harm as a result. The obligation to provide reparations is now clearly understood to extend to states that violate their protective obligations toward individuals under international human rights and humanitarian law. The clearest, and most recent statement of this obligation came in the form of a set of standards adopted in March 2006 by the UN General Assembly, the “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law” (UN Reparations Principles).⁸

The Reparations Principles derive their legal authority from the assertion that they “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations....”⁹ However, because the Principles were negotiated as among states comprising the Human Rights Commission over the course of fifteen years of occasionally rancorous debate, observers have noted that significant questions remain regarding whether they truly reflect every aspect of existing international law or depart from it in significant respects.¹⁰ The Principles also leave open a number of questions that have arisen in practice, including the relationship between “juridical” approaches to reparations focusing on individual findings of violations and less individualized but more efficient “programmatic” reparations efforts.¹¹ Nevertheless, the Principles do incorporate many of the baseline concepts of reparations, providing a useful (if not conclusive) framework for analyzing national efforts to redress human rights violations.

The Principles begin by defining reparations as one aspect of the broader right to remedies, along with access to justice and to information “concerning violations and reparations mechanisms.”¹² As set out in the preamble to the Principles, the right to an

⁸ UN General Assembly, 2006, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles), U.N. Doc. A/RES/60/147, 21 March 2006.

⁹ Id. Preamble.

¹⁰ For a discussion of some of the international law debates that informed the shaping of the UN Reparations Principles, see Dinah Shelton 2006, ‘The United Nations Draft Principles on Reparations for Human Rights Violations: Context and Contents’ in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia Publishers, Antwerp.

¹¹ See, for instance, Pablo de Greiff 2006, ‘Justice and Reparations’ in *The Handbook of Reparations*, Oxford University Press, Oxford.

¹² UN Reparations Principles, paragraph 11: “Remedies for ... violations ... include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice (information, privacy, safety, legal assistance);
- (b) Adequate, effective and prompt reparation for harm suffered; and

effective remedy for violations of human rights and humanitarian law is broadly accepted, as reflected by its explicit inclusion in numerous multilateral and regional conventions. Traditionally, the goal of reparations has been defined in terms of corrective justice, meaning that the victims of breaches should be restored to the condition they would have enjoyed had the breach never occurred and the perpetrator stripped of any gains resulting from their illegal actions.¹³ This approach is reflected in the UN Reparations Principles, which state that “[r]eparation should be proportional to the gravity of the violations and the harm suffered.”¹⁴

In practice, the extent to which reparations have been able to aspire to the ideal of corrective justice in individual cases is often contingent on the form they take. The form of reparations most closely corresponding to the ideal is *restitution*, by means of which the actual object of the breach is taken from the perpetrator and restored to the victim. As a result, restitution has traditionally been accorded a preferred status relative to other forms of reparations.¹⁵ Where restitution is barred by circumstances, a secondary form of reparations is *compensation*, by means of which the perpetrator provides money or other assets equivalent in value and kind to the object of the breach. Still other forms of reparations include *rehabilitation* of victims in response to physical, psycho-social and dignitary harms they suffered, *satisfaction* in the form of apologies, commemorations and public disclosure of information about violations, as well as measures designed as *guarantees of non-repetition* of illegal acts. In practice, the boundaries between different forms of reparations are often blurry and may not be particularly meaningful in complex contemporary post-conflict or transitional justice settings. As the UN Secretary-General noted in 2004:

No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims.¹⁶

(c) Access to relevant information concerning violations and reparation mechanisms.” As set out in Section VIII of the Principles, access to justice is defined primarily in terms of information about available remedies, confidentiality, safety and privacy of victims and witnesses and legal assistance.

¹³ This principle was most famously summarized in a 1928 decision by the Permanent Court of International Justice (PCIJ): “The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” Permanent Court of International Justice (PCIJ) 1928, Case concerning the Factory at Chorzow, Judgment No. 13, P.C.I.J., Series A, 47.

¹⁴ UN Reparations Principles, paragraph 15.

¹⁵ In its 1928 Chorzow decision, the PCIJ defined reparations primarily in terms of restitution, as follows: “Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ... such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”

¹⁶ The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, UN Security Council, U.N. Doc. S/2004/616, paragraph 55.

