

2010

Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations

Megan J. Ballard

Recommended Citation

Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT'L LAW. 462 (2010). Available at: <http://scholarship.law.berkeley.edu/bjil/vol28/iss2/4>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations

Megan J. Ballard*

SUMMARY

The international community has recently hailed the restoration of property rights for people uprooted by armed conflict as a means of remedying forced displacement. Proponents of property restitution assert that this remedy can enhance the rule of law in a post-conflict society by promoting reconciliation and bolstering economic and social stability. A United Nations (U.N.) sub-commission has endorsed a set of legal and technical guidelines for constructing a property restitution scheme. While other authors have written in support of this plan and a general right to property restitution, this Article represents a critical analysis of the remedy, pointing to weaknesses in its legal and theoretical foundations.

The current emphasis on property restitution is similar to past efforts of the United States and other Western nations to promote the rule of law and economic development through exporting an instrumentalist model of law. Just as these well-intentioned “law and development” efforts were plagued by unforeseen, deleterious consequences, so too might the export of property restitution laws and processes suffer from ill side effects. This Article identifies some of the possible unintentional outcomes of property restitution, including, ironically, that the U.N.’s property restitution scheme may ultimately undermine development of the rule of law. The Article seeks to spur further debate on the merits of property restitution so that unintended consequences might be avoided and the remedies to forced displacement can be strengthened to meet the needs of refugees and internally displaced people.

* Associate Professor, Gonzaga University School of Law. I am grateful to the colleagues and students who encouraged and assisted my drafting of this Article, specifically Professors Mary Pat Treuthart and Linda Rusch and research assistants Dena Burke and Darryl Coleman. Many thanks also to Ben Muse, 2009-10 Editor-in-Chief of the *Gonzaga Law Review*, for his outstanding editorial assistance.

I.
INTRODUCTION

The judge was summoned to a small village outside of Prey Veng, Cambodia in August 1995.¹ Pol Pot's survivors had returned to the village after the fall of the Khmer Rouge and as years had passed since the families had been in the village, many no longer recalled property boundary locations. Two families unable to settle their differences sought a judicial determination as to where the boundary lay. The judge, however, had no formal legal training, and no property documents existed to help her resolve the dispute.² After listening to representatives from the two families, the judge called for a village elder and interviewed him as to his recollection of the disputed boundary. She wrote down his version on a clean sheet of paper. The judge then painted the parties' thumbs with her lipstick and they affixed red thumbprints to the paper. The boundary was settled.

This dispute is a minor example of the plethora of property problems that can arise in the aftermath of armed conflict.³ As has occurred in Cambodia, the former Yugoslavia,⁴ Somalia,⁵ Iraq,⁶ and elsewhere around the world, violence

1. The author worked at the Prey Veng courthouse as a pro bono lawyer for the International Human Rights Law Group, Cambodian Court Training Project, during the summer of 1995.

2. Most of the nation's judges and lawyers either fled the country or died under the Pol Pot regime and the country had no law school from 1975 until 1992. Dolores A. Donovan, *Cambodia: Building a Legal System from Scratch*, 27 INT'L LAW. 445 (1993); see also The World Bank, *Project Information Document: Cambodia – Legal and Judicial Reform Project*, Feb. 2, 2001, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/26/000094946_01032309511010/Rendered/INDEX/multi0page.txt.

3. The Cambodian peace agreement established the right for Cambodian refugees to return to Cambodia. Final Act of the Paris Conference on Cambodia, Oct. 23, 1991, art. 20.1, pt. V, U.N. Doc. A/46/608 (1991). Nonetheless, continued unrest and a 1992 property law that prohibited the state from recognizing pre-1979 property rights prompted hundreds of thousands of Cambodians to be displaced from their homes after the Paris Peace Accords were signed. Shaun Williams, *Internally Displaced Persons and Property Rights in Cambodia*, 19 REFUGEE SURV. Q. 194, 195 (2000).

4. Over half of the entire population of Bosnia and Herzegovina was forced to leave their homes between 1992 and 1995. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons – Preliminary Report of the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003) (prepared by Paulo Sérgio Pinheiro) [hereinafter *Preliminary Report*]; see also Charles Philpott, *Though The Dog is Dead, The Pig Must Be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees*, 18 J. REFUGEE STUD. 1 (2005) [hereinafter *Dog is Dead*] (reporting that approximately 2,632,928 people had been displaced).

