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# THE CONTEMPORARY RIGHT TO PROPERTY RESTITUTION IN THE CONTEXT OF TRANSITIONAL JUSTICE

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### ***Executive Summary***

The issue of property restitution has featured prominently in many political transitions and peace settlements seen since the end of the Cold War. The return of property, homes, and land has been viewed as a means of redressing past injustice in many forms, ranging from communist nationalizations and colonial-era land confiscation to outright ethnic cleansing and war crimes. Restitution policies often figure at least implicitly in broader transitional justice efforts in the wake of repression, persecution, and widespread human rights violations.

Among the range of transitional justice mechanisms, restitution is most closely linked to reparations by virtue of both their common historical background and their shared aspiration, in principle, to restore victims to the condition they would have enjoyed had no violations of their rights occurred. This study summarizes the parallel development of restitution and reparations in international law and practice over the last century in order to provide context for recommendations on how restitution can best serve the needs of contemporary transitional justice settings.

Prior to World War II, restitution came to the fore as the preferred form of reparations in disputes between states. After World War II, the proliferation of international human rights rules resulted in a new understanding, according to which states responsible for violations could be obliged to make reparations—including restitution—to individual victims of human rights abuses. However, where restitution was traditionally viewed as hierarchically superior to other types of remedies such as compensation, this is no longer clearly the case in human rights settings. Many types of human rights violations do not simply result in the loss of recoverable assets, but do grave intangible harms to their victims' mental or physical integrity and dignity. As a result, the relevance of restitution as part of an integrated reparative response to contemporary human rights violations should be assessed on a case-by-case basis.

Restitution has, however, maintained its traditional high profile in remedying one distinct category of human rights violations, those involving displacement of people from their homes and lands. Although such displacement is illegal, the right of victims to return to their homes of origin is only weakly supported in international law. As a result, restitution of rights in homes, land, and property for displaced persons has come to prominence both as a formal legal remedy for displacement and as a practical means of allowing displaced people to return to their reclaimed homes—or sell them in order to finance a new life elsewhere. In other words, where international law does not set out an unambiguous right of return to homes of origin *as such*, the established right to a remedy in the form of restitution is increasingly invoked in order to achieve return and other durable solutions.

A review of four restitution case-studies—the Czech Republic, South Africa, Bosnia, and Guatemala—reflects how these developments have played out in practice. Restitution in the Czech Republic aimed to partially reconstitute the property relations that preceded communist nationalizations. Initially, the “cut-off date” selected for restitution excluded Jewish victims of the Nazis, as well as some three million ethnic Germans expelled from the Czech lands shortly before the communist takeover. A further citizenship requirement excluded thousands of exiles who defected and had their properties confiscated during the communist period. This restrictive approach was accompanied by highly decentralized procedures, which included few guarantees that the law would be applied consistently throughout the country. Although the Czech restitution program aspired to restore a measure of justice in the wake of communist dictatorship, it did not clearly correspond to a human rights based conception of reparations.

Property restitution also played an important role in the transition from apartheid in South Africa, where discriminatory confiscations left the black majority holding less than twenty percent of the land. South Africa's restitution program is more clearly addressed toward righting individual wrongs, but its delivery has been complicated by its subordination to a broader, politically contentious land redistribution program. As a result, the decision of many restitution claimants to seek compensation rather than return to their land has been seen as undermining the post-apartheid government's commitment to increasing the overall proportion of black landownership. However, recent commitments by the government to complete the process have increased the chance that restitution—if not full redistribution of land—will be achieved in a timely manner.

Bosnian restitution was an overtly human rights based remedy for resolving displacement, but was dependent on—and complicated by—massive international intervention. Restitution was conceived of as a way to secure the return of the two million civilians displaced in Bosnia's 1992–1995 conflict, both for their own good and in order to facilitate the policies of host-countries that wished to sustainably repatriate large Bosnian refugee populations. However, the practical difficulties involved in seeking to undo displacement through return led to a change of focus, with restitution coming to be seen primarily as a remedy in and of itself. This greatly expedited the restitution of 200,000 claimed homes, supporting the return of about half of those displaced by the conflict and restoring an important economic asset to those who chose not to return.

Guatemala, on the other hand, illustrates the risks inherent in raising expectations regarding restitution and return in the absence of either domestic or international resolve to guarantee full implementation. Government suppression of a largely indigenous insurgency in the early 1990s led to the displacement of between one and two million Guatemalans. However, the provisions on restitution set out in the subsequent peace accords did not create clear precedence for victims of displacement vis-à-vis those who subsequently occupied their land. As a result, many victims of the conflict had to be satisfied with government commitments to provide alternate land elsewhere, a promise that was not fully borne out due to inadequate funding as well as the ongoing neglect of those groups most marginalized by virtue of their displacement.

Drawing on these case studies, this study makes the following recommendations regarding how restitution programming in transitional settings should best be conceived and implemented:

- Where restitution is included as a component of transitional programming, it should be conceived of in a way that supports parallel efforts to provide broader redress and pre-empt future conflict. In contemporary transitional settings, reparations and restitution should be understood as functionally separate but complementary responses to human rights violations, each of which should be available in proportion to manifest need.
- Restitution processes should also be designed to complement broader, development-related efforts to end or pre-empt conflicts over land and property. In this context, restitution is usually best seen as a provisional measure applying legal criteria to right specific wrongs and should only be coordinated—not conflated—with long-term reform efforts based on overtly political considerations.
- In order for restitution programs to succeed on their own terms and avoid raising false expectations, their goals should be clearly conceived and mutually complementary. Fundamentally, restitution should be conceived of as a *legal remedy* available on equal terms to all victims of wrongful dispossession.

- Restitution can also provide an important *durable solution* for ending the dislocation of refugees and IDPs by restoring homes that can be returned to permanently or leased, sold, or exchanged in order to finance resettlement elsewhere in the country or abroad. The common tendency to privilege return over other durable solutions should be viewed cautiously as it may become a rationale for conditioning restitution upon return, jeopardizing the fundamental right of all victims of displacement to a remedy.
- In terms of procedure, restitution programs seeking to address widespread and systematic violations of property rights should be set up as streamlined administrative programs with relaxed evidentiary rules.
- Restitution programs should be based on clear parameters, and any “cut-off date” for claims should encompass the entire time period during which relevant violations occurred.
- Restitution programs should extend to significant, settled rights to occupy and use homes and lands, even where they fall short of full formal title.
- Restitution programs should set out clear rules balancing the rights of claimants against those of subsequent occupants. Because subsequent occupants may develop legitimate rights in abandoned property with the passage of time, there is no hard and fast rule, but precedence should generally be given to claimants, with consideration of compensation for subsequent occupants deemed to have acquired bona fide interests in contested property.

## I. INTRODUCTION

The issue of property restitution has featured prominently in many political transitions and peace settlements seen since the end of the Cold War. The return of property, homes, and land is viewed as a means of redressing past injustice in many forms, whether communist nationalization policies in Eastern Europe, apartheid-era confiscations in South Africa, or ethnic cleansing and war crimes in Bosnia and Guatemala. Property restitution programs often figure at least implicitly in broader transitional justice efforts in the wake of repression, persecution, and widespread human rights violations. Among the range of transitional justice mechanisms, restitution is most closely linked to reparations by virtue of both their common historical background and their shared aspiration, in principle, to restore victims to the condition they would have enjoyed had no violations of their rights occurred. This study summarizes the parallel development of restitution and reparations in international law and practice over the last century in order to provide context for recommendations on how property restitution can best serve the needs of contemporary transitional justice settings.

The first section of this study describes the evolving relationship between property restitution and reparations during three broad phases. Prior to World War II, restitution came to the fore as the preferred form of reparations where breaches of international obligations were found in disputes between states. After World War II, the proliferation of international human rights rules resulted in a new understanding, according to which states responsible for violations could be obliged to make reparations—including restitution—to individual victims. This understanding was confirmed most recently with the adoption by the UN General Assembly of a set of *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 Reparation Principles”).<sup>1</sup>

Finally, in the post-Cold War period, property restitution has come into its own as a preferred remedy for forced displacement in the context of resurgent ethnic conflict, as reflected by the approval by the UN Sub-Commission on Human Rights of *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (“UN Restitution Principles”).<sup>2</sup> The second section of the study consists of four restitution case-studies—the Czech Republic, South Africa, Bosnia, and Guatemala—that reflect how these developments have played out in practice. Drawing from these examples, the third and final section of the study seeks to provide general conclusions on how property restitution can best be conceptualized and implemented in complex transitional settings.

## II. EVOLVING UNDERSTANDINGS OF PROPERTY RESTITUTION IN INTERNATIONAL LAW

In traditional international law prior to World War II, reparations, including restitution, compensation, and other forms of satisfaction, were seen as legal remedies in inter-state disputes. Such disputes often arose when one state confiscated property belonging to citizens of another state. The case that has come to epitomize this principle involved the Polish confiscation of a

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<sup>1</sup> “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 Doc. A/RES/60/147 (March 21, 2006).

<sup>2</sup> “Principles on Housing and Property Restitution for Refugees and Displaced Persons,” UN Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005). It is important to note that these Principles remain at a preliminary stage of discussion and acceptance within the UN.

factory owned by German nationals after World War I. In this case “concerning the Factory at Chorzow,” the Permanent Court of International Justice (PCIJ) famously affirmed the principle that “the breach of an engagement involves an obligation to make reparation in an adequate form.”<sup>3</sup> The *Chorzow* decision defined the broad legal characteristics of restitution in a manner which endures largely unchanged to the present day. Restitution was affirmed not only as one possible form of reparations but as the preferred form. Other remedies such as financial compensation were only to be sought if restitution was not possible. This was based on the corrective justice notion that restitution in kind provided a more appropriate remedy than any alternative that provided redress to the victim without restoring the status quo ante by divesting the wrongdoer of the specific assets in dispute:

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. 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.<sup>4</sup>

During this period, the availability of remedies such as restitution was effectively reserved to states. States alone had discretion to take up claims against other states for violations of international law, as in *Chorzow* where claims against Poland were brought by the German government, rather than the individual factory owners. This was due to the prevailing understanding that “only states were *subjects* within the international legal order, and that wrongs done to foreign individuals were in actuality inflicted upon their state of nationality.”<sup>5</sup> International law was understood as prohibiting the confiscation of property belonging to foreign nationals, at least if undertaken without a public purpose and absent payment of compensation.<sup>6</sup> The protection of aliens’ property was part of a broader rule of state responsibility called the “minimum international standard” meant to protect the interests of states by ensuring treatment of their citizens abroad “in a civilized manner.”<sup>7</sup> However, where this rule was violated, the aforementioned principle of exclusive state subjectivity under international law meant that states were allowed to choose not only whether to seek a remedy on behalf of their aggrieved citizens, but also whether to share any proceeds from such a dispute with the individuals involved.<sup>8</sup> Aside from the rules governing treatment of aliens, international law posed few obstacles to states seeking to expropriate property. Traditional notions of sovereignty dictated that “the relationship between states and their own nationals was considered to be an internal matter for each state,” meaning that decisions to protect individual rights under national law were a matter of discretion rather than obligation.<sup>9</sup>

<sup>3</sup> Case concerning the Factory at Chorzow, Judgment No. 9, 21 (1927, P.C.I.J., Series A).

<sup>4</sup> Case concerning the Factory at Chorzow, Judgment No. 13, 47 (1928, P.C.I.J., Series A).

<sup>5</sup> Richard Falk, “Reparations, International Law, and Global Justice: A New Frontier,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 482.

<sup>6</sup> Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7<sup>th</sup> revised ed. (New York: Routledge, 1997), 235.

<sup>7</sup> *Ibid.*, 256.

<sup>8</sup> *Ibid.*, 257.

<sup>9</sup> *Ibid.*, 209.

## A. Human Rights and the Obligation to Provide Remedies to Individuals

In the wake of the unprecedented atrocities seen in World War II, existing international rules on the conduct of war and individual responsibility for war crimes were strengthened and international human rights law, protecting individuals from peacetime deprivations by their own states, emerged under the auspices of the United Nations. Acceptance of human rights law, with its emphasis on obligations owed by states to individuals, undermined the notion that only states could be the subjects of international law. This transformed traditional concepts of reparations by creating individual standing to seek remedies from states for internationally wrongful acts, and broadening the scope of such acts to include violation of a growing list of recognized human rights.<sup>10</sup> This “right to a remedy” was first expressed in the Universal Declaration of Human Rights (UDHR), which guaranteed every person “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>11</sup>

The right to a remedy was subsequently affirmed in the 1966 International Covenant on Civil and Political Rights (ICCPR), as well as regional conventions such as the American Convention on Human Rights (ACHR), the European Convention on Human Rights (ECHR), and the African Charter on Human and Peoples’ Rights (ACHPR).<sup>12</sup> Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include an explicit right to domestic remedies, the UN Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly found that the obligation to realize economic and social rights “by all appropriate means” entails the domestic provision of “judicial or other effective remedies.”<sup>13</sup> Although the right to a remedy has achieved broad acceptance, critics have noted that its allocation of primary responsibility for redressing violations to the states alleged to have committed them has limited its implementation to states predisposed not to commit violations in the first place.<sup>14</sup>

<sup>10</sup> Theo van Boven, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,” UN Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993), para. 45. “[T]he obligations resulting from State responsibility for breaches of international human rights law entail corresponding rights on the part of the individual persons...who are under the jurisdiction of the offending State and who are victims of those breaches. The principal right these victims are entitled to under international law is the right to effective remedies and just reparations.”

<sup>11</sup> Universal Declaration of Human Rights (UDHR), UN Doc A/810 at 71 (1948), Article 8.

<sup>12</sup> International Covenant on Civil and Political Rights (ICCPR), UN Doc. A/6316 (1966), Article 2 (3); American Convention on Human Rights (ACHR), O.A.S. Treaty Series No. 36, 1144 UNT.S. 123, Article 25; and Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 UNT.S. 222, (Nov. 4, 1950), Article 13. The African Charter on Human and Peoples’ Rights (ACHPR) is less explicit, though Article 26 calls for states-parties to “guarantee the independence of the Courts and...allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.” African [Banjul] Charter on Human and Peoples’ Rights (ACHPR), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 26.

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. A/6316 (1966), Article 2 (1): “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The duty implied in this undertaking to provide “judicial or other effective remedies” was found by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 3, para. 5 (Fifth Session, 1990). See also CESCR, General Comment 9 (Nineteenth Session, 1998).

<sup>14</sup> Falk, 484.



The nature of the right to a remedy was recently elaborated on in the UN Reparations Principles, which list restitution as a type of reparation due to victims of “gross violations of international human rights law and serious violations of international humanitarian law.”<sup>15</sup> However, the definition of restitution in the Reparations Principles departs from international law traditions in a number of respects. First, the Principles do not explicitly accord restitution its conventional preferred status relative to compensation and other forms of reparations. Instead, the four forms of reparations listed in the Principles—restitution, compensation, rehabilitation, and satisfaction—are implicitly placed on an even footing, with choices between them to be dictated by “the circumstances of each case” rather than any a priori hierarchy of remedies.<sup>16</sup> Second, the subject matter of restitution is broadened beyond its traditional focus on recoverable material assets to include “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment” as well as return of property.<sup>17</sup>

On the face of it, the decision by the drafters of the Reparations Principles to simultaneously de-emphasize restitution vis-à-vis other forms of reparations and broaden its scope is hard to account for. As one observer points out, the relegation of restitution to one form of reparation among equals may simply reflect political considerations.<sup>18</sup> For instance, the equivalency implied in the Principles between restitution and compensation may reflect some degree of reluctance to foreclose the possibility of resolving protracted conflicts through agreements allowing for compensation of those displaced and dispossessed as well as—or in lieu of—restitution.<sup>19</sup> However, whether by accident or design, the vision of restitution set out in the Principles may lend itself more aptly than traditional definitions to the exigencies of providing reparations in the context of complex human rights violations.

The concept of restitution originated in inter-state disputes that assumed violations involving rights in assets capable of being returned, as such, to their owners. However, “gross violations” of human rights of the type envisioned in the Principles are rarely limited to deprivation of assets. In contemporary settings, such violations typically threaten less tangible but fundamental values such as life, liberty, human dignity, and mental or physical integrity. In such contexts, traditional restitution is unlikely to be more than tangentially relevant as a remedy vis-à-vis responses such as compensation or rehabilitation of victims, and its relevance to particular human rights settings is best assessed on a case-by-case basis rather than presumed. As the UN Secretary General stated in 2004:

<sup>15</sup> UN Reparations Principles, Section IX.

<sup>16</sup> Ibid., para. 18: “In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation...which include [restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition].”

<sup>17</sup> Ibid., para. 19.

<sup>18</sup> According to Shelton, efforts to strengthen the language on restitution to reflect its traditional preference under international law “ran into government objections during the consultations.” Dinah Shelton, “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*, ed. K. De Feyter et al. (Antwerp: Intersentia Publishers, 2006), 22.

<sup>19</sup> The issue of whether the right to restitution can be “traded away” in whole or in part has been a key stumbling block in peace negotiations in both Cyprus and Israel and the Occupied Territories. See Agnès Hurwitz, Kaysie Studdard, and Rhodri Williams, “Housing, Property and Conflict Management: Identifying Policy Options for Rule of Law Programming,” *International Peace Academy Policy Report* (2005): 11-12.

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.<sup>20</sup>

For the same reasons, it may also be appropriate that restitution is defined so broadly that it essentially forms a continuum with other forms of reparations recognized in the Principles.<sup>21</sup> The approach taken by the Reparations Principles arguably reflects a new understanding of the substance of effective remedies that is calibrated to complex contemporary human rights violations. Given that such violations impinge on both tangible and intangible values, restitution appears to have been de-emphasized and merged into a more flexible conception of reparations.

## B. Property Restitution as a Remedy for Displacement

Nevertheless, a narrower and more traditional sense of restitution persists and continues to be applied in situations where breaches of international law result in the loss of recoverable material assets.<sup>22</sup> In fact, since the end of the Cold War, interest in this narrower conception of restitution has increased in response to a sharp rise in internal conflicts involving state failure and resurgent ethnic rivalries.<sup>23</sup> The tactics employed in contemporary “ethnic cleansing” campaigns have included the eviction of ethnic minorities from their homes and productive lands, and the reallocation of such assets to persons of rival ethnicity who can be relied upon to resist the efforts of former residents to return. Restitution has risen to prominence as an integral response to such displacement-related human rights violations.

During the Cold War, victims of ethnic persecution would have had a good chance of seeking and receiving asylum abroad, in accordance with the 1951 Refugee Convention.<sup>24</sup> While this treaty did set out the possibility that refugees could lose their protected status abroad if the conditions were created for them to return home, the policy of Western states during the Cold War was to

<sup>20</sup> “The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General,” UN Doc. S/2004/616 (2004), 18, para. 55.

<sup>21</sup> By virtue of the Principles’ inclusion of remedies such as “enjoyment of human rights, identity, family life and citizenship” in the definition of restitution, the line dividing restitution from satisfaction and guarantees of non-repetition is hard to draw. For instance, the prospective “enjoyment of human rights” under restitution closely corresponds to remedies listed under guarantees of non-repetition such as strengthening the independence of the judiciary, providing human rights education to all sectors of society, and promoting the observance of codes of conduct and ethical norms by public servants.

<sup>22</sup> For instance, the International Court of Justice (ICJ) recently ruled Israel in breach of international law by virtue of its construction of a “security fence” in the Occupied Palestinian Territories. In ordering a remedy, the court explicitly relied on the PCIJ’s decision in *Chorzow Factory* in defining restitution in its traditional superior relationship to compensation. “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” General List No. 131 (2004), para. 152. The International Law Commission (ILC) draft *Articles on State Responsibility* also take a traditional approach, prescribing compensation only where restitution is “materially impossible” or would “involve a burden out of all proportion to the benefit deriving [therefrom].” International Law Commission, *Draft articles on responsibility of states for internationally wrongful acts*, Articles 34 and 35(a) and (b).

<sup>23</sup> Kathleen Newland et al., *No Refuge: The Challenge of Internal Displacement* (New York and Geneva: United Nations, 2003), 40.

<sup>24</sup> 1951 Convention relating to the Status of Refugees (Refugee Convention), 189 UNT.S. 150.



promote permanent resettlement abroad.<sup>25</sup> This policy was expressed as a preference between the three “durable solutions,” or means by which the protection of a state is restored to refugees. Specifically, the West favored *local integration* of refugees in the country where they initially sought asylum or their *resettlement* in third states over attempts to facilitate *voluntary repatriation* to their countries of origin. However, by the end of the Cold War, Western countries were faced with rising numbers of asylum seekers combined with slowing economies and decreased support for immigration of any kind. As a result, repatriation supplanted resettlement abroad as the explicit preference for dealing with mass refugee movements generated by ethnic conflict.<sup>26</sup> Temporary protection regimes conditioning the entry of refugees on their eventual repatriation were pioneered in response to conflicts such as those in the former Yugoslavia and mass-return programs were carried out in their wake.<sup>27</sup>

However, one of the risks involved in repatriation was that refugees returning to unsettled post-conflict settings would be unable to return to their homes, swelling the ranks of internally displaced persons (IDPs). Exacerbated by both new ethnic conflict and new barriers to seeking asylum abroad, internal displacement became a major human rights issue, with the numbers of IDPs worldwide eclipsing the number of refugees by the mid-1990s.<sup>28</sup> As a result, refugee repatriation programs came under fire for failing to ensure that returns to countries of origin took place in a “sustainable” manner, with support offered to ease refugees’ transitions to life in their countries of origin and avert internal displacement. Critics of repatriation tended to focus on its coercive nature, its effect on vulnerable refugee sub-populations, and the destabilizing effect that repatriation of large groups into situations of internal displacement could have on fragile post-conflict societies.<sup>29</sup> Host countries responded by seeking means by which to guarantee that repatriation could be made sustainable, based on motives ranging from the need to be seen to act humanely to hopes that such measures would boost the legitimacy of post-conflict regimes and prevent beneficiaries from simply returning to seek asylum again.<sup>30</sup> As consensus emerged that facilitating return to homes of origin was a central element of both durable solutions for IDPs and sustainable repatriation of refugees, it also became clear that international law presented distinct constraints on the achievement of this goal.

On one hand, it was relatively clear that forced displacement of people from their homes was illegal in most cases. Since World War II, wrongful transfer of populations within countries or deportation of people outside their borders has been treated as a serious violation of international

<sup>25</sup> Ibid., Article 1(C)(5) and (6). Cessation of refugee status is permissible when the circumstances in connection with which refugees were recognized cease to exist and they can therefore “no longer...refuse to avail [themselves]” of the protection of their country of nationality or habitual residence.

<sup>26</sup> Eric Rosand, “The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?,” *Michigan Journal of International Law* 19 (1998): 1091, 1120.