The need to tailor remedies to the particular harms suffered by victims appears to be recognized in the Principles, which abandon the traditional international law preference for restitution in favor of a more open approach. In determining the form of reparations to be accorded to victims, the Principles recommend that, “taking account of individual circumstances, victims ... should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation” and then provides a non-prioritized list of four of the principal forms reparations can take (restitution, compensation, rehabilitation, and “satisfaction and guarantees of non-repetition”).¹⁷ In keeping with tailored approaches to human rights violations, each of these forms of reparations is defined quite broadly, with, for instance, restitution extended beyond the core function of return of property to incorporate “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, [and] restoration of employment[.]”¹⁸ However, it is worth noting that restitution under the Principles is still defined as an essentially corrective remedy, aiming “whenever possible, [to] restore the victim to the original situation before the ... violations ... occurred.”¹⁹

Although restitution has lost much of its emphasis relative to other forms of reparation in general human rights practice, it has nevertheless remained a pre-eminent remedy in the key area of addressing displacement. The conception of property restitution as a remedy for displacement has gained credence with the post-Cold War definition of arbitrary forms of displacement as violations of international law. This trend is reflected in both the prohibition of arbitrary displacement enunciated in the Guiding Principles on Internal Displacement and in international condemnation of the practice of forced evictions.²⁰ Such efforts to clarify the unlawful status of arbitrary displacement have often come in response to post-Cold War resurgence of ethnic conflicts such as that in Bosnia, where the uprooting of civilian populations has been a central tactic rather than a byproduct of the war. For instance, a 1993 UN report issued in the process of developing the Reparations Principles noted the need to more clearly condemn displacement as a serious human rights violation:

The issue of forced removals and forced evictions has in recent years reached the international human rights agenda because it is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and

¹⁷ UN Reparations Principles, paragraph 18.

¹⁸ Id. Paragraph 19.

¹⁹ Id.

²⁰ U.N. Commission on Human Rights, 1998, The Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2, Principle 6. Forced evictions have been repeatedly condemned as a violation of the right to adequate housing by the UN Committee on Economic Social and Cultural Rights (see General Comments 4 and 7) and the UN Commission on Human Rights (Resolution 1993/77), as well as by a UN Special Rapporteur appointed to examine the issue of “adequate housing as a component of the right to an adequate standard of living” (www.ohchr.org/english/issues/housing).

cultural rights of large numbers of people, both individual persons and collectivities.²¹

With arbitrary displacement established as a violation of international law by the late 1990s, the question of appropriate remedial approaches to crimes such as ethnic cleansing has become highly topical. Given the fact that such displacement is typically accomplished and consolidated through the confiscation of the victims' homes and property, restitution has come to the fore as a remedy. This is perhaps best reflected in a set of "Principles on housing and property restitution for refugees and displaced persons" (Restitution Principles) adopted by the UN Sub-Commission on Human Rights in June 2005.²² The Restitution Principles begin by setting out a right of displaced persons "to have restored to them any housing, land and/or property of which they were arbitrarily ... deprived" and goes on to explicitly urge states to "demonstrably prioritize" such restitution as "the preferred remedy for displacement..."²³

While the Restitution Principles remain at a fairly preliminary stage of UN adoption, they clearly reflect a broader tendency to view restitution as the primary remedial response to displacement.²⁴ This perspective has been shaped largely by the experience of peace implementation in Bosnia. The predominance of Bosnia in the definition of post-displacement remedies may be traced back to at least two factors. First, Annex 7 of the DPA broke new ground by setting out an extraordinarily strong formulation of the right to return, and linking it directly to restitution.²⁵ Second, the right to restitution was fully implemented in Bosnia, setting an international precedent and facilitating significant return movements. Nevertheless, the results of restitution in Bosnia remain controversial at a number of levels, emphasizing the difficulty of conceiving and implementing reparations programs in complex, post-displacement settings.

Property Restitution and Transitional Reparations in Bosnia

The severity and scope of the human rights violations that took place during the 1992-1995 Bosnian conflict are well-documented. In addition to widespread killing, detention, torture and rape, many of the most severe violations involved forced displacement of civilians in the context of ethnic cleansing. By the end of the conflict, these tactics resulted in the displacement of half of Bosnia's four million population (with one million

²¹ Commission on Human Rights, 1993, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1993/8, paragraph 21.

²² Sub-Commission on Human Rights, 2005, Housing and property restitution in the context of the return of refugees and displaced persons, Final report of the Special Rapporteur, Paulo Sergio Pinheiro, Principles on housing and property restitution for refugees and displaced persons, U.N. Doc. E/CN.4/Sub.2/2005/17.