5. More than half of the Somali population was displaced following the 1991 overthrow of the Siad Barre regime. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 129 (2006), available at <http://www.unhcr.org/4a4dc1a89.html> [hereinafter STATE OF THE WORLD].

6. The United Nations High Commissioner for Refugees reports that, by the end of 2008, 1.9 million Iraqis left the country as refugees and another 2.6 million remained as internally displaced persons. U.N. HIGH COMM'R FOR REFUGEES [UNHCR], 2008 GLOBAL TRENDS: REFUGEES,

forces hundreds of thousands of people to leave their homes every year.⁷ When the conflict subsides, refugees and internally displaced persons (IDPs) face immense barriers to returning home.⁸ Among these are: proving a right to occupancy in light of the destruction or nonexistence of property records; confronting the intentional or collateral devastation of structures; overcoming abandonment laws that purport to deprive those who have fled their homes of their property rights;⁹ and confronting the possibility that others may have occupied homes during the interim without consent (secondary occupation).¹⁰

The worldwide problem of displacement is enormous. At the end of 2008, the Office of the United Nations High Commissioner for Refugees (UNHCR)

ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 2, 19 (2009), available at <http://www.unhcr.org/4a375c426.html> [hereinafter GLOBAL TRENDS].

7. The UNHCR reported that there were approximately 42 million forcibly displaced people worldwide at the end of 2008. *Id.* Some of the displaced flee without being able to make arrangements for their property; others sell property under duress prior to fleeing.

8. “Refugees” are people who flee across a national border. “Internally displaced persons,” on the other hand, leave their homes but remain within the country.

9. Michael Kagan, *Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict*, 19 FLA. J. INT’L L. 421, 433-435 (2007) (discussing Israeli abandoned property laws). Wartime laws in Bosnia, for example, declared that housing vacated by fleeing occupants was “abandoned” and allowed municipal authorities to reallocate these homes. Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT’L & COMP. L.Q. 429, 431 (2004).

10. Another layer of complexity arises if the original occupant has died and a person purporting to be an heir asserts a claim. In Bosnia, for example, there was a relatively short period of time between the beginning of the war in 1992 and the time that property claimants began to file claims for restitution, four years later. *See, e.g.*, Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT’L L. & POL. 441, 489 (2005) [hereinafter *Post-Conflict Property Restitution*] (discussing property repossession claims filed with domestic courts in 1997). Accordingly, most applicants were the original property owners. If the owner had died, heirs could file claims using the same procedure available for the original owners, with the added requirement that heirs had to prove inheritance rights under the national law of succession or produce a valid will. INT’L ORG. FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES 103-04 (2008). A more complex situation faced the Claims Resolution Tribunal for Dormant Accounts in Switzerland (“CRT”), established in 1997 to determine the rights to assets deposited in Swiss bank accounts prior to or during World War II and dormant since 1945. *Id.* at 34. Because over 50 years passed between the initial point of dormancy and the beginning of the claims process, most claims were filed by heirs and legatees of the original victims. *Id.* at 103. Where an account holder’s will was not available, the CRT process required that a claimant prove heirship under applicable national law, or the law with the closest connection to the dispute. *Id.* at 114. Identifying which national law to use was, in itself, a challenge. Depending on the circumstances, this could have been the last domicile of the account holder, the country where the account holder had citizenship, or the country to which the account holder had emigrated. *Id.* at 113, 273 n. 211. The process also allowed claims to be resolved according to Talmudic law at the request of all parties involved. *Id.* at 272 n. 210. Moreover, a single bank account commonly had claimants from different branches of the original owner’s family, representing different generations and residing in different countries. *Id.* at 114. Once the tribunal identified the applicable national law, it had to apply the laws of various jurisdictions to settle each claim. For example, *see id.* at 103-113, for a discussion of the ways some restitution processes managed the claims of heirs.

estimated a global population of 16 million refugees and 26 million IDPs.¹¹ The UNHCR reports that 604,000 refugees returned to their countries of origin, and 1.3 million IDPs returned home in 2008, representing only a fraction of those previously displaced.¹²

The United Nations (U.N.) has long worked to protect people forced from their homes.¹³ It has emphasized voluntary repatriation for refugees since 1950,¹⁴ and made various pronouncements declaring that refugees have a right to return home.¹⁵

Governments, as well as refugee and migration policymakers, have increasingly focused attention on this right to return. Ensuring conditions for refugee return following the cessation of an armed conflict has become associated not just with protecting the human rights of refugees, but also with solidifying peace agreements and building economic development.¹⁶

11. UNHCR, GLOBAL TRENDS, *supra* note 6, at 2, 29. Afghanistan contributed the highest number of refugees fleeing its borders, 2.8 million. *Id.* at 9. Colombia tops the list for the highest number of IDPs, estimated to be close to 3 million. *Id.* at 19.