<sup>27</sup> See Simon Bagshaw, “Benchmarks or Deutchmarks? Determining the Criteria for Repatriation of Refugees to Bosnia and Herzegovina,” *International Journal of Refugee Law* 9, No. 4 (1997): 566-92.

<sup>28</sup> Newland et al., 9.

<sup>29</sup> For instance, UNHCR has warned that “return to areas other than the refugee’s place of origin or previous residence may impact adversely on the protection situation of the returnees themselves, that of others in the place of return and more generally on the processes of stabilization, reintegration, and reconciliation. From UNHCR’s perspective, [repatriation] to internal displacement upon return should only be countenanced if relocation is based on a free and informed choice....” UNHCR, “Global Consultations on International Protection: Voluntary Repatriation,” UN Doc. EC/GC/02/5 (2002), 6, para. 30.

<sup>30</sup> See Richard Black and Saskia Gent, “Sustainable Return in Post-conflict Contexts,” *International Migration* 44, No. 3 (2006): 15-38.

humanitarian and criminal law.<sup>31</sup> Forced displacement is also widely seen as a denial of the right to freedom of movement under international human rights law.<sup>32</sup> In addition, special provisions of international law on the rights of indigenous peoples worked to proscribe their displacement from tribal lands.<sup>33</sup> As a result of the collective weight of these prohibitions, UN efforts to develop a normative framework for combating internal displacement began with the recognition of a general ban on what came to be known as “arbitrary displacement.”<sup>34</sup> The resulting *Guiding Principles on Internal Displacement* enunciated a right of every person “to be protected against being arbitrarily displaced from his or her home of residence.”<sup>35</sup> In a finding highly germane to contemporary displacement settings, the drafters of the Principles noted that displacement was inherently arbitrary where it was “aimed at or results in the altering of the ethnic, religious or racial composition of the population.”<sup>36</sup>

However, despite the strength of the ban on arbitrary displacement, international law provided very little in the way of redress where it was violated.<sup>37</sup> Although a “right of return” is widely recognized in international human rights law, this right only pertains to repatriation to one’s country of origin, not return to one’s home within that country.<sup>38</sup> In light of contemporary

<sup>31</sup> See Convention (IV) relative to the Protection of Civilian Persons in Time of War, (1949), Article 49 (prohibiting individual or mass forcible transfers within occupied territories, as well as deportations to other states, and conditioning temporary evacuations of populations from their areas of residence on grounds of military necessity or the safety); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (1977), Article 85 (4) (a) (defining transfer of populations within or outside occupied territories as a grave breach entailing individual criminal responsibility); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, (1977), Article 17 (extending prohibition of population transfers to internal conflicts); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 UNT.S. 280, (1945) (categorizing deportation of civilian populations as a war crime in article 6 (b) and a crime against humanity in article 6(c)); and Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998) (defining deportation or transfer of civilian populations as a crime against humanity at article 7 (1) (d)).

<sup>32</sup> Francis Deng, “Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39: Addendum – Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement,” UN Doc. E/CN.4/1998/53/Add.1 (1998), Addendum, Section II. (A), para. 1. The right to freedom of movement is affirmed in the UDHR, Article 13 (1); ICCPR, Article 12 (1); ACHPR, Article 12 (1); ACHR, Article 22 (1); and Article 2 (1) of the Fourth Protocol to the ECHR.

<sup>33</sup> International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>34</sup> Francis Deng, see *Supra* note 31, Addendum, Section II., para. 1: “Few express international legal norms exist which protect people against individual or collective eviction and displacement or transfer from one region to another within their own country. However, if pieced together, these point to a general rule according to which forced displacement may not be effected in a discriminatory way nor arbitrarily imposed.”

<sup>35</sup> UN Commission on Human Rights, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998), Principle 6 (1).

<sup>36</sup> Walter Kälin, “Guiding Principles on Internal Displacement: Annotations,” *Studies in Transnational Legal Policy*, No. 32 (2000), 16.

<sup>37</sup> Only two of the international instruments banning displacement include rules requiring victims of displacement to be allowed to return home. These are the Fourth Geneva Convention, Article 49 (2), requiring transfer of those affected by wartime evacuations back to their homes as soon as hostilities in the area have ceased, and the ILO Convention No. 169 concerning Indigenous and Tribal Peoples, Article 3, entitling indigenous people to return to their lands as soon as the grounds for relocation cease to exist.

<sup>38</sup> See UDHR, Article 13(2) (guaranteeing the right of every person “to leave any country, including his own, and to return to his country”); ICCPR, Articles 12(4) (guaranteeing that “[n]o one shall be arbitrarily

concerns regarding sustainable repatriation of refugees and durable solutions for IDPs, there have been calls for extension of the right of return to include homes of origin. These calls have relied on international practice such as the implementation of the 1995 Dayton Peace Agreement (DPA), which ended the war in Bosnia and set out a strong right of return to homes.<sup>39</sup> UN human rights bodies such as the Sub-Commission on Human Rights have also affirmed an individual right of return to homes in the wake of displacement.<sup>40</sup> While the UN Security Council has also supported return to homes, it is not entirely clear whether this is viewed by the Council as a matter of rights or policy.<sup>41</sup>

The existence of a right of return home is increasingly recognized but is not beyond dispute. As a result, advocacy efforts on behalf of the displaced have tended to situate the emerging right of return to homes in the context of the established right to a remedy, and specifically, to the restitution of property and housing.<sup>42</sup> For instance, the drafters of the Guiding Principles on IDPs found no general rule of international law affirming an individual right to return to homes of origin, but noted that failure to allow such return could amount to a violation of the right to freedom of movement. As a result, the Principles included a state duty to allow return home on the basis of the right to a remedy: "...as states have a duty not only to avoid but to redress violations of international human rights and humanitarian law, the party responsible for illegal displacement is obliged to allow and facilitate the return of displaced persons in all situations."<sup>43</sup>

Developing on this theme, UNHCR has supported the existence of a right to restitution of homes as a remedy for illegal evictions, a finding that in displacement settings amounts to an effective right to return home.<sup>44</sup> The resulting understanding—that restitution can serve as a modality for achieving return to homes of origin—has also influenced the process of developing the UN Restitution Principles. Although the Principles' drafters supported an expanded right of return to homes of origin (and described restitution as "an essential element" of the exercise of this right),<sup>45</sup> the argument that restitution was also justified as a remedy for illegal evictions became increasingly important,<sup>46</sup> and ultimately prevailed in the final Principles' characterization of restitution as the "preferred remedy for displacement."<sup>47</sup>

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deprived of the right to enter his own country"); ACHPR, Article 12(2); ACHR, Article 22(5); and Article 3(2) of the Fourth Protocol to the ECHR.

<sup>39</sup> See Section III. C. of this study on restitution in Bosnia.

<sup>40</sup> UN Sub-Commission on Human Rights, Resolution 1998/26 (1998), para. 1; Resolution 1997/31 (1997), para. 1; Resolution 1996/9 (1996), para. 2; Resolution 1995/13 (1995), para. 2.

<sup>41</sup> Rosand, 1137.

<sup>42</sup> Human Rights Watch, "Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq" (2004), 22: "International law not only specifies the forced and arbitrary transfer of populations as a crime against humanity, but also provides for a remedy for the persons victimized by these forced transfers. Persons forcibly transferred from their homes in violation of international standards are entitled to return to their home areas and property, a right known as the 'right of return.'"

<sup>43</sup> Kälin, 69-70.

<sup>44</sup> Pointing out that the right of return to one's country "is increasingly seen as closely linked with...the right not to be arbitrarily deprived of housing and property," UNHCR states that "[f]or refugees, this means they have the right to return not only to their countries of origin but also to recover the homes from which they were previously evicted (restitution)." UNHCR, "Global Consultations," 4-5, para. 23.

<sup>45</sup> "The return of refugees' or displaced persons' property: Working paper submitted by Mr. Paulo Sérgio Pinheiro pursuant to Sub-Commission decision 2001/122," UN Doc. E/CN.4/Sub.2/2002/17 (2002), paras. 22 and 29.

<sup>46</sup> Ibid., paras. 31-2.

<sup>47</sup> UN Restitution Principles, Principle 2.2.

The right to restitution in displacement settings incorporates some traditional elements of classic restitution and breaks with others. Displacement-related restitution has retained its customary precedence over other forms of reparations, largely out of concern that a priori reliance on compensation could preclude return, restricting the ability of displaced persons to choose the durable solutions that best suit their needs.<sup>48</sup> For instance, the UN Restitution Principles subordinate compensation to restitution and exhort states to "demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice."<sup>49</sup> However, displacement-related restitution has also departed from tradition in the sense that it has expanded from protecting formally owned property to take in non-proprietary rights in housing and land. This development has served two purposes. First, it makes restitution relevant to the needs of many refugees and displaced persons who did not own their homes and lands outright before their displacement. Second, it links restitution with housing rights, which constitute a stronger and more dynamic area of international law than property rights, per se. Although the right to own property is included in the UDHR,<sup>50</sup> it is absent from later multilateral conventions and has been cautiously formulated in regional human rights treaties.<sup>51</sup> In the ECHR for instance, a limited right to enjoyment of possessions was only included in a protocol to the original treaty.<sup>52</sup> Moreover, most existing provisions do not explicitly require compensation for deprivations of property, reflecting traditional reluctance to limit state discretion in this area by insisting on remedies.<sup>53</sup> As a result, housing rights have come to the fore in justifying contemporary restitution:

[H]ousing and real property restitution in the context of the right to return of refugees and other displaced persons has deservedly received a great deal of attention from the international community, more so than other types of property restitution. This attention is due in large part to the unique role that housing and real property restitution play in securing...return of refugees and other displaced persons to their homes and places of original residence. [In addition], housing rights are enshrined in international law to a far

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<sup>48</sup> Compensation may be seen "as a means of legitimizing ethnic cleansing and other human rights violations. Moreover, the payment of cash compensation may only serve to compound the situation of those displaced. Throwing money at displaced persons whose livelihoods are dependent on access to land, such as farmers and pastoralists will not necessarily solve their problems in the same way as would allocation of equivalent land elsewhere in the region or country." Simon Bagshaw, "Property restitution for internally displaced persons: developments in the normative framework," in *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, ed. Scott Leckie (Ardsley, NY: Transnational Publishers, 2003), 381.

<sup>49</sup> UN Restitution Principles, Principles 2.1 and 2.2.

<sup>50</sup> Article 9 of the UDHR states that "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."

<sup>51</sup> Formulations of the right to property in regional human rights conventions have been qualified with assertions of states' rights to regulate and expropriate property. See, for example, Article 21 (1) of the ACHR: "The law may subordinate such use and enjoyment [of property] to the interest of society." The ACHPR adopts a similar approach in Article 14: "The right to property...may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

<sup>52</sup> The right to enjoyment of property set out in Article 1 of the First Protocol to the ECHR allows for deprivation of possessions if "in the public interest and subject to the conditions provided for by law and by the general principles of international law" and provides that states may "control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

<sup>53</sup> Catarina Krause, "The Right to Property," in *Economic, Social and Cultural Rights: A Textbook*, ed. Asbjørn Eide, Catarina Krause, and Allan Rosas (Dordrecht: Martinus Nijhoff Publishers, 1995), 151-2.

greater degree and encompass far more, substantively speaking, than are more general property rights.<sup>54</sup>

Housing rights relevant to property restitution are derived from the right to adequate housing set out in the UDHR and the ICESCR and affirmed in a number of multilateral and regional human rights treaties.<sup>55</sup> In 1991, the UN Committee on Economic, Social and Cultural Rights set out criteria for deciding “whether particular forms of shelter can be considered to constitute ‘adequate housing’ for the purposes of the [ICESCR].”<sup>56</sup> The first criterion, security of tenure, was defined primarily in terms of legal protection from eviction.<sup>57</sup> According to the Committee, states were obliged to provide a remedy to victims of violations of tenure security,<sup>58</sup> particularly where such violations took the form of “forced evictions,” a term the Committee would later confirm as referring to evictions of an inherently illegal or arbitrary nature.<sup>59</sup> Calls for restitution in response to housing rights violations were strengthened by the UN Commission on Human Rights’ 1993 declaration that forced evictions constituted a “gross violation of human rights,”<sup>60</sup> as well as by the recognition that evictions also raised civil and political rights issues.<sup>61</sup> Where housing rights are accepted as subject to restitution, they have expanded the potential scope of restitution programs greatly; in addition to private property, tenure rights subject to protection from forced eviction can include “rental (public and private) accommodation, cooperative housing, lease...emergency housing and informal settlements, including occupation of land or property.”<sup>62</sup>

<sup>54</sup> Pinheiro, “Working Paper,” paras. 9 and 10.

<sup>55</sup> Article 25 (1) of the UDHR sets out the right of everyone to “a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care....” See also Article 11 (1) of the ICESCR. Article 5 (e) (iii) of the CERD prohibits racial discrimination in the enjoyment of the right to housing. Article 14 (2) (h) of the CEDAW similarly prohibits discrimination against women in rural areas in enjoyment of “adequate living conditions, particularly in relation to housing....” Article 27 of the CRC requires parties to take appropriate measures to ensure the right of every child to an adequate standard of living, including with regard to housing. The right to adequate housing is also protected under Article 26 of the American Convention on Human Rights (which incorporates by reference the goal of “[a]dequate housing for all sectors of the population” in Article 31 (k) of the 1970 Buenos Aires Protocol to the Charter of the Organization of American States) and Article 31 (1) of the 1996 revised European Social Charter.

<sup>56</sup> Committee on Economic, Social and Cultural Rights, General Comment 4: The Right to Adequate Housing (Article 11 (1)), paras. 8 and 8 (a) (sixth session, December 13, 1991). The seven factors are legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.

<sup>57</sup> “Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.” CESCR, General Comment 4, para. 8 (a).

<sup>58</sup> *Ibid.*, para. 17.

<sup>59</sup> CESCR, General Comment 7: The Right to Adequate Housing (Article 11 (1)): Forced Evictions (sixteenth session, May 20, 1997), para. 3: “The term ‘forced evictions’...is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”

<sup>60</sup> UN Commission on Human Rights, Resolution 1993/77 (1993), paras. 1 and 4. The Commission called for “immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted....”

<sup>61</sup> Housing rights protections are complemented by the notion of the right to respect for the home, which is enumerated as a component of the right to privacy in a number of human rights instruments, such as the UDHR, Article 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence....”); the ICCPR, Article 17 (1); the ECHR, Article 8; and the ACHR, Article 11.

<sup>62</sup> CESCR, General Comment 4, para. 8(a).

Forced evictions in violation of housing rights have come to be closely associated with the broader concept of arbitrary displacement.<sup>63</sup> This link reinforces the gravity of forced evictions by recognizing that they not only take the form of isolated violations of housing rights but also represent one of the central means of carrying out acts of mass displacement such as ethnic cleansing. In a parallel development, restitution has come to be seen as an individual act of redress that can contribute to the resolution of larger conflicts, both through its reparative aspect and by means of facilitating durable solutions to displacement.<sup>64</sup> In this sense, restitution has come to be seen as a central tactic in addressing the wave of renewed sectarian strife and attendant ethnic cleansing that has threatened international peace and security since the end of the Cold War.<sup>65</sup>

### III. CONTEMPORARY RESTITUTION PRACTICE

As set out above, the post-Cold War period has seen significant changes in international understanding of the goals and modalities of restitution. However, the same time period has also seen increasingly widespread and diverse state practice in restitution that has both shaped contemporary understandings of the international law on remedies and been influenced by these understandings. The following four case studies represent a temporal, geographic, and thematic cross-section of state practice during this period. This section begins with the Czech Republic, which arguably led the trend in post-Cold War Eastern Europe toward repudiation of the prior socialist period through a highly politicized process of privatizing nationalized property through returning it to former owners. Restitution of land confiscated during the apartheid period in South Africa represented a shift toward squarely redressing displacement and human rights abuses in the context of a peaceful transition to majority rule. Bosnia stands as one of the most successful restitution programs in the immediate wake of appalling conflict and ethnic cleansing, albeit one that came about through an exceptional level of international engagement. Finally, Guatemala presented a negotiated end to ethnic conflict without a real transition to majority rule. As a result, although the forms of restitution were invoked, implementation did not follow, leaving both the grievances that triggered the conflict and many grievances resulting from the conflict largely unaddressed.

#### A. The Czech Republic

Czechoslovakia was one of a number of states in the former Soviet Bloc that chose property restitution programs as integral components of their transition from socialism and planned economies to liberal democracy and market capitalism. While the process began prior to the peaceful dissolution of the Czech and Slovak Federal Republic (CSFR) in 1992, its two successor

<sup>63</sup> Most recently, the UN Special Rapporteur on the Right to Adequate Housing noted that “the practice of forced evictions includes arbitrary displacement that results in altering the ethnic, religious or racial composition of the affected population.” “Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in the context, Miloon Kothari – Appendix: Basic principles and guidelines on development-based evictions and displacement,” UN Doc. E/CN.4/2006/41 (2006), 17, para. 19.

<sup>64</sup> The UN recently cited restitution of legal rights and restoration of property as tested means of providing reparations in contemporary post-conflict settings. “The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General,” 18, para. 54.

<sup>65</sup> Van Boven, “Final Report,” 10, para. 21: “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 cultural rights of large numbers of people, both individual persons and collectivities.”



states—the Czech Republic and Slovakia—both carried on with restitution programs.<sup>66</sup> Restitution in the Czech Republic has been greatly complicated by a number of factors, including a high number of potential claimant groups, the passage of time since the bulk of the impugned confiscations, and the sensitive political considerations that have, far more than any concept of individual rights, dictated which groups have benefited and which groups have been excluded. Restitution in the Czech Republic has been largely successful in terms of its domestic political symbolism, as a redistribution of societal goods concretizing rejection of the communist past through the partial reconstitution of the property relations that preceded it. However, the selective nature of this process dictated that actual remedies were not provided on an equal basis to all similarly situated victims of displacement. Phrased in the language of justice (if not rights) and deeply ideological at heart, Czech restitution represents a transition between old concepts of restitution as a discretionary option of sovereign states and the new concept of restitution as an individual remedy.

At the time of the collapse of communism in 1989, at least three significant groups of victims existed with cognizable restitution claims derived from different periods of the Czech Republic's prior history.<sup>67</sup> The earliest claims in time belong to the Jewish victims of persecution under Nazi Germany's 1939–1945 occupation of the Czech lands. During this period, Czech Jews were placed under German jurisdiction, and their homes, businesses, and communal property were confiscated and turned over to ethnic Germans. As a result, Jewish properties would later be lumped in with the bulk of German properties confiscated by the Czechoslovak state in the course of its expulsion of German minority communities at the end of World War II.<sup>68</sup> With the communist takeover of Czechoslovakia in February 1948, the trend towards nationalization increased and the confiscation of Jewish properties became effectively permanent.

The second set of restitution claims against the Czech Republic stem from its post-war expulsion of long-settled German minority communities, collectively referred to as the Sudeten Germans. During a three-year period in the wake of World War II, nearly three million Sudeten Germans were systematically expelled from Czechoslovakia, losing their land and property without compensation.<sup>69</sup> The Sudeten German territories had been involuntarily incorporated in the new state of Czechoslovakia after World War I.<sup>70</sup> Resulting grievances were exploited by Adolf Hitler in securing the 1938 Munich Agreement, which shifted Czechoslovakia's borders to place Sudeten German areas within the German Reich and set the stage for Hitler's 1939 occupation of the remaining Czech lands. Although the Sudeten Germans by no means uniformly supported

<sup>66</sup> Anna Gelpern, "The Law and Politics of Reprivatization in East-Central Europe: A Comparison," *University of Pennsylvania Journal of International Business Law* 14 (1993): 325.

<sup>67</sup> One author has identified as many as six different "waves of expropriation" experienced by the countries of Central and Eastern Europe between 1939 and 1989. Andrzej K. Kozminski, "Restitution of Private Property: Re-privatization in Central and Eastern Europe," *Communist and Post-Communist Studies* 30, No. 1 (1997): 96-97. In fact, a fourth set of property restitution claims against the Czech Republic exists in addition to the three discussed in this study, namely those asserted by the Catholic Church. Given the emphasis in this study on redress for individual violations and restitution of homes, these claims will not be addressed. For a discussion on the treatment of Catholic Church claims throughout Eastern Europe, see Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York, NY: Norton, 2000), 122-26.

<sup>68</sup> Robert Hochstein, "Jewish Property Restitution in the Czech Republic," *Boston College International and Comparative Law Review* 19 (1996): 423, 434.

<sup>69</sup> About 2,921,000 ethnic Germans were expelled from Czechoslovakia in the wake of World War II. Alfred-Maurice de Zayas, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans, 1944-1950* (New York: St. Martin's Press, 1994), 152.

<sup>70</sup> *Ibid.*, 15. The 3.5 million Sudeten Germans constituted 28% of the Czechoslovak population.

Hitler or union with Nazi Germany, they were perceived as a fifth column by the Czech government-in-exile, which successfully lobbied during the war for revocation of the Munich Agreement and the eventual expulsion of the Sudeten Germans.<sup>71</sup>

At the end of the war, the Allied powers requested the Czechoslovak authorities to allow the "orderly and humane" transfer of ethnic Germans to Germany.<sup>72</sup> Initially, however, tens of thousands of "wild expulsions" of Germans took place in conditions of chaos and frequent brutality.<sup>73</sup> By 1946, "orderly resettlement" procedures were instituted, with German communities forced to leave all but a small allowance of personal baggage behind and transported by freight train to Germany.<sup>74</sup> The Sudeten expulsions appeared to violate the international law prohibitions against deportations that were contemporaneously enforced against Nazi officials during the Nuremberg Trials. Nevertheless, they were undertaken with the blessing of the Allies and in accordance with a series of decrees issued by post-war President Edvard Beneš.<sup>75</sup> With the communist takeover of Czechoslovakia in 1948, all hope of redress for the Sudeten Germans would recede for four decades, until the "Velvet Revolution" of 1989 created a new opportunity for the assertion of their historical claims.<sup>76</sup>

A third category of restitution claims derives from extensive expropriations of property undertaken by the communist authorities after their takeover of Czechoslovakia in 1948. The first and most familiar group of claims in this category involves property transferred from individual to state ownership as part of post-war nationalization policies. Czechoslovakia was generally seen as going farthest among the Soviet bloc states in terms of nationalizing property and restricting private ownership.<sup>77</sup> As a result, by 1989, the state owned or controlled nearly all real property.<sup>78</sup> In practice, nationalization tended to be undertaken against inadequate compensation or none at all, and with little recourse available to those affected. In many cases, property was expropriated in violation of existing law at the time.<sup>79</sup> However, even under these circumstances, such acts of nationalization were not necessarily prohibited by international law. As discussed above, the traditional rules on expropriation focused on the protection of non-nationals, allowing states

<sup>71</sup> *Ibid.*, 78-80.