²³ Id. Section II.

²⁴ The UN Secretary General endorsed the "restoration of property rights, or just compensation where this cannot be done" as a component of post-conflict reparations in his 2004 report on "The rule of law and transitional justice in conflict and post-conflict societies," paragraph 54.

²⁵ In traditional international law, the right to return has been limited to repatriation to one's country, rather than actual return to one's home of origin, as set out in the DPA. See Eric Rosand, 1998, "The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?", *Michigan Journal of International Law*, vol. 19.

refugees sheltered abroad and an equal number internally displaced) and the virtually complete un-mixing of the ethnic groups (Bosnian Croats, Serbs and Muslim “Bosniaks”) that had previously lived in close proximity and relative harmony. The homes of those uprooted were systematically destroyed or allocated to persons of the dominant local ethnicity in order to prevent the return of their former inhabitants.

Such ethnic cleansing tactics were ultimately found to constitute crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (ICTY).²⁶ The single most severe violation of the conflict, the July 1995 slaughter of as many as 8,000 Bosniak men and boys and the deportation of some 25,000 women and children from the Srebrenica enclave by the Bosnian Serb army, has been condemned as genocide. In the landmark Krstic decision, the ICTY categorized the transfers from Srebrenica as a form of serious bodily or mental harm constituting an act of genocide, alongside the killings and instances of inhuman treatment.²⁷

However, despite the fact that displacement typically took place in the context of other human rights abuses during the conflict, the reparative measures prescribed in the DPA focused heavily on return rather than broader reparative measures. While Annex 7 represented a groundbreaking affirmation of the rights to return and property restitution, the broader human rights protections set out in the DPA were of an overwhelmingly prospective nature.²⁸ Perhaps the only exception is the obligation, also set out in Annex 7, to cooperate with the ICRC in tracing missing persons, a proviso that would eventually open up a broader debate about reparations - beyond property restitution - in Bosnia.²⁹ As discussed at the end of this Paper, however, these efforts have not been pursued nearly as consistently or successfully as restitution and return.

As foreseen in Annex 7 of the DPA, property restitution was initially seen purely as a mechanism for enabling return. Restitution served well as a tactic for ending displacement largely because the wartime confiscation and reallocation of homes by the parties to the conflict represented the single greatest practical obstacle to return. The restitution process began in earnest in 1998, with concerted international pressure resulting in the invalidation of wartime reallocations and the institution of domestic procedures for receiving and processing restitution claims.³⁰ The extent to which the

²⁶ Emanuella-Chiara Gillard 2005, ‘The Role of International Humanitarian Law in the Protection of Internally Displaced Persons’, *Refugee Survey Quarterly*, vol. 24, no. 3, p. 44.

²⁷ Id. See International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber I, 2001, Judgment in Prosecutor v. Radoslav Krstic, Case No. IT-98-33-T, paragraph 513.

²⁸ Although both the new Bosnian Constitution set out in Annex 4 and the Human Rights institutions set out in Annex 6 of the DPA allowed for the direct applicability – and justiciability – of the European Convention on Human Rights (ECHR) in Bosnia, these protections only applied from the date of ratification of the DPA.

²⁹ DPA, Annex 7, Chapter One, Article V.

³⁰ The political dynamics and legal technicalities of Bosnian restitution process have been described in far more detail elsewhere than the parameters of this Paper allow. See, for instance, Marcus Cox and Madeleine Garlick, 2003, ‘Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina’ in *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie, Transnational Publishers, Ardsley, NY; Lynn Hastings, 2001, ‘Implementation of the Property Legislation in Bosnia Herzegovina’, *Stanford Journal of International Law*, vol. 37; Charles

restitution process was premised on the return of its beneficiaries is evident from the texts of the restitution laws themselves. For instance, successful claimants to an important category of urban apartments treated as “socially-owned” property under former Yugoslav law were not entitled to simply repossess their homes, but instead permitted “to return in accordance with Annex 7 of the [DPA].”³¹ As a result of this focus, restitution came in some respects to be contingent on return, despite the fact that many other preconditions for sustainable return such as physical security and non-discriminatory access to public services could not yet be guaranteed. In the hands of nationalist politicians, this state of affairs could be turned against victims of displacement, threatening them with curtailed restitution rights for failing to return under conditions that were often inappropriate.³²