12. *Id.* at 7. The degree to which those returning did so “voluntarily” is contested. Some returnees may have failed in attempts to gain asylum elsewhere; others may not have been forcibly removed from host countries but are given no option to stay legally. Richard Black & Saskia Gent, *Sustainable Return in Post-Conflict Contexts*, 44 INT’L MIGRATION 15, 19 (2006).

13. “[I]nnumerable United Nations Security Council and General Assembly resolutions, adopted over the past 60 years explicitly address housing and property restitution rights.” Scott Leckie, *Introduction to CENTRE ON HOUSING RIGHTS AND EVICTIONS, THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS* 4 (2005), available at <http://www.cohre.org/store/attachments/Pinheiro%20Principles.pdf> [hereinafter *Introduction*].

14. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *The Return of Refugees’ or Displaced Persons’ Property: Working Paper Submitted by Mr. Paulo Sérgio Pinheiro*, ¶ 17, U.N. Doc. E/CN.4/Sub.2/2002/17 (June 12, 2002) (prepared by Paulo Sérgio Pinheiro) [hereinafter *Working Paper*] (discussing a “General Assembly resolution of 14 December 1950, in which the Assembly adopted the UNHCR Statute,” likely referring to G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/1775 (Dec. 14, 1950)).

15. G.A. Res. 35/124, at 93, U.N. Doc. A/RES/35/124 (Dec. 11, 1980) (affirming “the right of refugees to return to their homes in their homelands”). Other General Assembly resolutions concerning specific conflicts also restate this right. *Working Paper, supra* note 14, ¶ 25 (citing G.A. Res. 1672 (XVI), at 28, U.N. Doc. A/5100 (Dec. 18, 1961) (Algeria); G.A. Res. 3212 (XXIX), at 3, U.N. Doc. A/9361 (Nov. 1, 1974) (Cyprus); G.A. Res. 51/126, at 120, U.N. Doc. A/RES/51/126 (Dec. 13, 1996) (Palestine/Israel); G.A. Res. 194 (III), at 21, U.N. Doc. A/194 (Dec. 12, 1948) (Palestine/Israel); and G.A. Res. 51/114, at 263, U.N. Doc. A/RES/51/114 (July 3, 1997) (Rwanda)). Similarly, the U.N. Security Council has reaffirmed a right to return to one’s home within the context of conflicts in Bosnia and Herzegovina, Abkhazia and the Republic of Georgia, Azerbaijan, Cambodia, Croatia, Cyprus, Kosovo, Kuwait, Namibia and Tajikistan. *Working Paper, supra* note 14, ¶¶ 23-24 (citing to Security Council resolutions for each conflict). See also Rhodri C. Williams, *The Significance of Property Restitution to Sustainable Return in Bosnia and Herzegovina*, 44 INT’L MIGRATION 39, 51 (2006) [hereinafter *Significance of Property Restitution*]; Guilia Paglione, *Individual Property Restitution: from Deng to Pinheiro - and the Challenges Ahead*, 20 INT’L J. OF REFUGEE L. 1, 2 (2008).

16. Black & Gent, *supra* note 12, at 24; Anders H. Stefansson, *Homes in the Making: Property Restitution, Refugee Return, and Senses of Belonging in a Post-War Bosnian Town*, 44

U.N. officials and other policymakers have more recently interpreted the right to return as giving rise to a right to property restitution.¹⁷ In August 2005, a sub-commission of the U.N. Commission on Human Rights formally endorsed guidelines addressing legal and technical issues related to property restitution for persons arbitrarily or unlawfully displaced from their property.¹⁸ These guidelines are commonly referred to as the “Pinheiro Principles” (or the Principles), after the U.N. Special Rapporteur on Housing and Property Restitution for Refugees and Internally Displaced Persons, Paulo Sérgio Pinheiro.¹⁹

The Pinheiro Principles propose legal, administrative and enforcement guidelines for the construction and implementation of property restitution processes.²⁰ More specifically, they suggest elements of a legal framework within which a process of restitution might occur, as well as possibilities for administering that process and options for enforcing restitution orders.