<sup>72</sup> "The Potsdam Declaration: Tripartite Agreement by the United States, the United Kingdom and Soviet Russia concerning Conquered Countries, August 2, 1945," in *Pillars of Peace: Documents Pertaining To American Interest In Establishing A Lasting World Peace: January 1941-February 1946* (Carlisle Barracks, PA: Army Information School, 1946), Article XIII, paras. 2-3.

<sup>73</sup> De Zayas, 86-7.

<sup>74</sup> *Ibid.*, 113-115.

<sup>75</sup> The formal validity of the post-war "Beneš decrees" has been challenged since 1989. See Constitutional Court of the Czech Republic, Judgment No. Pl. US. 14/94, "Beneš Decree No. 108" (March 8, 1995); available at [test.concourt.cz/angl\\_verze/cases.html](http://test.concourt.cz/angl_verze/cases.html).

<sup>76</sup> Although the Czechoslovak authorities sought to resettle citizens returning from abroad after World War II in the properties of expelled Sudeten Germans, many of these areas have yet to reach their former population numbers. Dušan Drbohlav, "The Times They are A-Changin'," *Sharing Experience: Migration Trends in Selected Applicant Countries and Lessons Learned from the 'New Countries of Immigration' in the EU and Austria: Volume II – Czech Republic* (International Organization for Migration, 2004), 9.

<sup>77</sup> Gelpern, 324-325.

<sup>78</sup> Cheryl W. Gray, "The Legal Framework for Private Sector Activity in the Czech Republic," *Vanderbilt Journal of Transnational Law* 26 (1993-1994): 275: "Industrial enterprises and the real property they occupied were all under state ownership, as were most apartment buildings. Although the state never officially expropriated agricultural land during the socialist period, it did allocate rights of use and transfer to state farms and cooperatives. Single-family housing, a few apartment buildings, and the land on which these were built...were the only kinds of real property that remained in private hands."

<sup>79</sup> *Ibid.*, 276.

broad discretion to take their own citizens' property as they saw fit. Even from a moral perspective, absent persecutory intent, nationalization was not a categorical wrong:

For such great historical wrongs as slavery and genocide, the normative premises are clear—these acts were profound violations of the dignity of persons—and the appropriate response a generation later...must include a dose of moral horror. The same is true for some particular expropriations, those punishing the exercise of basic rights that any legitimate regime must respect. But responding to the systematic expropriations undertaken as part of the socialist project has to involve a different tone and set of premises, seeing them as failed and humanly costly political mistakes, but not as crimes.<sup>80</sup>

A second category of property takings carried out by the communist authorities did have a more obviously persecutory or at least punitive intent. These involved the confiscation of the homes and possessions of expatriates. Prior to 1989, defectors from the CSFR faced *in absentia* prosecution, with penalties including jail terms and the confiscation and sale of their properties.<sup>81</sup> Nevertheless, between 1948 and 1989, some 500,000 people illegally left Czechoslovakia.<sup>82</sup> Unlike nationalization programs, the bulk of which were implemented in the decades after World War II, punitive confiscations of property continued to be exacted against expatriates through the end of the communist period.<sup>83</sup>

Although there are important distinctions between the above four categories of restitution claimants—Jewish victims of the Nazis, expelled Sudeten Germans, Czechs impacted by nationalization and expatriates—a common thread uniting most of their claims has been the passage of time. By 1989, the bulk of claims for property taken through nationalizations and punitive confiscations related to events that had occurred as long as twenty years ago. Meanwhile, the Sudeten German claims were over forty years old and most Jewish claims up to fifty years old. In other words, most property claims were related to consequences of actions that either predated forty years of communism or that had occurred during the first half of the communist period, a generation prior to the Velvet Revolution. In this sense, restitution claims on the post-communist Czech regime represented a demand for “intergenerational” redress, as distinguished by Steinberg from conventional transitional justice in the immediate aftermath of human rights violations.<sup>84</sup>

<sup>80</sup> Christopher Kutz, “Justice in Reparations: The Cost of Memory and the Value of Talk,” *Philosophy and Public Affairs* 32, No. 3 (2004): 285-6.

<sup>81</sup> Drbohlav, 9.

<sup>82</sup> *Ibid.* Of these, about three quarters emigrated from the territory of the Czech Republic.

<sup>83</sup> In the case of one couple who complained to the UN Human Rights Committee regarding aspects of the Czech restitution regime, property confiscation occurred in the wake of departure from the Czech Republic in 1987, only two years before the Velvet Revolution. UN Human Rights Committee, Simunek against the Czech Republic, Communication No. 516/1992 (1995), para. 2.1.

<sup>84</sup> Jonathan Steinberg, “Reflections on Intergenerational Justice,” in *The Legacy of Abuse: Confronting the Past, Facing the Future* (The Aspen Institute, 2002), 71. Steinberg’s proposed continuum of transitional and intergenerational justice might be completed by reference to historic justice, or that related to acts that took place largely beyond living memory. Debates regarding how to appropriately address historic injustices continue, but the UN Sub-Commission on Human Rights has proposed not only “solemn and formal recognition” of historic responsibility for injustices, but also “a concrete and material aspect” such as debt cancellation and return of cultural objects to groups affected by historical injustice. UN Sub-Commission on Human Rights, Resolution 2001/1 (August 6, 2001).

As a result of the passage of time, the assertion of intergenerational restitution claims presents particular challenges. First, parties and witnesses to such proceedings may have died and evidence been lost or obscured.<sup>85</sup> Second, giving effect to such claims inherently gives rise to legal uncertainty by revisiting long-settled acts. In the case of restitution, even where the original expropriation may have been unjust, the fact that others have used or even owned the property for decades gives rise to legal interests on their part that must be taken into account. Finally, in the Czech Republic, the specific time period when many of the impugned property takings occurred was prior to the general acceptance of international human rights law. As a result, such takings did not clearly breach Czechoslovakia’s international obligations at the time and do not clearly oblige reparation now. The only area of intergenerational restitution clearly governed by contemporary human rights law is the requirement of fairness and equal treatment in any contemporary restitution procedures that governments voluntarily provide.

In the case of the Czech Republic, this dynamic is illustrated by the approach taken by the pre-eminent regional adjudicator of human rights, the European Court of Human Rights, to restitution complaints. One of the fundamental jurisdictional rules of the Court is that it may only consider complaints regarding acts or omissions of a respondent state that took place or continued after the date upon which that state acceded to the ECHR. This rule of jurisdiction “*rationae temporis*” reflects the Court’s obligation not to apply the ECHR retroactively. As the Czech Republic acceded to the ECHR in 1992, direct challenges to any property takings before 1989 are presumptively inadmissible.<sup>86</sup> The Czech Republic is, of course, bound by broader provisions of international law than the ECHR alone. However, most questionable confiscations in the Czech Republic also predated jurisdiction of bodies such as the UN Human Rights Committee, which hears individual complaints under the ICCPR.<sup>87</sup> As a result, the Committee does not have jurisdiction to examine past confiscations of property, but has issued a number of “views,” or decisions, finding that the exclusion of certain classes of claimants from restitution programs violates the right to equal protection of the law under Article 26 of the ICCPR.<sup>88</sup> However, because Czech constitutional law only recognizes the European Court of Human Rights as an “international court” whose decisions must be given effect, Czech courts have considered the Committee’s views but often rejected its findings.<sup>89</sup>

<sup>85</sup> See Keith N. Hlyton, “A Framework for Reparations Claims,” *Boston University School of Law Working Paper Series* (Law and Economics Working Paper No. 03-05, 2003); available at [www.bu.edu/law/faculty/papers](http://www.bu.edu/law/faculty/papers). The author discusses the difficulties involved in identifying specific perpetrators and victims, establishing the causality linking the perpetrators’ actions to harm to the victims, and overcoming formal rules prescribing legal remedies on the basis of the passage of time.

<sup>86</sup> Grand Chamber of the European Court of Human Rights, Decision as to the Admissibility of Application no. 33071/96, Malhous against the Czech Republic, 13-14 (2000): “In the present case, the property of the applicant’s father was expropriated in June 1949...long before 18 March 1992, the date of the entry into force of the Convention with regard to the Czech Republic....Therefore, the Court is not competent *rationae temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date. In this regard, the Court refers to and confirms...established case-law according to which deprivation of ownership...is in principle an instantaneous act and does not produce a continuing situation of “deprivation of a right....”

<sup>87</sup> The CSFR ratified the ICCPR in 1975, but only ratified an Optional Protocol allowing individuals to bring complaints under the ICCPR to the UN Human Rights Committee in 1991. The Czech Republic notified its succession to both instruments in 1993. UN Human Rights Committee, Simunek, para. 1. In cases before it, the Committee has asserted that it cannot rule on prior property confiscations as such (*Ibid.*, para. 4.3).

<sup>88</sup> See, for instance, UN Human Rights Committee, Simunek; UN Human Rights Committee, Marik against the Czech Republic, Communication No. 945/2000 (August 4, 2005).

<sup>89</sup> “Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies,” *International Law Association Berlin Conference* (2004), para. 39.

The uncertain applicability of contemporary human rights standards to intergenerational property takings left the Czech authorities with a great deal of discretion to define restitution according to political criteria. The choices ultimately made reflect the shift in power relations and ideology brought about by the 1989 Velvet Revolution. This transitional moment began with the sudden collapse of a widely reviled communist regime.<sup>90</sup> As in the rest of the region at the time, the absolute rejection of communism created a chance for a prospective redefinition of the Czech political community in the guise of a “return” to bourgeois nationalism, democracy, and market capitalism:

The similar political developments...in the region pointed to a regional historical revival aimed at recovering Communist expropriations in the name of the “people” rather than at rectifying human rights abuses...[Resulting restitution policies] privileged a specific ethnic group or rewrote the “traditional” national composition of the region so as to reflect the current middle class as liberating the “people” and “returning” the country to its historical pre-Communist status quo ante, its idealized past.<sup>91</sup>

The redistributive aspect of restitution in this context is significant. As Barkan points out, the process involved taking property from many people who felt they had acquired it legitimately and restoring it to the pre-communist elite, rather than distributing it evenly for the good of all.<sup>92</sup> On the other hand, restitution did promise to keep property out of the hands of discredited former communists and mistrusted diaspora groups abroad.<sup>93</sup> In a similar vein, Eastern European restitution also tended to be implemented in a manner that consolidated ethnic identity by excluding minorities.<sup>94</sup> Finally, restitution was often cast as “re-privatization” and treated as a component of the liberal economic reforms espoused by most East European countries.<sup>95</sup> However, credible economic arguments against restitution existed as well, reinforcing the primacy of politics in the decisions ultimately taken in many Eastern European countries to restate.<sup>96</sup>

Against this background, restitution proceeded in the Czech Republic on an extensive scale relative to other Eastern European states. The most important restitution laws were passed prior to the dissolution of the CSFR, beginning with the October 1990 “Small Restitution Law,” a limited intervention that reversed a particularly lawless wave of early nationalizations.<sup>97</sup> The substance of

<sup>90</sup> Gelpert, 323-4.

<sup>91</sup> Barkan, 118.

<sup>92</sup> Ibid., 119. In effect, “whole sectors of society were asked to support a major redistribution plan that would not provide them with any gains.”

<sup>93</sup> Michael Heller and Christopher Serkin, “Revaluing Restitution: From the Talmud to Postsocialism,” *Michigan Law Review* 97 (1999): 1389, 1405. Former communists were often feared to be the only domestic group with sufficient resources to participate in new property markets.

<sup>94</sup> Ibid., 1406. As in the Czech Republic, “most former socialist countries...chose cut off dates for restitution that coincided with the most ethnically pure moment in the country’s history.”

<sup>95</sup> Eric A. Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Chicago Public Law and Legal Theory Working Paper* No. 40 (2003): 20-1. The authors note that restitution was defended as an affirmation of the sanctity of private property rights, as well as means of eliminating the discretion of corrupt officials to manipulate privatization processes.

<sup>96</sup> Critics cited the “destabilization of already uncertain property regimes, the consequent loss of foreign investment, and a general proliferation of claims on...courts and administrative authorities.” See Gelpert, 323.

<sup>97</sup> Law on the Alleviation of Some Property Injuries, Law No. 403/90, cited in Gray, 276. This law only affected an estimated 70,000 properties, primarily apartment buildings and small businesses.

the Czech restitution program came with the “Large Restitution Law” and the “Federal Land Law,” both passed in 1991.<sup>98</sup> The Large Restitution Law permitted claims to real property appropriated by the communists, amounting to as much as ten percent of overall state property.<sup>99</sup> The Land Law created a similar cause of action for rights in agricultural and forest land alienated by the communists, affecting as many as 3.5 million titleholders.<sup>100</sup> Both laws swept widely, allowing restitution in cases of both formal nationalizations in accordance with then-valid law and less formal confiscations.

In defining the scope of Czech restitution, these two laws set two important parameters. First, both laws included a “cut-off date” of February 25, 1948, the date the communists formally took power.<sup>101</sup> As a result, all claims related to confiscations before this date were excluded, including those of the expelled Sudeten Germans and Jewish victims of Nazi persecution.<sup>102</sup> A second important limitation was the requirement that claimants be both citizens and permanent residents of the Czech Republic, a provision that excluded virtually all expatriate victims of communist confiscations.<sup>103</sup> In the context of their time, these laws were notable both for their generosity to the many eligible claimants they admitted, and for their harshness to the large classes of potential claimants they excluded.<sup>104</sup> However, the CSFR Parliament left little in the way of reasoning for the choices it had made, noting blandly that the laws represented their “attempt to redress the results of *certain property and other injustices* arising in the period from 1948 to 1989, aware that these injustices cannot ever be fully compensated for....”<sup>105</sup>

The laws balanced the relationship between former and subsequent owners, with claimants entitled to either restitution or compensation depending on the nature of subsequent use of the property.<sup>106</sup> Subsequent purchasers were protected from loss of claimed property unless demonstrated to have acquired the property illegally or through personal involvement in the persecution of the former owners.<sup>107</sup> Other properties exempt from in-kind restitution include those substantially altered or destroyed, those owned by foreign states or companies, and those used for public purposes.<sup>108</sup> In addition, tenants living in restituted apartment buildings were protected from eviction or rent increases.<sup>109</sup>

<sup>98</sup> Law on Extrajudicial Rehabilitation, Law No. 87/91 (February 1991) and Law on Land and Agricultural Cooperatives, Law No. 229/91 (June 1991), cited in Gray, 276.

<sup>99</sup> Gray, 276.

<sup>100</sup> Ibid., 276-7.

<sup>101</sup> Gelpert, 336.

<sup>102</sup> Although the Czech Parliament enacted a fourth restitution law (the “Czech Restitution Law”) in 1992 in favor of ethnic Germans and Hungarians, this only applied to those who had managed to avoid expulsion in the aftermath of World War II. See Gray, 277 and Gelpert, 337. In the aftermath of World War II, ethnic minorities were vulnerable to denunciation as collaborators and expulsion regardless of their actual conduct during the occupation. See Dinah A. Spritzer, “American seeks restitution: Corinne Ott’s grandmother’s hotel seized after World War II because of marriage to an Austrian,” *The Prague Post* (July 22, 2004).

<sup>103</sup> Gelpert, 340. This provision exists in both 1991 CSFR laws as well as the 1992 Czech Restitution Law.

<sup>104</sup> The Hungarian restitution law, by contrast, provided only compensation rather than in-kind restitution but did allow claims by Jewish victims of the Nazis and expatriates. Serkin and Heller, 1402-3.

<sup>105</sup> Preamble to the Large Restitution Law, cited in Hochstein, 441. Emphasis added.

<sup>106</sup> Gelpert, 338-9. Compensation could take the form of cash, state securities, or alternate land.

<sup>107</sup> Ibid., 341. This rule did not apply if the subsequent owner was a legal rather than a natural person.

<sup>108</sup> Ibid., 338.

<sup>109</sup> Ibid., 339. See also Martin Lux, “Housing the Poor in the Czech Republic: Prague Brno and Ostrava” in *Too Poor to Move, Too Poor to Stay: A Report on Housing in the Czech Republic, Hungary and Serbia*, (Open Society Institute Local Government and Public Service Reform Initiative, 2004); available at lgi.osi.hu. The Czech government maintained regulated rents in both publicly owned and restituted flats, resulting in such rents still being only one-fifth of the market level as late as 2001. See Lux, 27-8.



The procedures for Czech restitution were highly decentralized and informal, with claims initially made in writing to the current occupants of claimed properties and referred to local courts if terms could not be agreed.<sup>110</sup> As a result, lack of accurate aggregate information about the process was a problem from the beginning. Nevertheless, restitution was deemed largely completed by 1993, having affected “roughly 10 percent of the dwelling stock, mainly in the central parts of towns.”<sup>111</sup> However, several hundred disputed cases endured ten years later, with the Czech authorities still unable to provide reliable statistics regarding the overall outcome of the process.<sup>112</sup> As a result, public perceptions of Czech restitution have often been formed by controversies related to the groups excluded from restitution, rather than the progress of those entitled to claim. The most rancorous of these debates has been that over the claims of the Sudeten Germans.

A distinctive feature of the Sudeten German claims is their explicit articulation of restitution as a means of facilitating their own intended mass return.<sup>113</sup> Their claim is explicitly to “restore the pre-war situation.”<sup>114</sup> On the other hand, Sudeten German organizations have shown insensitivity to Czech grievances arising from the complicity of many Sudeten Germans in the Nazi occupation.<sup>115</sup> These missteps have aggravated a Czech tendency to view the proposed return of Sudeten Germans as a re-imposition of the dangerously unstable conditions of ethno-political conflict that resulted in World War II. These arguments invert the corrective justice rationale typically given in favor of mass return by implying that the pre-expulsion status quo (of what we would today call multi-ethnicity) was too dangerous to risk reinstating. This viewpoint was perhaps best expressed in a 1995 speech by then-Czech President Vaclav Havel.<sup>116</sup> While Havel acknowledged the expulsions as a historical wrong, the Sudeten Germans who supported union with Nazi Germany are described as having “turned not only against their fellow citizens, against Czechoslovakia as a state...they turned against humanity itself.”<sup>117</sup> Having established the threat to the past Czechoslovak state from nationalist minorities, Havel goes on to rule out any form of

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However, tenants in restituted apartments were excluded from laws allowing the sale of other publicly owned flats to their occupants at advantageous prices. See Gray, 278, note 23.

<sup>110</sup> Gelpert, 342. The author notes that there was not even a standard application or claim form.

<sup>111</sup> Lux, 27.

<sup>112</sup> In early 2004, the Czech Justice Ministry was quoted as stating that 252 restitution cases had remained active as of the end of 2002. Lenka Ponikelska, “Rising up against restitution,” *The Prague Post* (January 22, 2004). See also Katka Krosner, “Family regains Lobkowicz Palace,” *The Prague Post* (April 24, 2003). The article quotes Jirina Bohmova, director of the restitution section of the Czech Finance Ministry, as saying that the lack of “a central system or court dealing specifically with restitution” made it impossible to say how many restitution cases have passed through the courts or might yet be pending.

<sup>113</sup> Unlike German expellees from Poland, who have contested the post-war Polish-German border, Sudeten German associations accept the revocation of the Munich Agreement and seek reinstatement as a recognized minority community within the current borders of the Czech Republic. Barkan, 134.

<sup>114</sup> Ibid. However, a 1996 poll found that, in Germany, “the vast majority of Sudeten Germans were less than interested in the subject of restitution.” Ibid., 139.

<sup>115</sup> Ibid., 138-9. Occasional populist gaffes by the German authorities have exacerbated the situation. After periodic suggestions that German support for Czech EU accession might be made subject to Sudeten German compensation, German government support for Sudeten German claims hit a low point with the retaliatory suspension of payments to 12,000 Czech survivors of World War II slave labor in Germany. “Our Take: Crabs Walking,” *Transitions Online* (September 22, 2003); available at [www.tol.cz](http://www.tol.cz). Although such payments eventually resumed, Germany’s decision damaged its previous legacy of “admirable, occasionally awe-inspiring years of post-war repentance....”

<sup>116</sup> Vaclav Havel, “Czechs and Germans on the Way to a Good Neighbourship” (Charles University, Prague, February 17, 1995); available at [old.hrad.cz/president/Havel/speeches/1995/1702\\_uk.html](http://old.hrad.cz/president/Havel/speeches/1995/1702_uk.html).

<sup>117</sup> Ibid.

redress by the modern Czech state on the basis that it would risk opening itself up to the same dangers again:

If we were to transplant ourselves into our past history forever and existentially identify ourselves with it, we would lose the ability to look at it from a distance, to judge it with the due sense of responsibility and to learn from it. In the end, such a complete self-transplantation into the past would amount to a specific way of restoring the tribal concept of nation.... We know full well what the ultimate product of this concept is: the principle of a never-ending circle of blood feuds which again and again drives generations of grandchildren to punish other grandchildren for wrongs done by the grandfathers of the latter to the grandfathers of the former.<sup>118</sup>

Havel concludes by welcoming expellees to return as “guests who esteem the lands where generations of their forefathers once lived,” but rejects their restitution claims as “an effort to set the vicious circle of tribal retaliation in motion again.”<sup>119</sup> The terms of President Havel’s political rejection of restitution are mirrored in a Czech Constitutional Court judgment, adopted one month later, which legally dispensed with Sudeten German claims once and for all.<sup>120</sup> In addressing a challenge to the post-war “Beneš decree” on confiscation of German property, the Court attributes collective responsibility to the Sudeten German minority for having by and large supported union with Nazi Germany in the 1930s despite “its already overt totalitarian character.”<sup>121</sup> Referring to the extraordinary threat of totalitarianism, the Court justifies “extraordinary legislative measures,” such as the expulsions as a defence of human rights:

[The decree] is a sanction aimed at ensuring the function and purpose of human rights and freedoms, their constructive contribution to society, and the deepening of the sense of responsibility. After the Nazi occupation had ended, it was necessary to restrict the rights of the then Czechoslovak citizens, not due to the fact that they championed a differing position, rather due to the fact that...their position was hostile to the essence of democracy and its system of values....<sup>122</sup>

In this context, the Court implicitly rules out contemporary restitution for the Sudeten Germans on the same basis as President Havel, namely the Czech Republic’s “interest in doing away with further possible recurrences of analogous historical situations...” to those that led to Nazi occupation.<sup>123</sup> In the final paragraphs of its judgment, the Court refers to the least legally

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Constitutional Court of the Czech Republic, “Beneš Decree no. 108.” The case was brought by Sudeten German expellees who appealed decisions of lower Czech courts rejecting their claims for return of their pre-1945 homes. The UN Human Rights Committee declined to hear a challenge to the exclusion of confiscations based on the Beneš Decrees from the Czech restitution program. UN Human Rights Committee, Malik against the Czech Republic, Communication No. 669/1995 (1998).