In the face of such a politicized approach to return issues, international actors began emphasizing the ‘rule of law’ aspects of property restitution by 2000, stressing that claims should be handled expeditiously and impartially by domestic authorities regardless of whether claimants intended to return or not.³³ This shift was accompanied and reinforced by a growing awareness that victims of displacement were entitled to free choice among the durable solutions available to them – whether to remain where they were displaced, return to pre-war homes or resettle in some third location. This approach comported well with emerging standards such as the Guiding Principles on Internal Displacement that advocated the participation of displaced persons in processes affecting them as well as their individual autonomy in decisions on how – and where – to reintegrate themselves into society.³⁴ It also reflected recognition that restituted properties represented assets as well as homes, and could be crucial to the sustainable achievement of all durable solutions, whether resettlement financed by the sale of such properties or return to resume residence in them.

Descriptions of the ‘rule of law’ approach to property restitution tended to recast the process as the restoration of rights to homes and property that were violated in the course of the conflict, implicitly shifting the rationale for restitution from return, per se, to reparations. This trend was reinforced by the decisions of the Human Rights Chamber, a high court set up under Annex 6 of the DPA to interpret and enforce Bosnia’s human rights obligations under a number of conventions including the European Convention on

B. Philpott, 2005, ‘Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina’s IDPs and Refugees’, *Journal of Refugee Studies*, vol. 18, no. 1; Charles B. Philpott, 2006, ‘From the Right of Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina’, *International Journal of Refugee Law*, vol. 18, no. 1; and Rhodri C. Williams, 2005, ‘Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice’, *New York University Journal of International Law and Politics*, vol. 37, no. 3.

³¹ Law on Cessation of the Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, Article 3.

³² Williams, 513-17.

³³ This approach was summed in a policy document published jointly by the main international actors overseeing restitution in 2000: Office of the High Representative, 2000, ‘PLIP Inter-Agency Framework Document’, available at www.ohr.int/plip under the heading “Key Documents.”

³⁴ U.N. Commission on Human Rights, 1998, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, Principle 28.

Human Rights (ECHR).³⁵ In a substantial body of decisions, the Chamber found the Bosnian authorities' failure to restore homes to their pre-war occupants to constitute continuing violations of their rights to the home and property under the ECHR and often ordered not only the claimants' reinstatement but also the payment of compensation.³⁶

As the 'rule of law' approach took hold, international policy documents tended to conflate the original return rationale for restitution, now couched in term of durable solutions, with its newer reparations-based rationale:

The right of displaced persons and refugees to repossess and return to their pre-war property has long been one of the central concerns of the international community (IC) in Bosnia and Herzegovina and is guaranteed in Annex 7 of the [DPA]. This is based on the recognition that the failure to return properties to their rightful owners represents a violation of the right to property *inter alia* under [the ECHR]. Return of property is essential to the creation of durable solutions for refugees and displaced persons. This can take the form of either actual return to the property or sale of the property in order to finance one's own local integration elsewhere, through purchase or rental of a home that does not belong to someone else.³⁷

By 2003, restitution was all but complete, with about 200,000 families restored to the possession of their pre-war homes.³⁸ However, from the perspective of Annex 7 purists, this progress occurred for all the wrong reasons. After initially fierce resistance, even hardened nationalists in Bosnia came to accept and even embrace restitution, secure in the knowledge that returning homes to displaced people would not automatically lead to their return. In fact, while over a million returns have been officially registered, return movements have been unpredictable and a very high proportion of the displaced appear to have sold or exchanged restituted property and opted for local integration.³⁹ As a result, while Bosnian restitution has been a success in its own terms, and unquestionably facilitated durable solutions in tens of thousands of cases, it remains subject to criticism

³⁵ DPA, Annex 6, Chapter Two, Part C.

³⁶ As mentioned above in this Paper, the Chamber's jurisdiction was limited to human rights violations alleged to have occurred after the coming into force of the DPA. However, several categories of violations related to the war in Bosnia, notably property confiscations and disappearances, were frequently ruled to affect the victims' rights in a manner that continued into the post-war period and could be ruled on by the Chamber. See, for instance, Walpurga Engelbrecht, 2003, 'Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsman and the Human Rights Chamber Towards their Protection' in *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie, Transnational Publishers, Ardsley, NY

³⁷ Office of the High Representative, 2002, 'A New Strategic Direction: Proposed Ways Ahead For Property Law Implementation In A Time Of Decreasing IC Resources', Section 1, available at www.ohr.int/plip under the heading "Key Documents."