Scholars and human rights workers have hailed the recent focus on property restitution as a means of depoliticizing the right of voluntary return.²¹

INT’L MIGRATION 115, 116-17 (2006) (noting that return and property restitution are regarded as essential to peace processes).

17. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Housing and property restitution in the context of the return of refugees and internally displaced persons: Preliminary report of the Special Rapporteur*, at 9, U.N. Doc. E/CN.4/Sub.2/2003/11 (June 16, 2003) (prepared by Paulo Sérgio Pinheiro)[hereinafter *Progress Report*]; see, e.g., S.C. Res. 820, U.N. Doc. S/RES/820 (April 17, 1993); U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm’n on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (prepared by Francis M. Deng) [hereinafter *Guiding Principles*]. According to international law, restitution is a remedy encompassed under reparations. Pablo De Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 452 (Pablo De Greiff ed., 2006) (stating that reparations includes restitution, compensation, rehabilitation and satisfaction and guarantees of nonrecurrence). The term “reparations” generally refers to “measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.” *Id.*; see Richard Falk, *Reparations, International Law, and Global Justice*, in THE HANDBOOK OF REPARATIONS 478, 481-82 (Pablo De Greiff ed., 2006) (discussing the customary law genesis of reparations and its authoritative restatement in *The Case Concerning the Factory at Chorzow (Ger. v. Pol.)*, 1927 P.C.I.J. (Ser. A) No. 12 (Nov. 21)); see also ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 13-24 (2004) (discussing the historical origins of the right to redress).

18. *Housing and Property Restitution for Refugees and Displaced Persons*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, Res. 2005/21, U.N. Doc. E/CN.4/Sub.2/RES/2005/21 (Aug. 11, 2005) [hereinafter *Pinheiro Principles*].

19. CENTRE ON HOUSING RIGHTS AND EVICTIONS, *supra* note 13, at 4. The Sub-Commission on the Promotion and Protection of Human Rights appointed Pinheiro as Special Rapporteur in 2002.

20. See *infra* notes 81-94 and accompanying text (discussing the Pinheiro Principles).

21. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 450; Williams, *Significance of Property Restitution*, *supra* note 15, at 39; Philpott, *Dog is Dead*, *supra* note 4, at 10 (noting that amending the law in Bosnia, so that restitution could be awarded even if the rights holder did not plan to return, refocused the restitution program from a political one to a rights-based one). One author suggests that viewing housing recovery after natural disasters as a right rather than charity similarly shifts the debate in a productive manner. Charles W. Gould, *The Right to Housing*

For example, one observer suggests that the value of property restitution is that it “shift[s] the focus from the highly politicized concept of return to a more impartial ‘rule of law’ approach, connoting an emphasis on individuals’ rights to their former homes.”²² While a systematic approach to property restitution as suggested by the Pinheiro Principles does emphasize technical matters of process over political considerations related to the conflict, the merits of this approach are debatable.

Property restitution has intuitive appeal, from both property rights and human rights perspectives. This Article maintains, however, that the legal bases and theoretical claims for the Pinheiro Principles’ approach to restitution are weak. Failure to recognize these weaknesses can ultimately undermine the sustainability of return and repatriation.²³

Scholars, human rights advocates, and practitioners have written about the value of property restitution and specific restitution programs, including the degree to which programs adhere to the Pinheiro Principles.²⁴ The literature, however, is less replete with extensive critiques of property restitution.²⁵ This Article attempts to fill this gap by identifying and analyzing limitations of the Pinheiro approach to property restitution.

Part II addresses different phases of law and development movements in order to establish a framework for critically evaluating post-conflict property

Recovery After Natural Disasters, 22 HARV. H. RTS. J. 169, 173 (2009).

22. Williams, *Significance of Property Restitution*, *supra* note 15, at 39.

23. “Repatriation” refers to the process of returning from the perspective of international refugee law. International human rights law refers generally to a right to “return.” Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?* 19 MICH. J. INT’L L. 1091, 1096, n.17 (1998).

24. See, e.g., Scott Leckie, *New Directions in Housing and Property Restitution*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS, 3-4 (Scott Leckie ed., 2003); Dan E. Stigall, *Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions*, 34 RUTGERS L. REC. 1 (2009); Williams, *Significance of Property Restitution*, *supra* note 15, at 40; Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 442-47; Philpott, *Dog is Dead*, *supra* note 4 at 1-2; Gould, *supra* note 21, at 173.