<sup>121</sup> The Court elaborates on this collective responsibility as follows: “In the 1930’s, a fateful decade for the Czechoslovak Republic, each of its citizens could have realized, or rather should have realized, that right here, under the veil of propaganda and lies on the part of Nazi Germany, one of the crucial historical clashes between democracy and totalitarianism was taking place, a clash in which everyone bore responsibility together for the position they adopted and the social and political role they undertook, that is, the role of a defender of democracy or an agent of its destruction.”

<sup>122</sup> Ibid.

<sup>123</sup> The Court states elsewhere that “in such situations it is always a matter of eliminating the causes leading to the birth of totalitarianism, of doing away with the sources which could bring on a recurrence of it with all of its horrible features.”

disputable argument in defence of the confiscations, namely that international law at the time of these acts placed few restrictions on the discretion of states to appropriate private property,<sup>124</sup> and that the confiscations were instantaneous acts rather than continuing violations subject to contemporary scrutiny.<sup>125</sup> While this argument is morally debatable but legally well founded, the Court's more central inference that the return of Sudeten Germans might trigger a recurrence of totalitarianism is less convincing.<sup>126</sup> As such, the Court's decision does little to dispel accusations that the maintenance of ethnic purity achieved in the wake of World War II had become a "formative political consideration" for post-communist Eastern European countries such as the Czech Republic.<sup>127</sup> Perhaps most damaging, attempts to exalt the post-war confiscations as morally imperative conduct (instead of simply accomplished legal facts) have perpetuated the demonization of the Sudeten Germans, reducing the political space for reconciliation through symbolic acts such as nominal compensation or prospective repeal of the Beneš Decrees.<sup>128</sup>

The fear of real or imagined threats to the integrity of the Beneš Decrees has cast a shadow over other claimants than the Sudeten Germans.<sup>129</sup> The most obvious example has been with regard to Jewish claims for restitution of property expropriated by the Nazis which, like the Sudeten German claims, were pre-empted by the 1948 restitution cut-off dates. In this case, returning the relatively small number of claimed Jewish properties promised to yield a high anticipated "moral payoff" in terms of international public opinion.<sup>130</sup> A legal formula was arrived at by April 1994 allowing a limited exception to the cut-off date for "claimants who lost property under the racial laws enacted by Nazi Germany between 1939 and 1945."<sup>131</sup> The Beneš Decrees have also been invoked with regard to the restitution claims of the traditional Czech nobility. The confiscation of aristocratic estates after World War II often included elements of both nationalization and expulsion, as segments of the aristocracy were accused of having collaborated with the Nazi occupiers.<sup>132</sup> However, in a number of cases, property claims by former nobles have been decried

<sup>124</sup> The Court notes that "in the given situation [the consistency of the disputed Decree with human rights treaties binding via the Czech Constitution] cannot be reviewed today, for such a means of proceeding would lack any juridical function whatsoever."

<sup>125</sup> The Court states that "this normative act [the Beneš Decree] has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character...."

<sup>126</sup> As one observer noted, the Constitutional Court departed from its tradition of strict legal analysis in this decision, basing many of its findings on considerations of "history, politics, sociology and ethics." Mark Gillis, "Facing Up to the Past: The Czech Constitutional Court's Decision on the Confiscation of Sudeten German Property," *Parker School Journal of East European Law* 2 (1995): 709.

<sup>127</sup> Barkan, 135.

<sup>128</sup> Kate Swoger, "Government backs Benes Decrees," *The Prague Post* (October 8, 2002). Vladav Pavlicek, the head of the constitutional law department of Prague's Charles University, is quoted as saying that symbolic compensation would be tantamount to "admitting the defeated enemy was right."

<sup>129</sup> To be fair to the current Czech authorities, the stakes are very high, with the value of the properties confiscated under the Beneš Decrees estimated to represent as much as "one-third of the entire country's assets." Stephen Weeks, "Waiting and freezing," *The Prague Post* (March 24, 2005).

<sup>130</sup> Barkan, 149. Fear of opening the door to Sudeten German claims had defeated two pre-1994 draft laws.

<sup>131</sup> Hochstein, 443. Implementation of Jewish restitution has not been without political interference. See Courtney Powell, "Court case: Jewish group mulls lawsuit to recover tennis court and health clinic properties," *The Prague Post* (May 22, 2003).

<sup>132</sup> An example is the estate of the Schwarzenburg family, who suffered during World War II for opposing the Nazis, but whose extensive estates were irresistible to the post-war Czech authorities. A controversial special law passed in 1947 expropriated these properties without explanation, and as late as 1991, tour guides at the family's castle were still explaining that the properties were taken from "Nazi collaborators." Weeks, "Waiting and Freezing."

at the highest levels of Czech politics as undermining the Beneš Decrees, when, from a legal perspective, they represented no such threat.<sup>133</sup>

With regard to the restitution claims of the bulk of expatriates from the CSFR, the Beneš Decrees have received less emphasis and the Czech Republic's interest in investment in and protection of property has been more overt. However, pragmatic reasons to exclude expatriates were reinforced by the fact that their absence rendered them unable to participate in the formative political debates on restitution, underscoring a tendency throughout Eastern Europe to view them as opportunistic outsiders.<sup>134</sup> In this light, the citizenship and residency requirements of the restitution laws could implicitly be read as conditioning restitution of property on willingness to return and live there. Return satisfied not only the pragmatic concern that restituted property be properly maintained but also the ideological concern that property not be alienated to outsiders.

In 1994, the Constitutional Court abolished the residency requirement, but left the citizenship requirement intact.<sup>135</sup> One year later, the UN Human Rights Committee issued its "views," or decision, in the *Simunek* case, a challenge brought to the citizenship and residency requirements by four Czech expatriates who had fled the country, lost their Czechoslovak citizenship, and been denied restitution on this basis.<sup>136</sup> The Committee found both requirements to be unreasonable in light of the fact that the claimants' original entitlements to the claimed properties had not been conditioned on citizenship or residency.<sup>137</sup> The Committee also found that the disputed conditions constituted a requirement that claimants return in order to be entitled to benefit from restitution, a condition that was held to be discriminatory in effect (if not intent) with regard to the claimants, given the circumstances under which they had left Czechoslovakia:

Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to

<sup>133</sup> For instance, one case involving a claim for return of a castle simply revolved around evidentiary issues as to whether the pre-confiscation owner had been a Nazi collaborator without presenting any challenge to the Beneš Decrees themselves; nevertheless the Czech minister of culture evoked a new wave of restitution litigation as a result. Kevin Livingstone, "Court orders Opocno castle restitution," *The Prague Post* (May 22, 2003). In another case involving the Kinsky family, the claimant simply asked the courts to recognize his right to property that had never been formally confiscated. Although the claimant's father was alleged to have been a Nazi sympathizer, the claimant inherited the property in question directly from his grandfather. Nevertheless, the case was decried by the minister of culture as opening the door to Sudeten German claims. The Czech prime minister and president held high-level meetings to discuss the case and courts considering the Kinsky claims suspended them, allegedly under political pressure. Kevin Livingstone, "Private property," *The Prague Post* (July 10, 2003).

<sup>134</sup> "The moral justifications for the exclusion of 'foreigners' reasoned that restitution should be based not solely on actual loss of property but also on having remained and suffered under Communist affliction. The 'in group' included only those who had withstood the Communist regime for more than forty years, and therefore ought to benefit from restitution, but not those who had escaped it." Barkan, 128.

<sup>135</sup> Constitutional Court of the Czech Republic, Judgment No. Pl. US 3/94, "Permanent Residence" (undated); available at [test.concourt.cz/angl\\_verze/cases.html](http://test.concourt.cz/angl_verze/cases.html). In other sources, this judgment is given as Judgment No. 164/1994 (12 July 1994). See UN Human Rights Committee, Marik, para. 2.3. The decision annuls the requirement of permanent residence and opens a new deadline for claims available to those who claimed within the prior deadline but were rejected on residency grounds. The judgment relies on Article 11 (2) of the 1992 Czech Charter of Fundamental Rights and Basic Freedoms, which permits restrictions on property rights only on the basis of citizenship.

<sup>136</sup> UN Human Rights Committee, *Simunek*. The Committee also considers complaints against the permanent residency requirement, which was still in effect when the original submissions were made.

<sup>137</sup> *Ibid.*, para. 11.6.

return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.<sup>138</sup>

The Committee concluded that the Czech Republic should not only provide effective remedies to the claimants but also review the restitution laws “to ensure that neither the law itself nor its application is discriminatory.”<sup>139</sup> However, as set out above, the Committee’s views are not considered binding in the Czech Republic and were not given effect. The European Court of Human Rights’ decisions are deemed binding, however, and in 2002, the Court issued a decision on a claim brought by expatriates who challenged the citizenship requirement under the ECHR in explicit reliance on the Human Rights Committee’s views in *Simunek*.<sup>140</sup> Although the case was ultimately found inadmissible on technical grounds,<sup>141</sup> it forced the Czech Republic to set out its justification for the citizenship requirement more explicitly. In its submissions, the Czech Republic underscored the financial interest of the state, “which was in danger of running into debt by rectifying mistakes that had occurred in the past.”<sup>142</sup> As a result, the old equitable objective for the laws (“mitigating the effects of certain wrongs”) was supplemented with the new pragmatic goal of “returning property to those who could best look after it.”<sup>143</sup> The inference that the privilege of restitution should be conditioned on the duty to return and care for restituted property was made even more explicit in the course of a subsequent complaint to the UN Human Rights Committee:

[T]he [Czech Republic] indicates that its restitution laws...were designed to achieve two objectives. The first was to mitigate the consequences of injustices which occurred during the communist regime...The other was to enable a rapid implementation of comprehensive economic reform, in the interest of establishing a functioning market economy. The citizenship condition was included in the law to incite owners to take good care of the property after the privatisation process.<sup>144</sup>

Although the Committee observed that this argument had not been substantiated and found a further violation of the ICCPR by the Czech Republic,<sup>145</sup> it also noted that its earlier views on the topic remained unimplemented ten years on.<sup>146</sup> Despite conciliatory steps to permit expatriates to regain Czech citizenship, the confiscation of their property has by and large stood.<sup>147</sup> However,

<sup>138</sup> Ibid., paras. 11.6-11.7.

<sup>139</sup> Ibid., para. 12.2.

<sup>140</sup> Grand Chamber of the European Court of Human Rights, Decision as to the Admissibility of Application no. 38645/97, Polacek and Polackova against the Czech Republic (2002), para. 43.

<sup>141</sup> In contrast with the right to equal protection under Article 26 of the ICCPR, which can be applied independently, Article 14 of the ECHR banning discrimination may only be applied where discrimination is alleged in the exercise of a right set out in another article of the ECHR or its protocols (para. 46). The applicants in Polacek and Polackova argued that they were discriminated against in their right to peaceful enjoyment of possessions under Article 1 of Protocol 1 to the ECHR, but the Court found that their property rights had been instantaneously extinguished prior to the Czech Republic’s accession to the ECHR and that the existence of the citizenship requirement under Czech law meant that their current property claim did not even amount to a “legitimate expectation” and could not be considered on the merits (para. 67).

<sup>142</sup> Ibid., para. 53.

<sup>143</sup> Ibid., para. 54.

<sup>144</sup> UN Human Rights Committee, Marik, para. 4.5.

<sup>145</sup> Ibid., paras. 6.4 and 7.

<sup>146</sup> Ibid., para. 5.3. The Committee refers to its 1995 view in *Simunek* as well as to three other views on the topic issued in the intervening ten years.

<sup>147</sup> Barkan, 129.

the confirmation of return as a background requirement highlights the contradictions in Czech restitution as it has come to be implemented. For instance, while expatriates are excluded for failure to return, Sudeten Germans are excluded despite their stated intent to return and care for their property. Jewish victims of Nazi confiscations are provided restitution by the Czech state while Sudeten German victims of Czech confiscations are not. And among those whose property was expropriated by the communists, victims of generally applicable nationalization policies are entitled to redress, while victims of individualized punitive confiscations generally are not.

The apparent arbitrariness of Czech restitution highlights the challenges posed by intergenerational restitution, particularly where the unclear legal status of the underlying confiscations invites political criteria for the admissibility of claims. One observer has noted that the lack of clear procedures and political consensus around restitution “enable restitutions and denial of claims to be based on truly flexible readings of the laws, or even upon no laws at all.”<sup>148</sup> This perception is supported by a number of European Court of Human Rights decisions finding violations of the ECHR arising from the restitution process.<sup>149</sup> Far from promoting individual rights or restoring all victims as equal citizens, Czech restitution differentiated between similarly placed individuals in pre-empting remedies for some. Meanwhile, the overtly political process of integration in Europe appears to present a more hopeful engine for reconciliation and even symbolic redress than the restitution process. For example, Germany’s political renunciation of Sudeten German claims and support for the Czech Republic’s May 1, 2004 accession to the EU have contributed to a new and less defensive atmosphere in which Czechs have taken their first concrete steps toward making symbolic reparation for the unjustified suffering of many Sudeten Germans.<sup>150</sup>

## B. South Africa

As in Eastern Europe, property restitution has played an important role in the political transition from apartheid in South Africa. Important parallels existed between restitution in these two contexts, such as the urge to redress even intergenerational wrongs in reconstituting a past set of property relations deemed more just than those that resulted from communism and apartheid. On the other hand, they were distinguished by the fact that South African restitution has been less politicized, with all victims entitled in principle to redress under equal conditions. Politics nevertheless remain a factor, as the essentially corrective program of restitution has been

<sup>148</sup> Gelpert, 372.

<sup>149</sup> For instance, in 2001, the Court found that the a restitution claimant appealing a partially negative decision on his claim under Czech law was denied a public hearing before an independent and impartial tribunal in violation of Article 6 of the ECHR. Grand Chamber of the European Court of Human Rights, Judgment in Application no. 33071/96, Malhous v. The Czech Republic (2001). One year later, the Court found that inadequate compensation offered to subsequent purchasers required to vacate a property constituted a violation of Article 1 of Protocol 1 to the ECHR. Second Section of the European Court of Human Rights, Judgment in Application no. 36548/97, Pincová and Pinc v. The Czech Republic (2002).

<sup>150</sup> The process of gradual political rapprochement between Germany and the Czech Republic is described in Barkan at 139-42. In July 2005, Czech Prime Minister Jiri Paroubek suggested Czechs should acknowledge the existence of a democratic Sudeten German resistance to Nazism and make “at least symbolic reparations” to German anti-fascists deported after the war. “Czechs and Germans: Mobilization and its Discontents,” *Transitions Online* (July 25, 2005); available at [www.tol.cz](http://www.tol.cz). While this statement was not uncontroversial, it represented a crucial first step away from decades of uncritical demonization of Sudeten Germans and was accompanied by a proposal to invest 30 million Czech crowns (\$1.2 million) into a research program and information campaign to identify and honor anti-fascist Sudeten Germans. Peter Josika, “In a word: Cultural recognition of German heritage is key to future coexistence,” *The Prague Post* (September 2005).



articulated as one component of a more broadly redistributive post-apartheid land reform agenda, which in turn has suffered from confusion over whether its goal is to provide livelihoods to those most disadvantaged by prior barriers to land access, or to change the racial composition of a highly competitive class of commercial farmers.<sup>151</sup> This has led to conflicts where, for instance, restitution beneficiaries have accepted compensation rather than returning to their land, counteracting the overarching land reform objective of increasing the proportion of black ownership of land. In many respects, South African restitution has been a remarkable success under difficult circumstances. However, considerable questions remain as to utility of restitution in a context where political conceptions of justice through the reconstitution of a class of black agriculturalists do not always mesh with the manifest preferences of individual beneficiaries.

Land confiscation in South Africa took place on an almost unprecedented scale during two centuries of white minority rule, resulting in massive displacement and dislocation. Nevertheless, as recently as the turn of the last century, black farmers were still able to compete with white settlers in supplying the needs of South Africa's urban centers and mining towns.<sup>152</sup> In order to consolidate white control of land and agricultural markets, the South African government responded with the 1913 Natives Land Act, which restricted black use of land to designated reserves, later labeled "homelands," constituting a mere seven percent of the country's area. Although the percentage of land devoted to homelands increased over time, any chance that viable large-scale agriculture might be established on them was precluded by the abusive perpetuation of "customary" tenure forms. In effect, private purchase and ownership were banned in favor of communal ownership administered by state-appointed tribal authorities. As a result, agriculturally poor homelands came to house increasing populations of impoverished, displaced blacks, providing "a wealth of inexpensive black labour for white farms and mines."<sup>153</sup>

The policy of displacing blacks from desirable land and concentrating them in designated homelands accelerated after World War II. In the decades prior to the end of apartheid, over 3.5 million non-white South Africans were displaced from their homes and lands,<sup>154</sup> contributing to an increase in the population of homelands from 4.5 to 11 million.<sup>155</sup> The passage of the 1950 Group Areas Act presented non-white urban as well as rural dwellers with the prospect of forcible eviction without process or compensation. By the 1990s, these policies had resulted in a profoundly skewed tenure pattern, with the white minority holding 87% of the land and the black majority holding 13%. Although South Africa achieved the highest general level of urbanization in the region by the 1990s, the legacy of its apartheid-era removal policies was severe rural poverty.<sup>156</sup>

South Africa's early land confiscations were largely unconstrained by the international law at the time, especially given the tendency in colonial settings to treat unfamiliar native tenure systems

<sup>151</sup> International Crisis Group (ICG), *Blood and Soil: Land, Politics and Conflict Prevention in Zimbabwe and South Africa* (International Crisis Group Press, 2004), 17-18.

<sup>152</sup> *Ibid.*, 135.

<sup>153</sup> *Ibid.*, 136.

<sup>154</sup> Ruth Hall, "Rural Restitution," *University of the Western Cape Programme for Land and Agrarian Studies (PLAAS) Evaluating Land and Agrarian Reform in South Africa Series*, no. 2 (2003): 1.

<sup>155</sup> ICG, 136.

<sup>156</sup> *Ibid.*, 137: "Research conducted in the late 1990s indicated that 72 per cent of the poor were living in rural areas and that poverty was most severe in the provinces containing the former homelands. These studies also found that 61 per cent of South Africa's black population was poor (compared to only 1 per cent of whites)."

as evidence that tribal groups had no prior rights to the lands they occupied.<sup>157</sup> However, apartheid-era land confiscations continued nearly unabated through the end of the Cold War, a period when human rights law imposed increasing constraints on state action. During this period, international opinion also began to regard the institution of apartheid as illegal in light of its philosophy of pervasive racial discrimination. In 1973, the UN General Assembly established an international treaty "on the Suppression and Punishment of the Crime of Apartheid."<sup>158</sup> The Convention proscribed "measures...designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, [or] the expropriation of landed property belonging to a racial group or groups..."<sup>159</sup> Condemnation of South Africa's eviction policies remained part of the broader effort to isolate the apartheid regime until its demise in 1992.<sup>160</sup>

In South Africa's domestic context, land redistribution was a critical issue. The African National Congress (ANC), which led the resistance to apartheid and became a dominant political force under majority rule, adopted redress for land confiscations as a central component of its program. The 1955 ANC Freedom Charter noted that South Africa's people had been "robbed of their birthright to land, liberty and peace" and committed the ANC to redistribution as well as prospective guarantees of equitable access to land and housing.<sup>161</sup> Although early ANC plans called for wholesale land nationalization,<sup>162</sup> by the time of constitutional negotiations in the early 1990s the party conceded that redistribution would not take a confiscatory form.<sup>163</sup> In practice, this had two consequences. First, from a legal perspective, expropriation of land for redistributive purposes was permissible, but only in accordance with law and against compensation. Second, from a policy perspective, the ANC embraced the "willing seller-willing buyer" or "market approach" to redistribution, pledging to refrain from expropriating claimed properties in favor of negotiating their purchase. This decision was not uncontroversial, with many criticizing the government for agreeing to, in effect, buy back stolen land on terms awarding a market premium to the perpetrators.<sup>164</sup>

In accordance with the ANC's compromise, the 1993 transitional constitution extended legal protection to all property rights existing at the time of its inception, regardless of their

<sup>157</sup> See Privy Council, *In re: Southern Rhodesia*, A.C. 211 (1919), 223-4: "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them."

<sup>158</sup> The International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly resolution 3068 (XXVIII), 30 November 1973, entered into force 18 July 1976.

<sup>159</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 2(d).

<sup>160</sup> *The human rights dimensions of population transfer, including the implantation of settlers: Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano*, UN Doc. E/CN.4/Sub.2/1993/17 (1993), para. 269.

<sup>161</sup> African National Congress, *The Freedom Charter*, preamble (Adopted at the Congress of the People, Kliptown, on June 26, 1955); available at [www.anc.org.za/ancdocs/history/charter.html](http://www.anc.org.za/ancdocs/history/charter.html): "Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it."

<sup>162</sup> ICG, 140.

<sup>163</sup> Ruth Hall, "Land Restitution in South Africa: Rights, Development and the Restrained State," *Canadian Journal of African Studies* 38, No. 3 (2004): 654, 656. The ANC's decision was seen as necessary to preserve the commercial agricultural sector "in the interests of both political stability and food security."

<sup>164</sup> ICG, 140. In this sense, South African land reform was "seriously impeded by constitutional recognition of the legitimacy of precisely the relations it seeks to transform." Hall, "Land Restitution," 660.

provenance.<sup>165</sup> However, the constitution also mandated legislation on restitution of confiscated land, including authorization for the state to either purchase or expropriate privately held land in order to restore it to its prior owners.<sup>166</sup> The resulting *Restitution of Land Rights Act* (“Restitution Act”) was the first law adopted under President Nelson Mandela’s post-apartheid government.<sup>167</sup> The Restitution Act swept broadly, allowing for claims by persons or groups dispossessed of rights in land “as a result of past racially discriminatory laws or practices.”<sup>168</sup> As a result, claims could be submitted either by individuals or collectivities such as tribes upon a showing, in effect, that their property had been confiscated and that they were not white. Reference to racially discriminatory “practices” as well as laws meant that virtually any uncompensated apartheid-era appropriations were presumptively liable to redress.<sup>169</sup>

An important limitation on restitution came in the form of a cut-off date—confiscations that occurred prior to June 19, 1913 would not be remedied.<sup>170</sup> Although the adoption of a cut-off date effectively codified prior land grabs, the decision to reach back eight decades made South African restitution an inter-generational as well as a transitional project, necessitating the recognition of claims by direct descendants of dispossessed individuals and communities as well as surviving victims.<sup>171</sup> In the case of community claims, this has resulted in the time- and labor-intensive necessity of drawing up extensive family trees to establish group membership, as well as adjudicating multiple competing claims by estranged communities or sub-communities.<sup>172</sup> A second limitation on restitution was the imposition of a preclusive deadline for submission of claims. Despite extension of the original deadline and a nationwide public information campaign, the claims of those who failed to meet the deadline have remained a source of controversy.<sup>173</sup> Although an estimated 3.5 to 6 million people were affected by apartheid-era evictions, only about 80,000 claims were received on time.<sup>174</sup> Groups challenging the deadlines asserted that they were misled or unaware, but the government has held firm, fearing the additional costs and legal uncertainty that would result from accepting further claims.<sup>175</sup>

<sup>165</sup> Constitution of the Republic of South Africa, Act 200 of 1993, Article 28; available at [www.polity.org.za/html/govdocs/legislation/1993/constit0.html?rebookmark=1](http://www.polity.org.za/html/govdocs/legislation/1993/constit0.html?rebookmark=1).