³⁸ Monthly updated statistics on the restitution process in Bosnia for the period of 2000-2004 can be accessed at www.ohr.int/plip under the heading "Property Law Implementation Statistics."

³⁹ For updated statistics on return to and within Bosnia, see www.unhcr.ba.

for not having fostered the type of mass-return foreseen by the drafters of Annex 7 of the DPA.⁴⁰

Concerns about abandonment of the return process have come to focus on the international community in Bosnia, which recognized that return was related to factors beyond restitution, but which, under pressure to reduce its presence in Bosnia, explicitly handed over responsibility for return matters to the domestic authorities once property repossession process had been largely completed.⁴¹ In fact, ten years after the conflict ended, factors such as discrimination, ethnically biased educational curricula and insecurity continue to pose significant obstacles to return.⁴² Less attention is typically paid to the fact that those who have not returned, whether by dint of their choice to resettle or due to their inability to return, often live under inadequate conditions. Simply put, those already victimized by displacement tend to remain the poorest and most vulnerable in a country where economic insecurity and ethnic discrimination remain endemic. Citing statistics from the Bosnian Ministry of Civil Affairs, UNHCR noted that:

...[in Bosnia] over the last five years, almost 50% of the population that is capable to work is unemployed; 25% of them live in total poverty and at the very edge of existence; between 40-50% of citizens do not have a right to public health care; 18% of citizens live without electricity (mainly returnees and IDPs); and 25% of the population is exposed to explosive devices (mines), radioactive substances and similar dangers.⁴³

Many observers have acknowledged both the importance of property restitution and its successful implementation, but noted that much more needs to be done in order to help displaced persons find durable solutions. By the same token, it is widely acknowledged that the restitution process has had significant reparative value but is inherently ill-suited to be viewed as a form of reparations on its own. Most obviously, restitution did little for those who did not have their own property or homes prior to the conflict, or, as in the case of many in the Roma minority, did not have recognized title to them.⁴⁴ However, even for those who benefited from restitution, the effects of other human rights violations and the experience of displacement could not be addressed solely through repossession of their property. Nevertheless, the level of international emphasis on restitution was such that, arguably, little attention remained for questions of broader reparations.

⁴⁰ See, e.g. Nidzara Ahmetasevic, 2006, 'Bosnian Returnees Quietly Quit Regained Homes', *Balkan Insight*.

⁴¹ At the end of 2003, when restitution was largely completed, responsibility for return matters was formally turned over to domestic authorities, despite the fact that many obstacles to return remained. See Office of the High Representative, 2003, 'BiH Institutions Assume Responsibility for Return Process' (press release), available at http://www.ohr.int/print/?content_id=31466.

⁴² Internal Displacement Monitoring Center, 2006, 'Bosnia: Sectarian divide continues to hamper residual return and reintegration of the displaced'.

⁴³ UNHCR, 2005, Update on Conditions for Return to Bosnia and Herzegovina, p. 10.

⁴⁴ *Id.*, p. 9.

As a result, the International Center for Transitional Justice (ICTJ) concluded in 2004 that no comprehensive reparations program can be said to exist in Bosnia.⁴⁵ A UNDP-sponsored inquiry into transitional justice in the region arrived at a similar conclusion, though it did explicitly qualify restitution as a form of reparations in light of the centrality of displacement to the human rights violations that took place in the former Yugoslavia:

The only tangible reparations projects within states in the region have been efforts to restore property to its pre-war owners, or to compensate owners if their property was destroyed. To our knowledge, no country in the region is providing any other tangible form of reparations to victims, such as legal assistance or social support services. Overwhelmingly, victims of property loss or destruction are members of ethnic groups who fled a particular area out of fear for their physical safety. It is therefore not surprising that the countries/areas most involved in internal reparations projects are those whose populations were most substantially displaced: Bosnia and Herzegovina, Croatia, and Kosovo.⁴⁶

The shortcomings of restitution in providing for either durable solutions or reparations on its own is perhaps best demonstrated by the situation of the survivors of the 1995 fall of the Srebrenica safe haven. Because of the separation and massacres of men and boys that took place afterwards, many survivors live in female-headed households that depended on missing male relatives for income. Even where their property rights in the Srebrenica region have been upheld, such families often find themselves struggling for subsistence in situations which both return and local integration seem impossible. A 2003 report described the dilemma of one Srebrenica survivor:

Women whose menfolk were killed are not deemed a high priority for social benefits as most of them are alone, and family units take precedence when it comes to government aid. Sabra Mujic - who lost her husband and two sons in the massacres - lives a hand-to-mouth existence in a Sarajevo suburb. "I live alone, in a basement of an abandoned house which has no lavatory, in shameful conditions," she [said]. Sabra suffers from a number of serious health problems, and can barely afford to buy the numerous medications she needs out of the tiny state handout she receives. As is the case with other survivors, her house and land back home remain listed in her name, but she's fearful of returning and her property is often vandalised. "Even if I went to the police, nothing would get done, as they still employ people who were in the army that killed so many in 1995," she said.⁴⁷

In fact, the struggle for accountability for the crimes committed in Srebrenica has led to the second major effort to foster a reparations program after property restitution. By early 2003, the time that property restitution was in its final stages, the Annex 6 Human Rights

⁴⁵ International Center for Transitional Justice (ICTJ), 2004, 'Bosnia and Herzegovina: Selected Developments in Transitional Justice', p. 11.

⁴⁶ Louis Aucoin and Eileen Babbitt, 'Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia', p. 152.

⁴⁷ Nerma Jelacic, 2003, 'Bosnia: Forgotten Srebrenica Survivors', *IWPR Balkan Crisis Report*, no. 461.

Chamber had received some 1800 applications from persons whose male relatives had been missing since the fall of Srebrenica, and who demanded the truth about the ensuing crimes, prosecution of the perpetrators and compensation for their suffering. In its landmark *Selimovic* decision, the Chamber found in favor of forty-nine of these families, ordering the Bosnian Serb authorities to release all information under their control regarding the massacre, to conduct a full investigation into the underlying events and to pay approximately one million Euros in compensation to the victims.⁴⁸

However, the decision was controversial in that the compensation was not granted to individual complaints but awarded “for the collective benefit of all ... the families of the victims of the Srebrenica events” to the foundation in charge of developing a memorial and cemetery for those killed in 1995.⁴⁹ Moreover, the Chamber went on to dismiss the remaining balance of Srebrenica applications several months later on the basis that its earlier decision addressed their complaints as well.⁵⁰ The *Selimovic* decision was ultimately crucial in achieving significant disclosures of information about mass graves and formal acceptance of responsibility for crimes at Srebrenica by the Bosnian Serb authorities.⁵¹ However, the Chamber’s failure to award individual compensation in the absence of any meaningful consultation was negatively received by most survivors’ groups, which continued to pursue legally uncertain compensation claims against the Dutch Government and the United Nations.⁵² Meanwhile, hopes for significant state-to-state reparations payments were recently dashed when the International Court of Justice found Serbia responsible for failing to prevent genocide in Srebrenica but declined to order payment of compensation in a case brought by Bosnia.⁵³

Domestic pressure to address wartime disappearances continued and ultimately led to the passage of comprehensive Bosnian legislation on missing persons in late 2004.⁵⁴ Among other provisions, the Law on Missing Persons provided for the creation of a fund to financially support the family members of missing persons.⁵⁵ Given its nationwide scope, such a fund would represent a significant step in providing reparations to one of the groups most clearly victimized by some of the worst crimes of the Bosnian conflict. However, the actual effect of this provision has been mixed. Although the Fund was meant to be set up by the end of 2004, it had still not been constituted almost six months

⁴⁸ Human Rights Chamber for Bosnia and Herzegovina, 2003, *Selimovic et.al. against the Republika Srpska*, case no. CH/01/8365, et.al. Among the obligations the Bosnian Serb authorities were found to have violated was their commitment under Annex 7 of the DPA to assist the ICRC in tracing unaccounted for persons.

⁴⁹ *Id.*, paragraph 220.

⁵⁰ Nick Hawton, 2003, ‘Bosniak Compensation Bid Fails’, *IWPR Tribunal Update*, no. 320.

⁵¹ Samir Krilic, 2004, ‘Report Finds Massacre Planned’, *The Associated Press*.

⁵² See, e.g., Lauren Etter, 2004, ‘Court Decision Boosts Srebrenica Claim’, *IWPR Tribunal Update*, no. 381.

⁵³ International Court of Justice, 2007, Judgment, ‘Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina versus Serbia and Montenegro)’.

⁵⁴ Ministry for Human Rights and Refugees of Bosnia and Herzegovina (MHRR), 2006, ‘Application of the Law on Missing Persons of Bosnia and Herzegovina: Guide for Families of Missing Persons’, available at www.ic-mp.org.