<sup>166</sup> 1993 Constitution of South Africa, Articles 121-3.

<sup>167</sup> ICG, 142; Restitution of Land Rights Act 22 of 1994 (as amended); available at [land.pwv.gov.za/restitution/RSTEAJM.html](http://land.pwv.gov.za/restitution/RSTEAJM.html).

<sup>168</sup> Restitution Act, Article 1.

<sup>169</sup> *Ibid.* Racially discriminatory practices are defined as “racially discriminatory practices, acts or omissions, direct or indirect, by (a) any department of state or administration in the national, provincial or local sphere of government; (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation....”

<sup>170</sup> Adoption of this cut-off date allowed for the broadest possible scope of restitution permissible under the 1993 Constitution, Article 121(3). The date corresponds to the entry into force of the Natives Land Act.

<sup>171</sup> Restitution Act, Article 2.

<sup>172</sup> Hall, “Rural Restitution,” 15-16.

<sup>173</sup> *Ibid.*, 3-4. The original deadline ran three years from May 1, 1995 but was extended to December 31, 1998.

<sup>174</sup> South Africa’s Chief Land Claims Commissioner, Tozi Gwanza, estimated that as many as six million people were dispossessed between 1913 and the end of apartheid. Abhik Kumar Chanda, “Govt ‘not happy’ with land reform pace,” *Johannesburg Mail and Guardian* (April 14, 2005). Another Land Commissioner, Blessing Mphela, later cited research indicating that 3.5 million people were removed from their land during apartheid. Yolandi Groenewald, “Late land claimants want another chance,” *Johannesburg Mail and Guardian* (July 13, 2005).

<sup>175</sup> Groenewald, “Late land claimants want another chance.” In some cases, claimants who missed the deadlines have allegedly been victimized by organizations purporting to challenge the deadlines. Yolandi Groenewald, “Land claims profiteers,” *Johannesburg Mail and Guardian* (April 29, 2005).

In terms of procedures, the Restitution Act initially foresaw a judicial approach, with a Commission on the Restitution of Land Rights (Land Claims Commission) acting in support of a Land Claims Court tasked to decide what form of redress was “appropriate and fair” in each case.<sup>176</sup> Amendments to the Restitution Act in 1999 speeded the process by delegating greater powers to negotiate the resolution of land claims to the central and regional Land Claims Commissions.<sup>177</sup> However, financial constraints emerged as unexpectedly stable political conditions under majority rule drove up the price of land in South Africa.<sup>178</sup> The ANC’s commitments on land reform were nevertheless maintained both in the democratic constitution of 1996, which conditioned expropriation on compensation, and in the government’s continued observation of the voluntary market approach to acquisition of land.<sup>179</sup> Without the credible threat of expropriation, regional Land Claims Commissions were at a considerable negotiating disadvantage with farmers reluctant to sell.<sup>180</sup> In the context of limited funding, respect for the market cost of agricultural land came to constitute a nearly absolute block on rural restitution.<sup>181</sup>

As a result of constraints on rural restitution, early progress was primarily limited to the resolution of urban claims, which typically involved financial compensation packages for claimants evicted from urban neighborhoods under the Group Areas Act.<sup>182</sup> This approach has built on the freedom claimants enjoy under the Restitution Act to seek financial compensation and other alternative remedies rather than strict, in-kind restitution. As a result, although the Land Claims Commissions reported having resolved nearly 50,000 of their 80,000 claims in 2004, the bulk of these were for urban properties (42,490) rather than rural land (5,973) and were settled through cash settlements (59%) rather than in-kind restitution (36%).<sup>183</sup> Although urban settlements have been expedient for land commissioners under pressure to be “seen to be delivering,” they have significant drawbacks.<sup>184</sup> One of the primary problems is that while the majority of *claims* may be for urban properties, the majority of *claimants* are interested in restitution of rural land:

Rural claims account for between 20% and 25% of all claims, but most of these are large group claims involving hundreds, if not thousands, of people. Urban claims are generally smaller, often involving individual families. For this reason, rural areas—where an

<sup>176</sup> Hall, “Rural Restitution,” 3.

<sup>177</sup> *Ibid.*

<sup>178</sup> ICG, 140.

<sup>179</sup> Constitution of the Republic of South Africa (Act No. 108 of 1996), Article 25; available at [www.info.gov.za/documents/constitution/](http://www.info.gov.za/documents/constitution/).

<sup>180</sup> The Chief Land Claims Commissioner noted in 2005 that rural land claims are a particular challenge due to the price of land and the necessity of protracted negotiations with land owners. Sapa, “We would like to see it to the finish,” *Johannesburg Mail and Guardian* (January 18, 2005).

<sup>181</sup> Through the end of 2004, overall spending on land reform, including restitution, had never amounted to more than 0.5% of the total national budget. Yolandi Groenewald, “Land reform for dummies,” *Johannesburg Mail and Guardian* (November 30, 2004).

<sup>182</sup> Although claims for in-kind restitution of land are considered “settled” upon the issuance of a decision in favor of claimants, the process of “finalizing” a settled decision involves budgeting, purchase of the land, and transfer to the claimants, including registration of title deeds. This process is often fairly intensive and can take years to complete. Hall, “Rural Restitution,” 14; ICG, 149.

<sup>183</sup> ICG, 164. Statistics on restitution in South Africa are notoriously imprecise, as claims are often grouped or disaggregated in the course of processing and there have not been standard practices regarding definition of “claims” for statistical purposes. Hall, “Land Restitution,” 658-9. As a result, quoted statistics in this paper are relied upon only to the extent that they may demonstrate general trends.

<sup>184</sup> ICG, 164.

estimated 90% of claimants are and the bulk of the land is to be restored—are widely considered to be the “backbone” of restitution.<sup>185</sup>

Another challenge to property restitution in South Africa has been the articulation of its purpose in the context of broader land reform efforts. Land reform in South Africa consists of three parallel programs with overlapping goals. Because *restitution* is limited to redressing the victims of confiscations since 1913, a broader program of land *redistribution* was initiated to address the effects of earlier historical injustice.<sup>186</sup> Redistribution has sought to increase the overall proportion of black ownership of land in South Africa through support for purchase and improvement of land.<sup>187</sup> However, these programs did little for many blacks who continued to use land on farms or former homelands at the whim of white farmers or tribal authorities.<sup>188</sup> In response, *land tenure reform* programs sought to reduce the vulnerability of established users of land.

The land reform program built on these three components was initially conceived of as a vehicle for achieving numerous policy goals at once. While the equitable goal of increasing overall black ownership through redistribution has predominated, subsidiary goals related to poverty reduction and economic growth are also perennially emphasized.<sup>189</sup> In practice, there is still no consensus as to how land reform’s many objectives can best be integrated.<sup>190</sup> For instance, the purpose of redistribution remains contested as between advocates of poverty reduction, who would prioritize the handover of land to the poor for subsistence agriculture, and champions of black economic empowerment, who prioritize black participation in the commercial farming sector.<sup>191</sup>

Lack of consensus over *how* land should be redistributed has constrained the government to articulate its goals primarily in terms of *how much* land should be redistributed. Following the election of Thabo Mbeki as president in 1999, a “land transfer target” was set under which 30% of South Africa’s land was to be transferred to blacks within fifteen years (by 2014).<sup>192</sup> The government has remained committed to this ambitious goal despite evidence that its achievement will require rates of transfer far higher than any achieved to date.<sup>193</sup> Adoption of the transfer target as the benchmark of success or failure for overall land reform meant that restitution’s multiple ostensible objectives could no longer be muddled.<sup>194</sup> Instead, as systematic cash

<sup>185</sup> Hall, “Rural Restitution,” 25 (citation omitted).

<sup>186</sup> Hall, “Land Restitution,” 655.

<sup>187</sup> See ICG, 142-5 and 165-8.

<sup>188</sup> The precarious position of tenant labor on white farms is described in ICG, 158-9, while attempts to improve the tenure security of former homeland residents are discussed on pages 168-73.

<sup>189</sup> Hall, “Land Restitution,” 655. The author notes that land reform has sought to pursue the “twin objectives of equity and efficiency: to transform the racially skewed pattern of land ownership, while improving rural incomes and contributing to economic growth.”

<sup>190</sup> In 1997, the government defined land reform’s priorities as fourfold, namely: “to redress the injustices of apartheid; to foster national reconciliation and stability; to underpin economic growth; and to improve household welfare and alleviate poverty.” Department of Land Affairs, “White Paper on South African Land Policy,” Executive Summary (April 1997).

<sup>191</sup> See ICG, 143-4 and 165-8.

<sup>192</sup> *Ibid.*, 154. In 1994, the ANC had adopted a slightly more modest transfer target of moving 30% of all *white-owned* land to black ownership. ICG, 144.

<sup>193</sup> ICG, 175: At the rate of transfer as of 2004, only five percent of South Africa’s land would be transferred to black ownership by 2015.

<sup>194</sup> In 1997, restitution was defined as a remedy for apartheid confiscations delivered “in such a way as to provide support to the process of reconciliation and development, and with regard to the over-arching consideration of fairness and justice for individuals, communities and the country as a whole.” Department of Land Affairs, “White Paper,” Executive Summary.

settlement of urban claims came to the fore as a tactic to speed implementation, a gap opened between the individual remedial approach underlying restitution and the collective redistributive goals of land reform. Although cash settlements constituted freely chosen redress for individual claimants, their cumulative effect was to vitiate the contribution of the restitution program to the achievement of land reform’s paramount goal, transfer of land to blacks.<sup>195</sup>

Urban cash settlements also failed to provide a viable model for dealing with rural claims. While the urban displaced had often re-established themselves elsewhere and could afford to accept compensation, many rural displaced faced severe poverty and viewed restoration of their land as a route to self-sufficiency.<sup>196</sup> In order to realize rural restitution, the South African authorities were faced with the necessity of either dramatically increasing the budget for negotiated land purchases or abandoning the market principle in order to improve their bargaining power through the threat of expropriation. However, the fallout from a wave of uncompensated seizures of white-owned farms in neighboring Zimbabwe in 2000 suppressed discussion of abandoning the market principle.<sup>197</sup> Even though the South African authorities never proposed to exercise the constitutional option of expropriation in support of land reform without satisfying the corresponding requirement of “just and equitable” compensation, they continue to have to distance themselves from Zimbabwe’s uncompensated and lawless confiscations.<sup>198</sup>

The drift surrounding South African restitution sharpened into a crisis in 2002 when, having neither abandoned the market principle nor raised the restitution budget, the Mbeki administration declared a deadline of December 2005 for the finalization of all claims.<sup>199</sup> The imposition of a three-year time frame on a process expected to require decades led to speculation about how serious the government was about completing the project at all.<sup>200</sup> Nevertheless, restitution continued to enjoy considerable domestic support and had galvanized an increasingly assertive land-rights movement that threatened widespread land invasions if redistribution did not accelerate.<sup>201</sup> Beginning in 2003, the government responded with amendments to the Restitution Act streamlining expropriation procedures and hints of further policy changes in advance of a July 2005 “Land Summit.”<sup>202</sup> In early 2005, the restitution program was extended by three years and its budget increased, though not to the levels deemed necessary to complete the process.<sup>203</sup> At the same time, government officials noted that only one-tenth of the overall land redistribution

<sup>195</sup> ICG, 149.

<sup>196</sup> *Ibid.*, 165.

<sup>197</sup> *Ibid.*, 154. Official statements interpreted as supporting Zimbabwe’s approach led to a devaluation of the currency, forcing the government to re-affirm to the “willing buyer – willing seller” policy.

<sup>198</sup> Periodic gaffes such as the South African deputy president’s recent aside that South Africa could learn how to “do [land reform] fast” from Zimbabwe continue to provoke vigorous criticism and labored official clarifications. Jacques Keet, “Mlambo-Ngcuka: SA land reform ‘is right, just slow’,” *Johannesburg Mail and Guardian* (August 25, 2005).

<sup>199</sup> Hall, “Rural Restitution,” 19.

<sup>200</sup> One observer speculated that this “arbitrary” deadline might have been pretextual: “It is quite possible that government wishes to see the frustrating ‘unplannability’ of restitution...off the table so it can pursue the more controllable and plannable work of land redistribution.” Hall, “Land Restitution,” 667.

<sup>201</sup> Yolandi Groenewald, “No love lost in Limpopo,” *Johannesburg Mail and Guardian* (July 1, 2005); ICG, 154-5.

<sup>202</sup> The Restitution of Land Rights Amendment Act of 2003 allows expropriation proceedings in aid of land reform to be initiated through administrative proceedings rather than issuance of a court order, although court appeal remains available. Hall, “Land Restitution,” 661.

<sup>203</sup> The budget presented in February 2005 foresaw 6 billion rand “to complete the [restitution] programme” over the subsequent three years. This was considerably less than the 13 billion previously estimated to be necessary. Donwald Pressly, “Manuel injects R6-billion into land restitution,” *Johannesburg Mail and Guardian* (February 23, 2005).



transfer target had been met since the end of apartheid and signaled that the market approach was open for review.<sup>204</sup>

In the event, the July 2005 Land Summit formally abandoned the market principle of “willing seller – willing buyer.”<sup>205</sup> In September 2005, landmark expropriation proceedings were brought on behalf of 400 claimant families against a white farmer who had held out for nearly twice the government’s offer over the course of two and a half years of negotiations.<sup>206</sup> With an increased budget, an extended timeline, and a strengthened bargaining position vis-à-vis white farmers, the South African restitution program is far more likely to be completed as foreseen and in a manner that facilitates return of beneficiaries to their land in accordance with the broader transfer targets.<sup>207</sup> Nevertheless, debates over restitution and land reform have not been quelled. In particular, questions remain as to whether the government is devoting adequate resources to those who do not wish to return to the land:

The question that needs to be asked...is whether today’s young people want to be farmers...People clearly and rightly care about historical injustice and inequality inherent in the current situation, but is rural land what they really want? If the answer is that a significant number wish to move to towns, there are implications for land policy and the way in which overall inequality is addressed.<sup>208</sup>

In fact, the inability of the government to sustainably resettle blacks displaced from the countryside in urban areas has led to a serious crisis. In 1955, the ANC adopted provision of adequate urban housing as a priority alongside access to rural land.<sup>209</sup> However, in 1992 the ANC inherited a legacy of racially segregated cities bounded by neglected shantytowns inhabited overwhelmingly by blacks.<sup>210</sup> In 1994, nearly one in five South Africans lived in informal settlements, often without access to water, sanitation, or electricity, and the estimated backlog for housing was nearly one and a half million units and rising fast.<sup>211</sup> The ANC promised resolution of the housing crisis and included social and economic rights, including the right to adequate housing, in the 1996 constitution.<sup>212</sup> However, the government has consistently fallen short of its housing construction goals despite significant investment of resources.<sup>213</sup> As a result, in 2005,

<sup>204</sup> In April 2005, black landownership had risen to 16% from its immediate post-apartheid level of 13%, leaving another 27% to be transferred prior to the 2014 deadline. The Chief Land Claims Commissioner stated at the time that he was “not happy with the pace” of land redistribution, and that his office was “reviewing the willing seller – willing buyer policy.” Chanda, “Govt ‘not happy’ with land reform pace.”

<sup>205</sup> Sapa, “Summit rejects land-reform principle,” *Johannesburg Mail and Guardian* (August 1, 2005).

<sup>206</sup> Michael Wines, “South Africa to Take Farm From a White,” *New York Times* (September 26, 2005); and Mariette le Roux, “Owner to contest first SA farm expropriation,” *Johannesburg Mail and Guardian* (September 22, 2005).

<sup>207</sup> As of the summer of 2006, a policy of closing purchase negotiations and initiating expropriation within six months reportedly led to increased acceptance of government offered compensation. Abhik Kumar Chanda, “‘Good response’ to land reform initiative,” *Johannesburg Mail and Guardian* (August 16, 2005).

<sup>208</sup> ICG, 174.

<sup>209</sup> African National Congress, “The Freedom Charter.” The Charter includes guarantees that “[a]ll people shall have the right to live where they choose, be decently housed, and to bring up their families in comfort and security; [u]nused housing space to be made available to the people; [r]ent and prices shall be lowered [and] [s]lums shall be demolished, and new suburbs built where all have transport, roads, lighting, playing fields, creches and social centres....”

<sup>210</sup> Elisabeth Wickeri, “Grootboom’s Legacy: Securing the Right to Access to Adequate Housing in South Africa?,” *Center for Human Rights and Global Justice Working Paper* No. 5 (2004): 10.

<sup>211</sup> *Ibid.*, 10-11.

<sup>212</sup> *Ibid.*, 12. See also Constitution of the Republic of South Africa (Act No. 108 of 1996), Article 26.

<sup>213</sup> *Ibid.*, 13.

South Africa’s housing minister acknowledged that the construction program was “marking time,” with current levels of funding and population growth dictating that “in ten years time we will be at the same place with the same backlog.”<sup>214</sup>

The crisis of urban housing has much in common with the crisis of land reform. Both involve early commitments by the ANC, with expectations raised and disappointed by the failure to achieve ambitious targets.<sup>215</sup> Both programs have been constrained by insufficient budgets as well as the necessity of building up new administrative structures and procedures in the context of a political transition.<sup>216</sup> Finally, both seek to assist overlapping beneficiary populations from among the large population of black South Africans displaced from rural areas during and after apartheid.<sup>217</sup> Delays in the delivery of both programs have led to increasing political radicalization within this population. However, while threats to organize “Zimbabwe style” rural land invasions have largely failed to materialize, organized urban squatting is an increasingly common phenomenon in South Africa.<sup>218</sup> The emergence of squatting presented a dilemma to the government, which felt it must “discourage land invasions onto land which had been set aside for the development of low income housing,” but knew that “evicting those ‘queue jumpers’ would create scenes reminiscent of apartheid days.”<sup>219</sup> However, the authorities have taken a hard line, evicting urban squatters and moving them to less desirable alternative land.<sup>220</sup> Urban eviction policies have exacerbated the political alienation of poor urban blacks, with social unrest and riots resulting from efforts to remove them.<sup>221</sup> Activists increasingly compare current ANC removals to apartheid policies, blaming them for “creating atomized communities that are breeding grounds for increased poverty and crime.”<sup>222</sup>

At the opening of the 2005 Land Summit, the South African agriculture minister blamed the previous neglect of rural restitution claims for the increasing “pressure on urban and peri-urban land for sustainable human development.”<sup>223</sup> The implication was that by completing restitution, the government could secure the return of a large proportion of urban shantytown-dwellers to the countryside, easing the pressure on housing programs. However, the assumption that most of the landless wish to return to the land remains largely untested, reinforcing the impression that the government’s self-imposed targets risk becoming ends in themselves. In 2005, a survey found that “most blacks regard jobs and housing in urban areas as overwhelmingly more important

<sup>214</sup> Donwald Pressly, “Breaking the back of the housing backlog,” *Johannesburg Mail and Guardian* (September 22, 2005). The minister noted that the population of South Africans living in informal settlements rose by 26% between 1999 and 2001, while population growth during the same period was only 11%.

<sup>215</sup> In the words of one land reform activist threatening Zimbabwe style self-help, “[a] carrot has been dangled in front of us.” Groenewald, “No love lost in Limpopo.”

<sup>216</sup> Pressly, “Breaking the back of the housing backlog.” The housing minister stated that a 12% increase in her budget would be sufficient to overcome the housing construction backlog.

<sup>217</sup> ICG, 137. The authors note that poverty in South Africa is concentrated in the countryside but that this has resulted in labor migration to cities, “with many of the poorest splitting their time between the former homelands and urban shantytowns.”

<sup>218</sup> See, generally, ICG, 156-62. The authors speculate that South Africa’s regionally exceptional rate of urbanization may account for the fact that demands for rural land have not been as destabilizing as in neighboring, more agriculturally oriented countries such as Zimbabwe. *Ibid.*, 15.

<sup>219</sup> Wickeri, 13.

<sup>220</sup> ICG, 160-1.

<sup>221</sup> Meera Selva, “South Africa uses apartheid laws to evict thousands for the World Cup,” *The Independent* (July 30, 2005).

<sup>222</sup> ICG, 161.

<sup>223</sup> “Address by Ms Thoko Didiza, MP Minister of Agriculture and Land Affairs at the National Land Summit, NASREC Johannesburg, Gauteng July 27-30 2005”; available at [land.pwv.gov.za/Land\\_Summit/](http://land.pwv.gov.za/Land_Summit/).

priorities than rural land.”<sup>224</sup> The survey noted that nearly 70% of the population lived in urban areas and that only 9% of blacks not already on the land wanted to become farmers. In this light, land reform appeared as a costly diversion of resources from the manifest needs of the poor:

...South Africa’s current land reform model is largely informed by an out-moded vision of the role of agriculture and the rural areas in South African society. This ‘rural romanticism’ reflects the past rather than the future and is driven more by past injustices under colonialism and apartheid than contemporary, rational developmental considerations. As a result, the government’s land reform policy is overloaded with expectations it cannot fulfil.<sup>225</sup>

Debates on land reform hinge on whether the 30% land transfer target has led to an undue emphasis on return to the land at the expense of efforts to durably resettle landless people who wish to live elsewhere.<sup>226</sup> The extent to which return per se, rather than redress, has come to pervade government thinking is revealed by the terms on which the Chief Land Claims Commissioner recently rejected calls to re-open the restitution claims deadlines.<sup>227</sup> Meanwhile, there is little question that those who wish to return to the land should be assisted through in-kind implementation of restitution claims, broader redistributive subsidies and sustained post-settlement support.<sup>228</sup> However, there are also strong arguments that the parameters of such efforts should be set by demand rather than essentially arbitrary targets. Achievement of the 30% transfer target by 2014 is likely to come at a great cost in terms of both budget and political capital. Meanwhile, those victims of apartheid who choose urban resettlement over rural return are left with the prospect of one-time cash payouts on restitution claims, long waiting lists for government housing, and indefinitely prolonged residence in informal settlements.<sup>229</sup>

<sup>224</sup> Ann Bernstein, “Change the debate on land: Getting land reform right” (Center for Development and Enterprise, May 26, 2005); available at [www.cde.org.za/media\\_release\\_land\\_reform.htm](http://www.cde.org.za/media_release_land_reform.htm).

<sup>225</sup> Centre for Development and Enterprise, “Media Release: Land reform: a place to stay not a place to farm” (May 26, 2005); available at: [www.cde.org.za/media\\_release\\_land\\_reform.htm](http://www.cde.org.za/media_release_land_reform.htm).

<sup>226</sup> In 2004, the government effectively doubled the transfer target to 60% by including land reform in the framework of “agriculture broad-based black economic empowerment” (AgriBEE). Under this program, white farmers are expected, above and beyond the 30% target for outright transfer, to make 20% of “high potential and unique agricultural land” available on a leasehold basis to black South Africans, and to lease an additional 10% of their land available to farm workers “for their own crops and animals to assist in poverty alleviation and food security.” Marianne Merten, “Govt out to spur land transfer,” *Johannesburg Mail and Guardian* (July 30, 2004).

<sup>227</sup> “Most of the people who are making the request...have expressly said they want financial compensation, when we all know that payment of cash does not help to address the critical issue of skewed land ownership in the country.” Groenewald, “Late land claimants want another chance.”

<sup>228</sup> See ICG, 184 on post-settlement support in order to ease the adjustment to sustenance and commercial farming. The authors note that white farmers’ organizations have long since recognized their own pragmatic interest in cooperating with land reform programs generally as well as in transferring skills to newly established black commercial farmers. *Ibid.*, 155-6. Another observer points out the potentially permanent consequences of failure to provide such support: “If conditions cannot be created in which poor people are able to survive and improve their livelihoods on the basis of restored land rights, then these land rights are likely to be lost again, permanently, through the apparently neutral operations of the land market.” Hall, “Land Restitution,” 667.

<sup>229</sup> One-time cash settlements have been criticized from a number of perspectives. ICG, 163-4. In terms of poverty alleviation in particular, such settlements tend to be viewed as counterproductive relative to more sustainable forms of assistance such as extension of micro-credit. *Ibid.*, 177.

### C. Bosnia

The issue of restitution mobilized considerable domestic political support in the context of peaceful political transitions in the Czech Republic and South Africa. By contrast, Bosnia and Herzegovina (Bosnia) presents the first example of successfully implemented mass restitution in the wake of full-blown conflict.<sup>230</sup> The logic of ethnic cleansing in Bosnia was such that the three parties to the conflict—the Muslim Bosniaks, Orthodox Serbs, and Catholic Croats—had little incentive either to encourage displaced persons of their own ethnicity to depart from areas they controlled or to allow the return of original inhabitants of other ethnicities.<sup>231</sup> However, the “international community” in Bosnia—comprised of international organizations, NGOs, embassies, and aid agencies—supported return, both in the interest of corrective justice and as a means of facilitating repatriation of Bosnian refugees from Western Europe. The internationally sponsored Dayton Peace Accords (DPA) that ended the war in Bosnia also mandated extensive property restitution in support of refugee return.<sup>232</sup> Although these provisions were implemented, Bosnia represents an important learning experience in terms of the extent to which property restitution is most effective when conceived and implemented with the aim of providing durable solutions rather than dictating return per se.

The 1992–1995 Bosnian conflict left virtually no area of the country untouched. Although the war began as a conflict pitting Bosniaks and Croats against Serbs, all three groups were soon in open combat with each other. By 1994, international mediators pressured the Bosniaks and Croats into an awkward political union referred to as the Federation of Bosnia and Herzegovina (Federation). Conflict continued for a further year between the Federation and the Bosnian Serbs, who had organized a self-styled Serb Republic (*Republika Srpska* or RS). The war in Bosnia was characterized from the beginning by attacks on civilian populations with the goal of creating ethnically pure territorial enclaves. Such “ethnic cleansing” by the three parties to the conflict was mutually reinforcing, in the sense that the arrival of co-religionists expelled from other parts of Bosnia reinforced the homogeneity of Bosnia’s emerging ethnic enclaves every bit as much as the expulsion of locally resident minorities.<sup>233</sup>

Although all three parties to the conflict were responsible for attacks on civilians in the areas they controlled, ethnic cleansing was pursued most systematically by Bosnian Serbs and Croats, whose wartime goals included not only the creation of contiguous ethnically homogenous areas but also their secession to the neighboring former Yugoslav republics of Serbia and Croatia.<sup>234</sup> For these parties in particular, the endurance of mixed communities represented a rebuke to the ideology of ethnic separation. As a result, both engaged in acts that constituted self-inflicted ethnic cleansing.<sup>235</sup> By the end of the war, one half of Bosnia’s four million inhabitants were displaced,

<sup>230</sup> Bosnia and Herzegovina is the internationally recognized name of the Bosnian state.

<sup>231</sup> Reference to ethnicity in Bosnia is as misleading as it is ubiquitous. Ethnically and linguistically, all three of the major groups in Bosnia are Slavic. However, given the history of conflict in the area between neighboring powers associated with monolithic religions (Muslim Ottoman Turkey, Orthodox Russia, Catholic Austria-Hungary), local religious differences have been attributed great political significance.

<sup>232</sup> General Framework Agreement for Peace in Bosnia Herzegovina, 35 I.L.M. 75 (1995). This agreement is often referred to as the Dayton Peace Accords (DPA).

<sup>233</sup> Reference to “minorities” in the Bosnian context tends to refer to the post-war composition of the territory in question, regardless of the pre-war situation.

<sup>234</sup> Elizabeth M. Cousens and Charles K. Cater, “Toward Peace in Bosnia: Implementing the Dayton Accords,” *International Peace Academy Occasional Paper Series* (2001), 71.

<sup>235</sup> One of the most notorious examples was the wartime Croat massacre of Bosniak civilians in the central Bosnian village of Stupni Do, an act of unprovoked violence calculated to render continued cooperation between the Croat and Bosniak populations of the nearby town of Vareš untenable. Soon after the attack,

with one million finding refuge abroad and one million remaining as IDPs. As a result, Bosnia's pre-war ethnic mix polarized into a pattern of enclaves with only 42% of the population in their pre-war places of residence.<sup>236</sup> In Bosnia's countryside, ethnic cleansing was cemented by the destruction of abandoned villages. However, in urban areas, the same end was accomplished through laws and practices adopted by all parties to the conflict allowing homes abandoned by fleeing minority residents to be re-allocated to other users.<sup>237</sup> In most cases, allocation of property was ostensibly temporary, but there were no effective procedures for those displaced to claim back their homes. By 1995, more than half of the housing stock in Bosnia had been abandoned by its pre-conflict residents, with about one-third damaged or destroyed and the rest re-allocated to other users.<sup>238</sup>

While the bulk of Bosnia's housing stock consisted of privately owned houses, much urban housing consisted of centrally located and highly desirable "socially owned apartments" (apartments). Under socialist law, users of such apartments held a permanent right that could be transferred to surviving spouses and family members. However, such rights were subject a "use requirement," whereby unjustified failure to live in the apartment for a six month period or longer could lead to cancellation of the occupant's rights.<sup>239</sup> By the end of the war, application of the use requirement became the proxy justification for measures cynically proposing to permanently dispossess displaced apartment occupants on the basis of their failure, in conditions of pervasive ethnic tension, to return and resume use of their apartments. Moreover, the revival of pre-war plans to privatize such apartments raised the stakes dramatically by threatening to endow the new users of claimed apartments with ownership rights. Reallocation of property reflected the intent of all three parties to the conflict to strengthen control over their enclaves by replacing unreliable minorities with loyal and beholden co-religionists.<sup>240</sup>

Ethnic cleansing in Bosnia was condemned as a crime of the highest order under international law. Most notably in 2004 the massacre and expulsions carried out by Serbs against the Bosniak population of the UN "safe area" around Srebrenica in 1995 was confirmed as an act of genocide by the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>241</sup> However, the criminal nature of ethnic cleansing was abundantly clear even at the time of the conflict. As early as 1992, the UN Security Council called upon all parties "to ensure that forcible expulsions of

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the local Croat population had fled to Croat-controlled areas virtually en masse. Anthony Loyd, *My War Gone By, I Miss It So* (New York: Atlantic Monthly Press, 1999), 140-63.

<sup>236</sup> Rosand, 1100.

<sup>237</sup> Wartime regulations permitting the reallocation of "abandoned property" were initially justified as a humanitarian necessity, allowing the local authorities to provide shelter to displaced persons arriving from other parts of Bosnia. However, this justification became increasingly pretextual as choice properties were offered to functionaries in the local ethno-political regimes—military officers, judges, police, and politicians—as a reward for their loyalty.

<sup>238</sup> Rhodri C. Williams, "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* 37, No. 3 (2006): 441, 478.

<sup>239</sup> In the context of socialism, where all citizens had a right to look to the state for housing, the "use requirement" reflected the need to re-allocate apartments away from users who clearly did not need them.

<sup>240</sup> According to one observer, property confiscation took on a quasi-constitutional character, defining Bosnia's post-war politics by perpetuating their ethnic makeup. Timothy William Waters, "The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution," *Harvard International Law Journal* 40 (1999).

<sup>241</sup> Mark Freeman, "Bosnia and Herzegovina: Selected Developments in Transitional Justice," *International Center for Transitional Justice Case Study Series* (2004): 3; Prosecutor v. Krstic, Appeals Chamber Judgment, April 19, 2004.

persons from the areas where they live and any attempts to change the ethnic composition of the population... cease immediately."<sup>242</sup> One year later, the Council reaffirmed "that any taking of territory by force or any practice of 'ethnic cleansing' is unlawful and totally unacceptable" and insisted that "all displaced persons be enabled to return in peace to their former homes."<sup>243</sup> By this time, the use of property reallocation as a tool for consolidating ethnic cleansing was evident, prompting the Council to declare that "all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void..."<sup>244</sup> Given that ethnic cleansing in Bosnia was so clearly illegal, redress for expulsions and property confiscation were a matter of urgency in the transition from conflict to peace.<sup>245</sup>

On the other hand, the political terms on which the conflict was settled initially reinforced concerns that all sides would retain the territory—and the homes—they had taken or held by force. The post-war Bosnian constitution perpetuated the existence of the Federation and the RS as the two "entities" constituting the post-war state, and allowed them to retain broad residual powers over key areas such as policing and defense.<sup>246</sup> The new Bosnian central government was so weak as to be almost nonexistent, leaving the entities—and the ethno-political parties that governed them—in effective control of territories that corresponded closely to the wartime ethnic enclaves they had created. On its own, such an arrangement would have been a recipe for de facto partition rather than restitution and refugee return. However, other provisions in Annex 7 of the DPA sought to reverse ethnic cleansing by creating a strong individual right to return of homes of origin and backing it up with restitution:

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 in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.<sup>247</sup>

While the provisions of Annex 7 clarify that refugees and displaced persons are free to resettle elsewhere rather than return home,<sup>248</sup> the document clearly privileges return, at least as a matter of policy.<sup>249</sup> Required affirmative measures in support of return range from the specific, such as restitution and repeal of discriminatory laws,<sup>250</sup> to general commitments by the entities to encourage reintegration of returnees.<sup>251</sup> The DPA also created three institutions that would play important roles in property restitution. The institution most directly responsible for this issue was the Annex 7 Commission for Real Property Claims of Refugees and Displaced Persons (CRPC).

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<sup>242</sup> UN Security Council, Resolution 752, para. 6, UN Doc. S/RES/752 (1992).

<sup>243</sup> UN Security Council, Resolution 820, para. 1, UN Doc. S/RES/820 (1993).

<sup>244</sup> *Ibid.*, para. 7.

<sup>245</sup> Unlike the Czech Republic and South Africa, Bosnian restitution was burdened with few inter-generational issues. Although Bosnia had seen socialist nationalization of property, the post-war restitution program did not address these issues and they have only recently become the subject of serious debate.

<sup>246</sup> DPA, Annex 4, Article III(3)(a) ("All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.").

<sup>247</sup> *Ibid.*, Annex 7, Chapter 1, Article I(1).

<sup>248</sup> *Ibid.*, Annex 7, Chapter 1, Article I(4): "Choice of destination shall be up to the individual or family . . . The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life."

<sup>249</sup> *Ibid.*, Annex 7, Chapter 1, Article I(1). The "early return" of those displaced is given as "an important objective of the settlement of the conflict in Bosnia."

<sup>250</sup> *Ibid.*, Annex 7, Chapter 1, Article I(3)(a)-(c).

<sup>251</sup> *Ibid.*, Annex 7, Chapter 1, Article II(1).



As envisioned in the DPA, the CRPC was a quasi-international body mandated to override anticipated domestic resistance to return of property by awarding enforceable decisions on property claims.<sup>252</sup> A second DPA body, the Human Rights Chamber, was set up as a high court to monitor Bosnia's prospective compliance with its human rights obligations, particularly under the ECHR.<sup>253</sup> The Chamber would rule in several landmark cases that failure to reinstate displaced persons in their apartments gave rise to continuing violations of rights to property and respect for the home under the ECHR, ensuring that rights to apartments under pre-war socialist law would ultimately be considered interests in "property" subject to restitution in the terms of the DPA.<sup>254</sup>

The third and most important DPA institution was the Office of the High Representative (OHR), a *sui generis* body with a general mandate under Annex 10 of the GFAP to coordinate civilian aspects of peace implementation in Bosnia.<sup>255</sup> Although the OHR's explicit powers are limited to coordination and interpretation, an organization of donor states that oversees the OHR's work attributed powers to provisionally impose legislation and dismiss public officials to the High Representative in 1997.<sup>256</sup> As a result, the OHR not only formally headed the international community in Bosnia but could also provisionally substitute itself for the domestic authorities, imposing legislation and sanctioning officials who refused to implement it. Some of the earliest and most aggressive exercise of these powers would come in support of restitution. Key international agencies with restitution-related mandates under the DPA included UNHCR, which assumed the "leading humanitarian role" in the repatriation and return of refugees and displaced persons under Annex 7,<sup>257</sup> the Organization for Security and Cooperation in Europe (OSCE), with a human rights monitoring mandate,<sup>258</sup> and the UN Mission to Bosnia, tasked with police reform.<sup>259</sup>

Against this legal and institutional background, the implementation of the right to restitution was a lengthy and complicated affair. At the outset, nationalist authorities continued to see the preservation of ethnic purity as imperative. This meant not only resisting the return of ethnic minorities to territory they controlled but also preventing the return of displaced co-religionists to homes in other parts of Bosnia.<sup>260</sup> Although secessionist hopes faded with the fall of nationalist

<sup>252</sup> Ibid., Annex 7, Chapter 2, Articles XI and XII (2).

<sup>253</sup> The mandate of the Human Rights Chamber is set out in Annex 6, Chapter 2, Part C of the DPA. The ECHR was made applicable in Bosnia by provisions of the Annex 4 Constitution that gave it "priority over all other law" (Article II(6)).

<sup>254</sup> See, for instance, Human Rights Chamber for Bosnia and Herzegovina, Decision on the Merits: Case No: CH/97/46: Kevešević against the Federation of Bosnia and Herzegovina (September 10, 1998).

<sup>255</sup> The mandate of the High Representative is set out in Annex 10 of the DPA. The High Representatives to Bosnia so far have been Carl Bildt, from Sweden (1995–1997), Carlos Westendorp, from Spain (1997–1999), Wolfgang Petritsch, from Austria (1999–2002), and Paddy Ashdown from the UK (2002–2006). The current High Representative is Dr. Christian Schwartz-Schilling, from Germany.

<sup>256</sup> The Peace Implementation Council (PIC) provides guidance to the OHR through the issuance of regular communiqués. In its 1997 meeting, the PIC effectively expanded the OHR's powers. Peace Implementation Council, "Bosnia and Herzegovina 1998: Self-Sustaining Structures" (1997), section XI(2).

<sup>257</sup> DPA, Annex 7, Chapter 1, Article III(1). The DPA entrusts UNHCR with development of a repatriation plan "that will allow for an early, peaceful, orderly and phased return of refugees and displaced persons, which may include priorities for certain areas and certain categories of returnees." (Article I(5)).

<sup>258</sup> In addition to administering elections (DPA, Annex 3), the OSCE Mission to Bosnia was authorized to "monitor closely the human rights situation" in Bosnia (DPA, Annex 6, Chapter 3, Article XIII(2)).

<sup>259</sup> See Annex 11 to the DPA setting out the mandate of the International Police Task Force (IPTF).

<sup>260</sup> Thus, while Croat authorities discouraged Croat displaced persons from filing claims to their pre-war property, Serb authorities sponsored a displaced persons' organization, the official name of which meant "to stay" or resettle ("*Ostanak*," a substantive derived from the Bosnian verb *ostati*, to stay or remain).

regimes in neighboring Croatia and Serbia, nationalists of all ethnicities continued to share political incentives to resist return.<sup>261</sup> In this context, the international community in Bosnia represented a fourth political actor with significant resources at its disposal, including large peacekeeping forces and civilian monitoring networks, a multi-million dollar reconstruction program that could be channeled to reward compliance, the carrot of accession to prestigious regional organizations and the stick of the OHR's ability to legislate and sanction on behalf of the domestic authorities. The international agenda settled early on achieving restitution based on a hopeful supposition that it would lead to mass return, restoring the pre-war ethnic composition of the country and subverting the power base of Bosnia's post-war nationalist authorities. There was also a self-interested element to international support for return based on the anticipated repatriation of many of the 685,000 Bosnian refugees in Western Europe.<sup>262</sup> As early as the negotiation of the Dayton Accords, pressure to repatriate refugees was a central concern:

With over three hundred thousand Bosnian refugees in their country, Germany wanted to reduce the burden that the refugees had put on its social services and budget. Other countries had similar problems, although not as severe. Bonn had given [its representative at Dayton] one firm instruction: any agreement must encourage the refugees to return home.<sup>263</sup>

Initial efforts to encourage return in the form of ad hoc return quotas failed, even as low-level ethnic cleansing and property reallocations continued under the noses of international peacekeepers.<sup>264</sup> What little progress was made involved "majority return" of displaced persons to areas controlled by their co-religionists, while "minority return" remained stymied by property occupation and pervasive ethnic tension. The post-war crisis sharpened in 1997 when several countries began systematically repatriating Bosnian refugees. The fact that the majority of these refugees could not return to homes in areas controlled by other ethnic groups meant that they were repatriated into internal displacement.<sup>265</sup> In order to make repatriation "sustainable" for both individual repatriates and for Bosnian society, a breakthrough on return was necessary. Some early progress came in the area of freedom of movement, as the UN Mission dismantled illegal police checkpoints, the peacekeeping force moved more aggressively to arrest indicted war criminals, and the OHR pushed through adoption of non-ethnically identified license plates.<sup>266</sup> However, a fundamental problem remained in the form of wartime regulations on re-allocation of property, which were still not only in effect but in active use.

In 1998, concerted international political pressure led to the passage of entity laws repealing the regulations on property reallocation and establishing a domestic claims process to return disputed properties to their rightful pre-war residents. Early implementation of these "property laws" established restitution as a domestic obligation driven by international pressure. Local administrative bodies tasked to receive, decide, and enforce claims worked under constant observation by international field monitors. As monitors reported on gaps in the laws, the High Representative repeatedly imposed amendments during the course of 1999 that increased their

<sup>261</sup> European Stability Initiative, "Reshaping International Priorities in Bosnia and Herzegovina: Part One: Bosnian Power Structures" (1999): 2: "Following the collapse of the former Yugoslavia [the] nationalist parties...became the local successors to the communist party, taking over its tools of social and economic control...Nationalist leaders have a strategic interest in maintaining the conditions on which their power depends [including] pervasive separation [and] fear and insecurity among the general populace...."

<sup>262</sup> Cousins and Cater, 72-3.

<sup>263</sup> Richard Holbrooke, *To End a War* (New York: The Modern Library, 1999), 275.

<sup>264</sup> Williams, 486-8.

<sup>265</sup> Cousins and Cater, 73.

<sup>266</sup> Ibid., 77.

effectiveness and harmonized their workings in both entities. This effort was capped by an unprecedented OHR decision removing twenty-two officials from their posts for alleged obstruction of the property laws. Having established workable restitution procedures and clear penalties for failing to implement them, the international community developed a unified institutional structure, the “Property Law Implementation Plan” (PLIP), which committed all the involved agencies—OHR, UNHCR, OSCE, and the UN Mission to Bosnia—to a common framework for monitoring restitution and formulating policy.<sup>267</sup> In essence, property restitution succeeded by co-opting the domestic authorities, rather than bypassing them. By contrast, the CRPC, initially envisioned in the DPA to allow international control of the restitution process, suffered from both structural flaws and institutional limitations in the face of tens of thousands of claims and was ultimately relegated to a subsidiary role as a parallel adjudicator in the domestically administered restitution process.<sup>268</sup>

As amended by the High Representative, the property laws defined cognizable claims broadly. Owners or lawful possessors of private property and rights holders to apartments were entitled to resume possession based on a showing of their legal rights in the claimed properties as of the date of the outbreak of hostilities. Although the process of restitution of private property was largely unconditional, the laws initially imposed restrictions on the return of apartments. These restrictions reflect early ambiguity as to whether apartments—still technically held subject to the socialist-era use requirement—truly constituted “property” liable to restitution or merely “homes” to be returned to, in the sense of Annex 7 of the DPA. Although the Human Rights Chamber consistently found that rights to apartments constituted a strong possessory interest, the early property laws reflected a tendency to view reinstatement in apartments purely as a matter of effecting return. For instance, where the property laws entitled owners to simply “repossess” their properties, successful apartment claimants were instead accorded the “right to return in accordance with Annex 7.”<sup>269</sup> Moreover, the peculiar nature of socialist-era rights to apartments came to influence the legal definition of return to apartments in the property laws. Rather than the voluntary exercise of a right, return came to be defined as the revival of a duty to use the apartment; in effect, apartment claimants could only preserve their right to return to their apartments by actually returning. In accordance with this logic, the property laws required apartment claimants to register their claim within preclusive deadlines, take affirmative steps to advance their claims and resume personal use of their apartments within prescribed time periods. While none of these conditions applied to repossession of private property, failure to comply with any of them could terminate the claimant’s right to their apartment.<sup>270</sup>

Despite these limitations, the property laws set a balance between claimants and subsequent users that very much favored claimants. Subsequent users’ rights to abandoned property were cancelled *ex lege* under the property laws, and they were required to vacate claimed apartments or face forcible eviction by local police. In contrast with restitution in South Africa and the Czech Republic, where subsequent users were deemed to have acquired bona fide compensable rights, the restitution process in Bosnia took the wartime humanitarian justification for reallocation of property at face value. Subsequent occupants were, by and large, deemed to have acquired no

<sup>267</sup> Office of the High Representative, “PLIP Inter-Agency Framework Document” (October 15, 2000).

<sup>268</sup> Charles Philpott, “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* 18, No. 1 (2005): 16.

<sup>269</sup> Williams, 492-3.