⁵⁵ *Id.*, pp. 19-23. The baseline level of monthly financial support is meant to be 25% of the country’s average salary for the previous quarter. *Id.*, p. 46.

later, when the Bosnian Constitutional Court reviewed the grouped claims of over one hundred families of missing persons from all over Bosnia.⁵⁶ Although the Court found violations, it did not order compensation for the claimants, instead ordering the Bosnian authorities to immediately activate the Fund, “so as to remove further consequences of violations of constitutional rights of the appellants and render exercise of their other rights under law possible.”⁵⁷

A decision to establish the Fund for Missing Persons was formally taken nearly 18 months later, in October 2006.⁵⁸ However, as of February 2007, negotiations over the implementation of the Fund remained bogged down in disagreements over how to fund it and where to situate its head office.⁵⁹ Eventual establishment of the fund is unlikely to end demands for reparations in Bosnia, however. Despite their symbolic importance, families of the missing, like families whose homes were confiscated, represent a significant proportion, but only a proportion of all those victimized by serious human rights abuses in the course of the conflict.⁶⁰ Numerous other groups continue to seek compensation for their suffering and the official response remains both slow and unsystematic. Nevertheless, steps such as Bosnia’s recent commitment to the UN Committee against Torture to implement a law on the protection of victims of wartime torture and sexual violence must be seen as positive, if long overdue, step.⁶¹

Conclusions

One of the central lessons to be drawn from the Bosnian experience is that restitution can be an important mechanism in achieving both durable solutions and reparations, but that on its own it is adequate to neither. The relationship between reparations and durable solutions has not been extensively explored despite the growing areas of overlap between two concepts in an era when systematic human rights violations increasingly involve displacement. However, the corrective justice aspirations of reparations programs – to provide redress in proportion to the harm suffered by victims – would imply that they share many of the same basic objectives as durable solutions, e.g. to put displaced persons in at least as good a position as they enjoyed prior to displacement in terms of personal autonomy, physical security and economic independence. The Bosnian experience indicates that upholding rights to properties and homes without further assistance is unlikely to meet these goals.

⁵⁶ Constitutional Court of Bosnia and Herzegovina, 2004, Decision on Admissibility and Merits in the Appeal of Ms. M.H. et.al., case no. AP-129/04.

⁵⁷ Id. paragraph 67.

⁵⁸ International Commission on Missing Persons (ICMP), 2006, ‘Creation of Fund Required by Law’ (Press Release).

⁵⁹ Sanita Rozajac, 2007, ‘Disagreement of Entity Governments Regarding the BiH Fund for Missing Persons’ (unofficial translation), *Oslobodjenje*, p. 7.

⁶⁰ According to recent data, some 30,000 people went missing during the Bosnian conflict, of whom some 15,000 are still unaccounted for. International Commission on Missing Persons, 2006, ‘Missing Persons Institute’, *The ICMP Update*, p. 1.

⁶¹ Committee against Torture, 2005, ‘Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Bosnia and Herzegovina, U.N. Doc. CAT/C/BIH/CO/1, paragraph 8.

On the other hand, in post-displacement settings, property restitution or compensation may safely be seen as a starting point for both durable solutions and reparations. Other aspects of achieving these goals may vary depending on the context. However, given the fundamental importance of property, homes and lands as sources of shelter, livelihood, identity and economic independence, any program aspiring to durable solutions or reparations that does not address deprivations of such assets is unlikely to succeed. On a related note, the design and implementation of restitution programs should foster choice of durable solutions. Return is often the first choice for displaced people and tends to be seen abstractly as the most just and morally satisfying way to resolve forced displacement. However, respect for the autonomy of victims of displacement argues that steps should be taken to ensure that both return and resettlement are viable options and that the displaced are permitted to choose as freely as possible between them.

Finally, and perhaps most important, any measures undertaken to provide durable solutions and reparations in the wake of displacement should be identified and prioritized primarily through consultation with those affected by displacement. A great deal is now known about the relative merits of a variety of transitional justice mechanisms and rule of law reform models developed in post-conflict settings.⁶² The appropriateness of such mechanisms in addressing particular cases of displacement and related human rights abuses should be assessed in light of the situation and expressed needs of the displaced.

⁶² See, e.g. UN Secretary General, 2004, The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General, U.N. Doc. S/2004/616.