<sup>270</sup> *Ibid.*, 514-15. The compulsory nature of return to apartments was underscored by a rule imposed by the OHR in consultation with the Bosniak authorities excluding returnees to the Federation from general provisions allowing apartment privatization unless and until they had returned to live in their apartments for a two year period. *Ibid.*, 515-16.

legitimate rights to the properties they occupied and were entitled at most to seek temporary alternative accommodation once they had vacated or been evicted from claimed property. Given the scale of displacement in Bosnia, it was assumed that most subsequent users were waiting to repossess their own pre-war homes and would only require alternative accommodation as an interim measure. However, the provision of alternative accommodation became a major implementation issue in Bosnia, with the ostensible lack of adequate space used as a pretext by local authorities to block enforcement and protect temporary occupants.<sup>271</sup> Open-ended provision of alternative accommodation for those who had no homes to return to also came to substitute for the lack of any coherent post-war social housing policies in Bosnia.

Within two years of the passage of the property laws, restitution in Bosnia had made substantial progress. According to statistics collected by local officials and compiled by PLIP, one-fifth of the approximately 200,000 claims in Bosnia had been resolved by the end of 2000 and virtually every municipality in Bosnia had begun routinely deciding claims for property and even enforcing them.<sup>272</sup> To a large degree, this progress was due to the effectiveness of international monitoring and implementation policies. However, it was also driven by pressure from individual displaced persons who had at first cautiously, then enthusiastically embraced the idea that their pre-war homes might be returned to them and pressed their claims before every available forum.<sup>273</sup> As implementation accelerated, it became clear that the “return conditions” imposed on repossession of apartments were presenting apartment claimants with a precipitous choice between return, often under insecure conditions, or possible loss of their apartment. Threats and attacks against returnees were not unheard of in 2000 and significant concerns regarding non-discriminatory access to jobs and education have yet to be addressed to this date.<sup>274</sup> When the entities initiated inspections of repossessed apartments with the goal of verifying return, the “return requirement” began to look like a discriminatory ploy to divest ethnic minorities and consolidate control over prime urban housing stocks.<sup>275</sup>

In response, the High Representative issued a series of amendments in 2001 that effectively revoked the return requirement. Claimants to apartments in both entities were free to repossess their pre-war homes, purchase them under general privatization legislation, and dispose over them at will, without having to return to live in them.<sup>276</sup> In essence, displaced apartment occupants had been put on an equal legal footing with apartment occupants who had not been forced to flee their homes. Although the immediate motivation for these measures was to preserve the possibility of return to apartments, they reflected a fundamental shift in the international community’s perception of the justification for restitution, from promoting return per se to supporting durable solutions. The experience of apartment restitution had revealed the futility of forcing return in the face of significant numbers of displaced people who clearly wished to delay or avoid it.

<sup>271</sup> *Ibid.*, 528-32. Although the restitution laws clearly stated that subsequent users entitled to alternative accommodation had to be evicted without it if all other legal conditions had been met, the international community was initially reluctant to insist on rigorous enforcement of this provision.

<sup>272</sup> Office of the High Representative, “Statistics: Implementation of the Property Laws” (Dec. 31, 2000). Restitution statistics referenced in this study are generally available at [www.ohr.int/plip/](http://www.ohr.int/plip/).

<sup>273</sup> Claimants often claimed through both the municipal and CRPC systems, filed complaints with the Human Rights Chamber and other bodies, and followed up regularly with visits to both the housing authorities processing their claims and the international field monitoring offices overseeing the process.

<sup>274</sup> Internal Displacement Monitoring Centre, “Bosnia and Herzegovina: state-building key to overcome ethnic division and solve displacement issue” (March 24, 2005).

<sup>275</sup> Williams, 517-8.

<sup>276</sup> *Ibid.*, 518-20, 533.

However, registered returns of refugees and IDPs also rose in this period from a low point of about 75,000 in 1999 to 100,000 in 2001 and nearly 110,000 one year later.<sup>277</sup> Patterns of resettlement and return were highly localized and unpredictable, with mass return occurring in relatively hostile nationalist environments, and disappointing return to ostensibly welcoming places such as Sarajevo.<sup>278</sup> Recognizing that it could not control the outcome of individual decisions to return or resettle, the international community sought to facilitate free choice by accelerating the restitution of properties and allowing the beneficiaries to dispose over them at will. This approach became an explicit article of international policy by 2002.<sup>279</sup>

For some observers, international abandonment of measures to force return was taken as a betrayal of early commitments to reverse the injustice of ethnic cleansing. However, as local authorities realized that restitution would not lead to return in every case, they began to support the process, contributing to startling rates of implementation.<sup>280</sup> The proportion of claims resolved jumped from 21% at the end of 2000 to 40% at the end of 2001 and nearly 70% one year later.<sup>281</sup> Both entities had largely completed the process in early 2004.<sup>282</sup> Although both domestic and international observers recognized the landmark significance of completion of the process, the realization remained that restitution alone was not necessarily an adequate precondition for the type of voluntary decisions on return envisioned in the DPA. The international community was sensitive to such criticism:

We in the international community...know that the repossession of the home is only a first precondition for return. Much more needs to be done to give refugees and displaced people a free choice to decide whether they want to stay where they are now, or to return: in their places of origin, they must have access to jobs, to social services, to the education they wish to provide their children with, and they must feel welcome and appreciated. There is still a lot of work to do. But the sooner the property repossession process is completed, the sooner can the domestic authorities and international community focus their energies on these tasks.<sup>283</sup>

In the event, the international community did not take significant steps after the end of property restitution to directly support return. Faced with mounting pressure to “streamline” the

<sup>277</sup> UNHCR, “Returns Summary to Bosnia and Herzegovina from 01/01/1996 to 30/09/2005” (September 2005). Updated statistics on return of refugees and IDPs in Bosnia are available at [www.unhcr.ba](http://www.unhcr.ba).

<sup>278</sup> Tim Judah, “Half-Empty or Half-Full Towns?,” *Transitions Online* (February 5, 2004).

<sup>279</sup> “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.” Office of the High Representative, “A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources” (2002), section 1; available at [www.ohr.int/plip/key-doc/default.asp?content\\_id=27904](http://www.ohr.int/plip/key-doc/default.asp?content_id=27904).

<sup>280</sup> Marcus Cox and Madeline Garlick, “Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina,” in *Returning Home*, 77: “Several years after Dayton, it had become clear to all of the major political players that restoring property rights was the essential pre-condition not only to return, but also to the successful resettlement of those who chose not to return. Those who were able to sell their pre-war homes recovered the means to build or buy in a new location. Even authorities opposed to return came under pressure to help their own citizens reclaim properties in other parts of the country.”

<sup>281</sup> Office of the High Representative, *Statistics: Implementation of the Property Laws* (December 31, 2001); and Office of the High Representative, *Statistics: Implementation of the Property Laws* (December 31, 2002).

<sup>282</sup> Press Release, Office of the High Representative, “RS and FBiH Reach Same Ratio of PLIP at End August” (October 1, 2003).

<sup>283</sup> Alexandra Stiglmeier, “Return,” *Ljiljan* (September 25, 2001) (unofficial translation).

international presence in Bosnia and proclaim an exit strategy, the OHR formally handed over responsibility for all further return issues to the domestic authorities of Bosnia at the end of 2003 noting that “[restitution] is nearing completion, almost one million people have returned to their homes, and [Bosnian] institutions have expressed a clear desire to take the lead in maintaining and then completing the return process.”<sup>284</sup> Significant international programming has continued in areas affecting return, such as reform of the economy, the educational system, and the judiciary. While such reforms are of a general nature, it is to be hoped that they may provide disproportionate assistance to those still displaced in Bosnia, a group that continues to be disproportionately impacted by its situation.<sup>285</sup> An important lesson of Bosnian restitution, learned at great expense, is that such programs should seek to facilitate individual choice of durable solutions rather than prejudge the outcome in favor of return. However, a question remains as to whether enough was done beyond restitution to ensure that decisions taken on durable solutions were truly free and sustainable.<sup>286</sup>

#### D. Guatemala

As was the case in Bosnia, Guatemala’s recent history is marred by ethnic conflict and persecution deemed to have risen to the level of genocide. Moreover, as in South Africa, the roots of social conflict in Guatemala lay in generations of discriminatory confiscations of land from indigenous people by a formerly colonial elite. However, transitional restitution programs in Guatemala are seen as having completely addressed neither the immediate effects of the conflict nor the long-term effects of historical injustice. The failure of restitution is related to the fact that, in distinction to South Africa, the indigenous majority in Guatemala who suffered the most from both historical injustice and the recent war did not assume dominant political power in the course of the transition. Post-transition Guatemala continues to be controlled by an oligarchy and post-war restitution commitments have been delegated to local authorities with much to lose from their implementation. Moreover, Guatemala is distinguished from Bosnia in that the international community played a significant role in negotiating and monitoring the transition, but did not systematically intervene to force return and restitution.<sup>287</sup> As a result, the availability of remedies for displacement has largely been a factor of the level of political organization of the groups of victims seeking them, relegating a large population of dispersed IDPs to a state of unalleviated poverty. Meanwhile, disputes over land continue to present a destabilizing factor in post-war Guatemalan politics.

Land has traditionally been a source of contention in Guatemala. Since early colonial times, a Spanish-speaking elite has systematically expropriated Guatemala’s arable land from the indigenous majority who, as in South Africa, were forced to provide seasonal labor.<sup>288</sup> Ownership of land and productive resources came to be concentrated in the hands of a small oligarchy that effectively governed the country. As a result, the post-war Guatemalan Commission for Historical Clarification (CEH) found that the state effectively became partisan, representing only the interests of the powerful few and providing no channels for permissible dissent for the oppressed

<sup>284</sup> Press Release, Office of the High Representative, “BiH Institutions Assume Responsibility for Return Process” (December 30, 2003).

<sup>285</sup> IDPs in Bosnia continue to constitute the most vulnerable group in Bosnian society according to most indicators. See European Stability Initiative, “Governance and Democracy in Bosnia and Herzegovina: Post-Industrial Society and the Authoritarian Temptation” (2004), 43.

<sup>286</sup> For a gloomy assessment, see Nidzara Ahmetasevic, “In Depth: Bosnian Refugees Quietly Quit Regained Homes,” *Balkan Insight* (August 31, 2006).

<sup>287</sup> Cecilia Bailliet, “Property Restitution in Guatemala: A Transnational Dilemma,” in *Returning Home*, 168.

<sup>288</sup> Bailliet, 170.



majority.<sup>289</sup> The main exception to this pattern came with the presidency of Jacobo Arbenz, who undertook Guatemala's only significant land reform program in the early 1950s. In 1954, Arbenz was overthrown in a US-backed coup and his reforms reversed.<sup>290</sup> Dispossessed groups responded with an armed uprising, the *Unidad Revolucionaria Nacional Guatemalteca* (URNG), which won widespread indigenous support in Guatemala's northwest highlands.

The Guatemalan military fought the URNG with increasingly repressive tactics culminating in the early 1980s with a wholesale scorched earth campaign throughout the highlands. Villages were destroyed and their inhabitants massacred and displaced. Populations allowed to remain in the area of hostilities were organized into militarized "Civil Patrols" (PACs), forced to participate in atrocities against groups suspected of rebel sympathies, and encouraged to settle on land left behind by those fleeing the conflict.<sup>291</sup> Systematic reallocation of property became a tactic to prevent the return of the displaced. In order to lend a veneer of legality to the process, the government invoked existing prescription statutes allowing the state to assume ownership of property "voluntarily" abandoned by its owner for more than one year.<sup>292</sup> The human cost of the conflict was devastating. The CEH found that over 200,000 persons, the vast majority of whom were indigenous civilians, were killed or disappeared during the conflict, with 93% of all human rights violations attributable to the Guatemalan state.<sup>293</sup> As many as 2.5 million people—nearly one in three Guatemalans—were forced from their homes, with at least one million displaced internally and one million finding shelter as refugees in neighboring Mexico and the United States.<sup>294</sup> The CEH found that the common denominator of all these attacks, "the fact that [all the victims] belonged to a specific ethnic group," supported a finding of culpability for genocide on the part of the Guatemalan state.<sup>295</sup>

In 1986, three decades of military dictatorship ended with a formal transfer of power to civilian government. Early efforts to end the conflict in Guatemala coincided with similar negotiations in El Salvador and Nicaragua. International actors including the UN and neighboring countries such as Mexico initiated a process of incorporating refugee issues in this regional peace process. The resulting International Conference on Central American Refugees (CIREFCA) issued a May 1989 Declaration calling for states in the region to "respect...access to the means of subsistence and land [for returning refugees] under the same conditions as other nationals of their country."<sup>296</sup> This prospective guarantee of non-discriminatory land access was not accompanied by any call for restitution of wrongfully appropriated land and did not, in any case, extend to IDPs.<sup>297</sup> In 1992, a repatriation agreement was signed between the representatives of Guatemalan refugees in Mexico and the Guatemalan authorities.<sup>298</sup> Although this agreement set out much more concrete

<sup>289</sup> Commission for Historical Clarification (CEH), "Memories of Silence" (undated); available at [shr.aaas.org/guatemala/ceh/report/english/toc.html](http://shr.aaas.org/guatemala/ceh/report/english/toc.html), "Conclusions," section I, para. 7.

<sup>290</sup> Andrew Painter, "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145, 149.

<sup>291</sup> CEH, "Conclusions," section I, para. 50.

<sup>292</sup> Painter, 150-1. The Guatemalan agency responsible for agrarian development worked closely with the army in systematically transferring title over abandoned lands to new settlers.

<sup>293</sup> CEH, "Conclusions," section I, paras. 2, 15, and 25.

<sup>294</sup> Christine Cheng and Johannes Chudoba, "Moving beyond long-term refugee situations: the case of Guatemala," *UNHCR New Issues in Refugee Research* (Working Paper No. 86, 2003): 9.

<sup>295</sup> CEH, "Conclusions," section II, paras. 111 and 122.

<sup>296</sup> Declaration and Concerted Plan of Action in Favor of Central American Refugees, Returnees and Displaced Persons, UN Doc. CIREFCA/89/14 (1989), cited in Painter, 153.

<sup>297</sup> Painter, 153. The CIREFCA Declaration nevertheless broke new ground by explicitly mentioning the needs of IDPs and calling for development and humanitarian assistance for all displaced persons.

<sup>298</sup> CEAR-CCPP Agreement, cited in Painter, 153-4.

provisions for repatriating refugees to acquire land, it only applied to the 40,000 refugees officially registered by UNHCR, excluding up to 160,000 unregistered refugees in Mexico as well as the estimated one million IDPs in Guatemala.<sup>299</sup> Finally, in June 1994 an agreement on the resettlement of "uprooted populations" (Resettlement Agreement) was signed between the URNG forces and the Guatemalan government.<sup>300</sup> Although this agreement accorded rights to all those displaced by the war (including IDPs) that became legally binding after the signature of the final Peace Accords in 1996, its provisions were "so vague as to cast doubt on whether they will bring any practical benefits."<sup>301</sup>

The ex ante lack of clear provisions affording an effective remedy to all displaced persons deprived of property rights appears to reflect the incomplete nature of the political transition in Guatemala. Almost a decade after the Peace Accords in Guatemala, the persistence of extreme poverty and inequality are often described in terms that might just as well have applied to the pre-conflict situation.<sup>302</sup> Although Guatemalan elites made significant concessions in the course of the peace negotiations, they did not surrender power and largely avoided binding legal and financial commitments in the areas of return and restitution.<sup>303</sup> Moreover, whatever commitments were made by Guatemala's central government would have to be respected and in some cases implemented by local military and civilian authorities in order to be effective. However, these were often the same authorities that had actively persecuted the displaced and encouraged reallocation of their land, creating an entire network of local property and political relations inherently hostile to the displaced persons' return.<sup>304</sup> Finally, the longstanding political marginalization of the indigenous groups comprising the overwhelming majority of the victims hindered their ability to mobilize political support for the negotiation of strong return provisions or even the consistent implementation of weak ones.

As a result, although the Guatemalan peace agreements are often described as providing for the right to restitution, what they actually set out was, at best, the guarantee of an unspecified remedy. Where the Czech, South African, and Bosnian programs favored restitution, in principle, over compensatory measures, the Guatemalan program simply placed all options on the table. For instance, under the Repatriation Agreement, repatriating refugees were entitled to claim lands previously held in recognized title, but, should the current occupant of claimed land refuse to vacate it, claimants were left to either individually pursue judicial remedies or to waive their rights in exchange for state guarantees of alternate land.<sup>305</sup> In other words, the failure to define a clear relationship of precedence as between claimants and subsequent occupants meant that claimants had no guarantee of in-kind restitution. This problem was also pronounced in terms of

<sup>299</sup> Painter, 155.

<sup>300</sup> Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, cited in Painter, 155; available at [www.usip.org/library/pa.html](http://www.usip.org/library/pa.html).

<sup>301</sup> Painter, 156.

<sup>302</sup> Michael J. Brown, Jorge Daly, and Katie Hamlin, "Guatemala Land Conflict Assessment" (Report Submitted to the United States Agency for International Development, 2005), 1-2: "The majority of the population is indigenous, and faces profound systemic and structural exclusion on many fronts. A small and powerful agricultural private sector—with a particularly influential core tied historically to a long-standing landowning oligarchy—owns enormous extensions of the country's productive land and tends to maintain political influence over whatever government is in place....the country is characterized by a dramatically unequal pattern of land distribution, constituting one of the most unequal in Latin America and the world."

<sup>303</sup> Painter, 156-7. For instance, implementation of the Resettlement Agreement was made explicitly contingent on international donor assistance and the government was authorized to prioritize the use of its own budgetary resources in favor of overall economic growth rather than reparations.

<sup>304</sup> *Ibid.*, 163-6.

<sup>305</sup> *Ibid.*, 154-5. Repatriates without cognizable claims were guaranteed access to credit to purchase land.

the Resettlement Agreement's treatment of wartime reallocation of land. Although the Agreement renounced the abuse of prescription laws to cancel the rights of those who fled their properties during the conflict, it failed to either clearly nullify the effects of wartime decrees of voluntary abandonment or establish unambiguous precedence of the right to restitution for their victims.<sup>306</sup>

The lack of clear rules of decision on disputed property weakened the state authorities' hand in enforcing restitution claims. Because the government did not have a mandate to expropriate or regulate land prices for the purposes of restitution, it was largely reliant on the good will of subsequent occupants, who had often been instructed to refuse to surrender possession of claimed property by local officials.<sup>307</sup> Such local obstruction has been particularly damaging as the failure of the central authorities to develop effective procedures ceded control over much of the process to the local level.<sup>308</sup> From this perspective, the government barely committed itself to the minimum reparatory standard established by the CEH, namely to undertake "[m]easures for the restoration of material possessions so that, as far as is possible, the situation existing before the violation be re-established, particularly in the case of land ownership."<sup>309</sup> Meanwhile, inequalities that pre-dated—and fuelled—the URNG insurgency were addressed only superficially in the Peace Accords. The negotiation of separate sub-agreements on "Socioeconomic Aspects and the Agrarian Situation" and the "Identity and Rights of Indigenous Peoples" had raised hopes for a broader redistributive land reform program.<sup>310</sup> However the "absence of any reference to expropriation" as a tool for effecting reform limited the potential impact of these agreements significantly.<sup>311</sup>

In the eyes of many, the Accords effectively died when constitutional amendments meant to give them binding effect in domestic law failed in 1999.<sup>312</sup> The conditions under which the amendments were defeated reflected the incomplete nature of Guatemala's political transition—the displaced poor who stood to benefit the most from them abstained out of a lack of trust and information, while the government stood at the sidelines, allowing a "campaign of misinformation" against the amendments to dominate the debate.<sup>313</sup> Property claimants are technically free to bypass the Accords' provisions and seek judicial remedies but this approach entails considerable delay and expense without a guaranteed outcome; Guatemalan courts are notoriously overburdened, inaccessible, and politically compromised.<sup>314</sup> Although the UN peacekeeping mission in Guatemala (MINUGUA) was mandated to monitor implementation of the 1994 Resettlement Agreement, a contemporary observer noted that "because the... Agreement requires only that the government promote the return of lands, MINUGUA will have to interpret

<sup>306</sup> Ibid., 156. The relevant provision of the Agreement states that "[i]n the particular case of abandonment of land as a result of armed conflict, the Government undertakes to revise and promote legal provisions to ensure that such an act is not considered to be voluntary abandonment, and to ratify the inalienable nature of landholding rights. In this context, it shall promote the return of land to the original holders and shall seek adequate compensatory solutions."

<sup>307</sup> Ibid., 163-6.

<sup>308</sup> Ibid., 165.

<sup>309</sup> CEH, "Recommendations," section III, para. 9(a).

<sup>310</sup> Painter, 157-9. The Agreements are available at [www.usip.org/library/pa.html](http://www.usip.org/library/pa.html).

<sup>311</sup> Bailliet, 172. South Africa, by contrast, explicitly included equitable redistribution of land as a ground justifying expropriation in its 1996 Constitution (Article 25 (4) (a)).

<sup>312</sup> Bailliet, 171.

<sup>313</sup> Inter-American Commission on Human Rights (IACHR), "Fifth Report on the Situation of Human Rights in Guatemala" (2001), Chapter XI, paras. 31-3.

<sup>314</sup> Brown et al., 7. Although alternative dispute resolution mechanisms have emerged at the local level, these often do not have the resources for in-depth investigations of land disputes, and tend to decide cases on the basis of ad hoc negotiations without clearly binding legal effect. Brown, et al., 10-11.

this commitment expansively if its monitoring activities are to be of any consequence."<sup>315</sup> In the event, MINUGUA was not seen as having made a significant impact on this issue as of the expiration of its mandate in 2004.<sup>316</sup> The international community is generally accused of having lost interest in Guatemala as of the signing of the 1996 Peace Accords, which in the words of one observer "signaled...that the conflict had been resolved and that vigilance and active solidarity were no longer needed...."<sup>317</sup>

With in-kind restitution complicated by these factors, implementation of the return provisions of the Peace Accords has focused on the provision of alternative land to claimants. Considerable progress was made in terms of the purchase of land for government distribution in the early stages of the process, benefiting repatriating refugees in particular.<sup>318</sup> However, corruption and underfunding emerged as issues early in the process, with concerns about the apparent diversion of large amounts of money provided by international donors.<sup>319</sup> Beneficiaries of alternate land have complained about its low quality and the lack of supplementary social services to make their return sustainable.<sup>320</sup> General failure to provide adequate resources has resulted in Guatemala having "by and large failed to address the long-term needs of the displaced and ultimately to comply with the intent of the resettlement agreement."<sup>321</sup> In light of these issues as well as the vagueness of the government's legal commitments under the Resettlement Agreement, the actual availability of remedies for displacement appears to have become a factor of the political cohesion of sub-groups of the displaced population and their corresponding ability to demand redress.

In this context, the groups that have asserted their interests most effectively are the repatriating refugees from Mexico. The experience of living together in camps in Mexico did much to both unite disparate indigenous refugee groups and organize them into cohesive political communities.<sup>322</sup> From the perspective of the Mexican authorities, the influx of 200,000 Guatemalan refugees into one of Mexico's poorest regions had threatened to be politically destabilizing, but the refugees had ultimately integrated well with local populations that benefited from the international assistance and development aid that accompanied them.<sup>323</sup> As a result, the Mexican government actively supported both return and local integration of Guatemalan refugees.<sup>324</sup> Mexico was also an early participant in the CIREFCA process that incorporated refugee issues into the regional peace process in Latin America and supported the formation of Permanent Commissions (CCPPs) of Guatemalan refugees, which set an international precedent by negotiating the 1992 agreement on their own repatriation with the Guatemalan government.<sup>325</sup>

<sup>315</sup> Painter, 160.

<sup>316</sup> Norwegian Refugee Council (NRC), "Guatemala: lack of progress in implementing peace accords leaves IDPs in limbo" (2004), 6.

<sup>317</sup> Yodit Figiu, "Forgotten People: Internally Displaced Persons in Guatemala," Refugees International Article (December 7, 2005).

<sup>318</sup> Cheng and Chudoba, 16; and IACHR, "Fifth report," Chapter XIV, para. 23.

<sup>319</sup> Painter, 163-4; Brown et al., 7.

<sup>320</sup> Yodit Figiu, "Guatemalan Refugees Return to a Hard Life," Refugees International Report (January 5, 2002); and Cheng and Chudoba, 11.

<sup>321</sup> NRC, 6.

<sup>322</sup> Painter, 160.

<sup>323</sup> Cheng and Chudoba, 13.

<sup>324</sup> Ibid., 9-10 and 16. According to the authors, those willing to move away from volatile border areas were offered free land and some 20,000 registered refugees who opted to remain in Mexico are gradually being naturalized

<sup>325</sup> Painter, 153-4.

As early as 1984, Guatemalan refugees began spontaneously returning to their home regions, actively negotiating the demilitarization of some.<sup>326</sup> Large-scale return began in 1993, and by the time the Peace Accords were signed in 1996, as many as four-fifths of all those who would eventually repatriate had done so.<sup>327</sup> As a result, the refugees were in place early to benefit from government land distribution and support programs at a time when they still had significant international funding and political backing. By contrast, IDPs tended to organize later, if at all. A relatively small proportion of Guatemala's IDPs, some 50,000 indigenous people, had remained in the highlands during the conflict and formed "Communities of People in Resistance" (CPRs).<sup>328</sup> Although their numbers were reduced by attacks by the army, the CPRs came through the conflict sufficiently politically organized to demand government recognition of their displacement and receive land and resettlement assistance.<sup>329</sup>

In contrast to the CPRs, the bulk of Guatemalan IDP communities were scattered in the course of their displacement and often fled to urban centers. This population of dispersed IDPs has sought anonymity, failing to organize themselves or assert their restitution claims for fear of further persecution. In many cases, dispersed IDPs do not speak Spanish and are unable to obtain regular employment, leaving them to work under exploitative conditions and live in conditions of extreme poverty.<sup>330</sup> As in South Africa, much of this population has ended up in informal housing in shantytowns growing around Guatemala's cities.<sup>331</sup> Although as many as 250,000 Guatemalans remain displaced under these circumstances, the government has left this population out of the resettlement program and has not provided remedies for the loss of their homes and land.<sup>332</sup> In fact, the failure of dispersed IDPs to assert their claims makes it relatively easy for the government to deny any obligation toward them:

Rather than considering their plight as part of the larger problem of displacement due to conflict, the Guatemalan government defines the urban displaced as economic migrants. The government is unwilling to recognize thousands of people as IDPs without personal identification documents stating proof of origin. Many in the community, particularly women, have lost these documents as the result of the constant displacement during the war.<sup>333</sup>

Broadly speaking, the government's approach to displaced groups has been to assume that they are simply poor and entitled only to prospective development assistance unless they prove themselves entitled to redress under the Peace Accords.<sup>334</sup> This approach stems from a school of conservative political thought in Guatemala that takes the current distribution of land as a given and views prospective wealth creation rather than redistribution as the solution to poverty.<sup>335</sup> As one observer notes, while including the displaced in poverty alleviation programs is "a sound approach in theory, the result has been a neglect of the special needs of displaced persons, and an

<sup>326</sup> Cheng and Chudoba, 19.

<sup>327</sup> Ibid.

<sup>328</sup> IACHR, "Special Report on the Human Rights Situation in the So-Called "Communities of Peoples in Resistance" in Guatemala" (1994); and Fitigu, "Forgotten People."

<sup>329</sup> NRC, 3; and IACHR, "Fifth report," Chapter XIV, para. 23.

<sup>330</sup> Fitigu, "Forgotten People."

<sup>331</sup> Bailliet, 169.

<sup>332</sup> NRC, 3.

<sup>333</sup> Fitigu, "Forgotten People."

<sup>334</sup> Ibid: "Within two years of the signing of the peace accords, the Guatemalan government announced that their approach to assisting the displaced population would be to address their needs along with the rest of the landless population through a national development program for poverty alleviation."

<sup>335</sup> Brown et al., 8.

overall lack of justice and restitution for the displacement that they suffered during the violence."<sup>336</sup>

As of 2004, the land-related provisions of the Peace Accords were generally judged to have been only partially implemented, and to have failed in their overall goal of redressing the effects of the war.<sup>337</sup> It should therefore come as little surprise that land disputes continue to play a destabilizing role in Guatemalan post-transition politics. As of early 2005, over 2,000 active land disputes were registered in Guatemala—a very high number for a country of its size—and experts estimated that tens of thousands of disputes remained latent.<sup>338</sup> The unresolved nature of property relations in Guatemala is thought to discourage both foreign and domestic investment and raises the specter of continued "low intensity localized violence" throughout the country.<sup>339</sup> Although the successful demobilization of the URNG and general fatigue from the last war militate against the outbreak of renewed hostilities, protests over landlessness promise to destabilize the Guatemalan political and economic landscape for the foreseeable future.<sup>340</sup>

#### IV. CONCLUSIONS

The case studies examined above provide a sense of the variety of issues addressed by contemporary restitution programs and their sensitivity to contextual factors. At the same time, they also illustrate a certain trajectory taken by post-Cold War restitution. While Czech restitution nominally sought to restore justice in the wake of a repressive communist regime, its conduct opened it to accusations of being victor's justice—a redistribution of goods based on political considerations rather than a remedy based on the manifest victimhood of individual beneficiaries. South Africa's restitution program is more clearly addressed toward righting individual wrongs, but its delivery has been complicated by its subordination to a broader, ill-defined, and politically contentious land reform program. Bosnian restitution was an overtly human rights based remedy for resolving displacement, but was dependent on—and complicated by—massive international intervention. Guatemala, on the other hand, illustrates the risks inherent in raising expectations regarding restitution and return in the absence of either domestic or international resolve to guarantee full implementation. Taken together, these case studies provide useful insights on a series of key issues regarding how transitional restitution programs can be conceived and implemented.

##### A. Relationship of Restitution to Transitional Reparations and Land Reform

Where restitution is included as a component of transitional programming, it should be conceived of in a way that supports parallel efforts to provide broader redress and pre-empt future conflict. The "external coherence" of restitution programming is particularly important with regard to conventional transitional justice mechanisms such as reparations.<sup>341</sup> In contemporary transitional

<sup>336</sup> Fitigu, "Forgotten People"; see also IACHR, "Fifth report," Chapter XIV, para. 16.

<sup>337</sup> Brown et al., 2: "Unfortunately, the land aspects of the peace process have been unsuccessful in changing the land dynamic in any fundamental way. Many of the relevant Peace Accord commitments have been inadequately implemented or not implemented at all. The overall impact of the new land agencies has been very limited." See also NRC, 3: "Indeed, there is a widespread consensus that the government has not complied with the resettlement and compensation sections of the Peace Accords and this—together with unresolved land issues—has prevented uprooted people to reintegrate and return to their homes."

<sup>338</sup> Ibid., 3.

<sup>339</sup> Ibid., 12-14.

<sup>340</sup> Ibid., 14. The authors note that land invasions by landless and land-poor peasants have become both increasingly common and increasingly well-coordinated in Guatemala.

<sup>341</sup> Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, 467.



settings, reparations and restitution should be understood as functionally separate but complementary responses to human rights violations, each of which should be available in proportion to manifest need. Restitution is of little use in addressing many common patterns of human rights violations, but where such acts include confiscation of land, homes, businesses, or other assets, as well as forced evictions or arbitrary displacement, restitution is likely to be a crucial component of any remedy worth the name. Such dispossession and displacement are often accompanied by other violations, whether political disenfranchisement and discrimination as in South Africa, or unlawful detention, torture, and killing, as in Bosnia and Guatemala. As a result, where restitution is called for as a reparative measure, it will most often comprise only a partial remedy.

Nevertheless, with its new, post-Cold War focus on addressing displacement, restitution has come to play an increasingly prevalent role in post-conflict settings, albeit one that is rarely conceived of in explicit transitional justice terms or integrated with transitional justice programming. Restitution has the perceived advantage of being a concrete and straightforward means of undoing violations and restoring the status quo ante. Because it involves the return of *existing* property to its rightful users, its costs are often calculated primarily in terms of the political capital required to carry out unpopular evictions, rather than in terms of the mobilization of financial resources that often acts as a constraint on compensation-based reparations programs.<sup>342</sup> In displacement contexts, the association between restitution of homes and return of those displaced from them tends to guarantee support for restitution from both domestic actors and host countries interested in sustainable repatriation of refugees. A consequent risk is that restitution programs, having developed a higher profile than broader reparations programs, may supplant them, arbitrarily privileging victims whose suffering took the form of dispossession of recoverable assets. This was initially the case in South Africa, where restitution was perceived as compatible with the ANC's political priorities and reparations were not.<sup>343</sup> In Bosnia, the overriding post-war focus on restitution left few resources available for broader reparations programming.<sup>344</sup>

In addition to transitional justice programming, restitution processes should also be designed to complement broader, development-related efforts to end or pre-empt conflicts over land and property. In theory, such complementarity should be easily achieved. For instance, the UN Restitution Principles recommend that the establishment of cadastral registration systems be an “integral component of any restitution program” with decisions awarding restitution “accompanied by measures to ensure registration or demarcation of [restituted] property as is necessary to ensure legal security of tenure.”<sup>345</sup> This approach may correspond well to settings such as Bosnia, where property relations were both formally registered and relatively uncontested prior to the conflict. However, in the context of less formal systems, attempts to use restitution as a platform for land and property titling programs should take into account the fact that such efforts have often proven counterproductive when undertaken without consideration of local contextual factors.<sup>346</sup>

<sup>342</sup> Alexander Segovia, “Financing Reparations Programs: Reflections from International Experience,” in *The Handbook of Reparations*.

<sup>343</sup> Christopher J. Colvin, “Overview of the Reparations Program in South Africa,” in *The Handbook of Reparations*, 205. The author notes that the South African reparations debate came to focus almost exclusively on the issue of individual financial grants.

<sup>344</sup> As of 2004, no comprehensive reparations program existed in Bosnia and many victims groups have felt compelled to seek relief through litigation. Freeman, 11.

<sup>345</sup> UN Restitution Principles, Principle 15.

<sup>346</sup> Klaus Deininger, “Land Policies for Growth and Poverty Reduction,” *A World Bank Policy Research Report* (2003), 39.

Similarly, restitution programs may interact poorly with efforts to undo the effects of generations of discrimination, as in South Africa, where prospective redistributive measures were adopted to redress the effects of historical confiscations that took place beyond the reach of retrospective restitution programs. The case of South Africa illustrates the need to distinguish between the short-term exigencies of restitution and longer-term efforts to enhance equitable access to land for marginalized groups. Failure to make this distinction initially subordinated the reparative goals of restitution to the redistributive goals of broader land reform, compromising the perceived effectiveness of both. Attempts to shift restitution programs from an essentially corrective to a redistributive footing tend to introduce a political element that may undermine their legitimacy—and effectiveness—as a form of legal redress, as was arguably the case in the Czech Republic.

Short-term, provisional restitution programs conceived in response to specific waves of human rights violations are probably not the best tool for addressing long-term patterns of inequality. The latter involve human rights issues, but are essentially political questions, in the most positive sense of the term—they merit deliberation, sensitivity to local political factors, and democratic accountability. In light of the complications arising from mixed programs such as that in South Africa, restitution may be best viewed as a provisional measure applying legal criteria to right specific wrongs and should only be coordinated—not conflated—with long-term reform efforts based on overtly political considerations. This view has gained credence in South Africa, where the Deputy Minister of Agriculture and Land Affairs recently described restitution in the following terms:

Restitution is a priority in South Africa. We must finish it off. It's a matter of right. It's not a matter of pure economic development like you have in land reform as such...It must be finished off so that we can go into systematic land reform, scientific land reform, to a far greater extent than we are capable of at the moment.<sup>347</sup>

While restitution should be clearly distinguished from broader reforms, programming in both areas may be necessary to forestall the resumption of conflict over land and property. Restitution alone is also a poor proxy for broader reform, as illustrated in Guatemala, where addressing some of the grievances resulting from the conflict has done little to resolve the broader grievances that gave rise to it. Restitution may even be an unhelpful distraction where land has been contested back and forth for generations, leaving multiple credible claims for ownership and no clearly legitimate status quo ante for a restitution program to aspire to restore. An example is Afghanistan, where observers have noted that “development of land policy and dispute resolution mechanisms may be more important to stabilization...than restitution *per se*.”<sup>348</sup>

## B. Rationalizing Restitution—Remedies and Durable Solutions

In order for restitution programs to succeed on their own terms and avoid raising false expectations, their goals should be clearly conceived and mutually complementary. Fundamentally, restitution should be conceived of as a *legal remedy* available on equal terms to all victims of wrongful dispossession. This rationale for restitution is applicable to virtually any transitional setting, whether or not displacement took place. However, in displacement settings, an additional end served by restitution is the *provision of durable solutions* for ending the dislocation of refugees and IDPs. On the face of it, there is no reason that the goals of providing

<sup>347</sup> Jacques Keet, “Land expropriation,” *Johannesburg Mail and Guardian* (November 8, 2005).

<sup>348</sup> Hurwitz et al., 10. See also Liz Alden Wiley, “Rural Land Relations in Conflict: A Way Forward,” *AREU Briefing Paper* (2004).

legal remedies on one hand and durable solutions on the other should come into conflict. In fact, the remedial aspect of restitution—the restoration of victims’ prior rights over their property or housing—typically presents the most important precondition for choice among an entire range of durable solutions. Restored homes and lands represent not only shelter that can be returned to permanently but also assets that can be leased, sold, or exchanged in order to finance local integration where beneficiaries are displaced or resettlement elsewhere in the country or abroad.

A common tension that nevertheless arises in displacement settings is the tendency to conceive durable solutions in the sense of *reversing* displacement rather than merely ending it. In effect, the traditional notion of restitution as a means of making victims entirely whole tends to encourage a view of durable solutions that privileges return.<sup>349</sup> Return intuitively corresponds to the ideal of integral, corrective justice by holding out the possibility of wholesale reconstitution of a demographic status quo ante. Where entire communities have been scattered, the most satisfying remedy, in abstract, is to turn back the clock, reversing the dislocation. This can encourage a rigid approach to return by both the political representatives of displaced persons and international actors, particularly where, as in Bosnia, the failure of international mediators to prevent the conflict may be perceived as placing a moral obligation on the international community to undo its effects. In such cases, property restitution tends to be viewed primarily as an instrumentality for achieving return rather than a remedy in its own right.

In legal terms, some confusion about return may derive from the fact that restitution has traditionally enjoyed formal hierarchical superiority over other types of reparations. Return has become closely associated with restitution, not least because it shares restitution’s connotation with physically undoing (rather than simply mitigating) past harms such as those inflicted by ethnic cleansing. As a result, return at times appears to be attributed a hierarchical superiority over other durable solutions similar to restitution’s formal preference over compensation. However, durable solutions should be guided by individual choice, with states responsible for creating the conditions for equally viable return or resettlement. It is from this perspective that the preferred status of restitution continues to make sense in displacement settings, as, uniquely among legal remedies, it can facilitate free choice among all durable solutions.<sup>350</sup>

Although large-scale return is clearly possible under the right circumstances, restitution justified solely in such terms is likely to disappoint political expectations. As in South Africa, many restitution beneficiaries opt instead for compensation and choose to remain where they have rebuilt their lives. Although the displaced may be given support to return, forcing them to return or penalizing them for resettling elsewhere would give rise to fresh violations of their rights.<sup>351</sup> In Bosnia, rules effectively compelling return were abandoned on this basis, but an enduring policy predilection for return continues to hamper efforts to facilitate the local integration of those who wish to remain where they are.<sup>352</sup> Privileging return over other durable solutions may also become

<sup>349</sup> See UN Reparations Principles, para. 15, stating that restitution “should, whenever possible, restore the victim to the original situation before the [violations] occurred.”

<sup>350</sup> As discussed above, in Section I. B. of this paper, sole reliance on other forms of reparations such as compensation tends to preclude the possibility of return.

<sup>351</sup> See UN Guiding Principles on Internal Displacement, Principles 14 (“Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.”) and 15 (“Internally displaced persons have...[t]he right to seek safety in another part of the country...and...to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.”)

<sup>352</sup> “Protection of and Assistance to Internally Displaced Persons, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons,” General Assembly, UN Doc. A/60/338 (2005), 10, para. 25.

a rationale for conditioning restitution upon return, especially where those displaced sought shelter abroad as in the Czech Republic. In short, where restitution programs presuppose return as a durable solution for their beneficiaries, they may come into conflict with the fundamental right of all victims of displacement to a remedy. The UN Restitution Principles seek to mitigate this risk by articulating restitution as a “distinct right...prejudiced neither by the actual return nor non-return of refugees and displaced persons.”<sup>353</sup>

### C. Procedural Considerations

In both restitution and reparations practice, one of the most fundamental issues is whether to seek to resolve claims through routine, individualized judicial procedures or through streamlined administrative programs specifically set up to address claims arising from particular patterns of human rights violations.<sup>354</sup> Although a variety of approaches are possible, any attempt to redress widespread and systematic violations is more likely to be effective if handled in an administrative mass claims procedure. By recognizing that norm-breaking behavior constituted the rule rather than the exception during the time period in question, administrative programs can reverse the overall allocation of burdens vis-à-vis judicial proceedings, which tend to presume that norm-breaking behavior did not happen unless demonstrated otherwise.<sup>355</sup> As a result, claimants will face minimal evidentiary burdens, reduced costs and delay, and less of the uncertainty associated with proving one’s case in adversarial proceedings subject to repeated appeals.<sup>356</sup> A controversial element of such programs in reparations contexts is their tendency to award compensation at rates lower and less individualized to specific harms than what victims might hope to receive from a court.<sup>357</sup> This is less of a concern in restitution programs, given that meritorious claims result in the restoration of distinct assets rather than the award of standardized or subjective assessments of their worth.

All four case studies tend to bear out the utility of exceptional administrative procedures in mass restitution settings. In the Czech Republic, the decision to entrust restitution disputes to local courts resulted in a highly decentralized process with very limited possibilities for supervision of either the progress of overall implementation or the consistency with which the laws were applied. In South Africa, judicial proceedings under a specialized land court were abandoned early on in favor of a nimbler administrative process more suited to the negotiation-based nature of the process. The success of Bosnian restitution was built on a streamlined administrative system heavily weighted in favor of claimants. However, Guatemalan restitution provided an example of the worst of both worlds; where restitution claims were contested by subsequent occupiers, the administrative authorities had little enforcement power and the fallback of judicial appeal was unaffordable to many claimants

<sup>353</sup> UN Restitution Principles, Principle 2.2.

<sup>354</sup> Jaime E. Malamud Goti and Lucas Grosman, “Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies,” in *The Handbook of Reparations*.

<sup>355</sup> For instance, the United Nations Compensation Commission, a pre-eminent example of an administrative mass claims body, proceeded from the proposition that Iraq had illegally invaded Kuwait in 1990 and therefore bore liability for all damages arising from this act, leaving claimants required only to establish the individual harms they suffered in order to receive compensation. Hans van Houtte, Hans Das, and Bart Delmartino, “The United Nations Compensation Commission,” in *The Handbook of Reparations*.

<sup>356</sup> de Greiff, 459.

<sup>357</sup> *Ibid.*, 456-7.

#### **D. Substantive Considerations**

Where restitution takes the form of a provisional administrative program, it is very important that both claimants and adjudicators are given clear legislative guidance on how to proceed. Such guidance should consist of a series of parameters describing the scope of restitution. For instance, a first basic parameter is the “cut-off date,” which should be set at the moment before significant violations of human rights began. For instance, Bosnian restitution applied to property that was confiscated not only during the formal state of war, but also during a period of documented civil unrest leading up to the war. Czech restitution was controversial because it initially only applied to communist confiscations after 1948; when it was extended to the pre-1948 period, it was done in a manner that applied only to the claims of Jewish victims of the Nazis and continued to exclude the claims of expelled Sudeten Germans. In South Africa, where discriminatory land confiscations had gone on for centuries, the date of adoption of the 1913 Natives Land Act proved an expedient cut-off date for restitution, leaving the effects of prior discriminatory confiscations to be addressed through a broader land redistribution program.

Another key parameter of restitution programs is the type of assets they apply to. As discussed above, an important development in contemporary restitution has been its extension as a remedy to cover violations of housing rights as well as property rights. At least in displacement settings, this argues strongly for designing restitution programs to restore claimants rights to their former homes, whether or not they owned them.<sup>358</sup> Respect for this principle was vitally important in Bosnia, where many urban dwellers had spent generations living in apartments that they did not formally own. Another key parameter involves who is entitled claim. South Africa set two important precedents in this area by recognizing the claims of the successors to deceased victims of apartheid confiscations and by giving effect to the group claims of tribes who had held land in traditional collective tenure forms.

Once abandoned, homes and property are rarely left unoccupied, and one of the most important substantive parameters for any restitution program is the way in which it balances the rights of claimants against those of subsequent occupants. Because subsequent occupants may develop legitimate rights in abandoned property with the passage of time, there is no hard and fast rule. However, precedence should generally be given to claimants, with consideration of compensation for subsequent occupants deemed to have acquired bona fide interests in contested property. In the Czech Republic, communist confiscations were condemned but individuals who legally purchased confiscated properties were allowed to keep them, leaving the claimants to be satisfied with compensation. In South Africa, settled subsequent ownership is respected, but the order of precedence reversed, with the government relying on expropriation proceedings in order to ensure that claimants are restored to possession of land against compensation for subsequent owners. In Bosnia, subsequent occupants were not seen as having acquired rights in claimed properties at all, and were compelled to vacate all such properties without compensation. However, in Guatemala, the failure to enunciate a clear rule of decision favored subsequent occupants in practice, obliging claimants to settle for alternate land rather than in-kind restitution.

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<sup>358</sup> See the UN Restitution Principles, Principles 13.6 and 16.