25. This is true at least with regard to English-language publications. For critiques of the focus on individual property restitution, to the exclusion of alternative remedies, see Paglione, *supra* note 15, and Jose-Maria Arraiza & Massimo Moratti, *Getting the Property Question Right: Legal Policy Dilemmas in Post-Conflict Property Restitution in Kosovo (1999-2009)*, 21 INT’L J. OF REFUGEE STUDIES 421, 426 (2009) (arguing that compensation may have been the preferred remedy for the majority of those displaced during conflict in Kosovo); see also Anneke Rachel Smit, *Housing and Property Restitution and IDP Return in Kosovo*, 44 INT’L MIGRATION 63 (2006) (questioning the value of restitution schemes that ignore other aspects of the right to return); Stefansson, *supra* note 16, at 116, 125, 132 (claiming that the international community’s focus on property restitution in Bosnia came at the expense of constructing political and socio-economic structures necessary for sustainable return); MARIA KETT & MIRANDA DALRYMPLE, THE CONTINUING “PLIGHT” OF DISPLACED PEOPLE IN BOSNIA-HERZEGOVINA 7 (2004), available at <http://www.responseinternational.org.uk/downloads/archives/BiHLCCEditedReportAug04.pdf> (criticizing the focus on property laws in Bosnia as minimizing the attention paid to the welfare of the IDP population).

restitution. Large-scale restitution processes, similar to the legal reform instigated under the auspices of the law and development efforts, depend heavily on Western nations imposing or influencing law in other countries. Both law and development movements have resulted in unintended, harmful consequences.²⁶ Revisiting these law and development experiences may prevent a similar legacy from attaching to restitution efforts.

Part III provides background information useful for understanding this Article's critiques of property restitution. It describes salient features of the Principles and briefly explains the property restitution process following the war in the Federation of Bosnia-Herzegovina (Bosnia). The Bosnian experience is important not only because it provides an example of a property restitution scheme, but also because the Bosnian restitution experience significantly influenced the drafting of the Pinheiro Principles.²⁷

Part IV analyzes the legal underpinnings and non-legal theoretical claims of restitution. This Part considers evidence from Bosnia and other sources to reveal limitations of the legal and theoretical support for post-conflict property restitution as a remedy to mass displacement. It also discusses difficulties related to international involvement in restitution processes.

The scope of this Article is limited to the application of the Pinheiro Principles in the context of significant population displacement caused by armed conflict.²⁸ However, it is important to note that the Pinheiro Principles themselves are not so limited. They broadly prescribe elements of a property

26. See *infra* Part II.

27. Pinheiro was appointed as U.N. Special Rapporteur in 2002; he submitted his Working Paper on the principles that same year. *Working Paper*, *supra* note 14. He drafted a Preliminary Report in 2003. *Preliminary Report*, *supra* note 4. The property restitution process in Bosnia underwent significant transition and growth during those two years. See, e.g., Philpott, *Dog is Dead*, *supra* note 4 (discussing the restitution process following the December 2001 amendments to the property laws and the end of 2003, when the bulk of claims processing was to be completed). Moreover, both the Working Paper and the Preliminary Report reflect the influence that the Bosnia experience had on crafting the Pinheiro Principles. The 2002 Working Paper, for example, includes a section on "Issues Requiring Further Study" expressly referencing problems encountered in Bosnia, such as: the lack of independent local judicial systems, *Working Paper*, *supra* note 14, ¶ 44; secondary occupation of abandoned housing, *id.* ¶ 46; and abandonment laws implemented during the conflict that purported to terminate the property rights of persons who vacated their housing, *id.* ¶ 49. The 2003 Preliminary Report includes a section reviewing property restitution in Bosnia to identify "best practices" and "common obstacles" in property restitution programs. *Preliminary Report*, *supra* note 4, ¶ 21-29. Notably, this review states that the Peace Accords ending the conflict in Bosnia "established principles which are of fundamental importance to this discussion . . ." *Id.* ¶ 25.

28. While this Article addresses "post-conflict" situations, there likely is no exact moment when a society in conflict transitions to a post-conflict society. Even after warring factions officially cease armed activity, violence and displacement can still be part of the political and social landscape. B.S. Chimni, *Refugees and Post-Conflict Reconstruction: A Critical Perspective*, 9 INT'L PEACEKEEPING 163, 165 (2002) (quoting a World Bank report as acknowledging that "drawing a line between 'conflict' and 'post-conflict' is difficult.") (citing WORLD BANK, POST-CONFLICT FUND: GUIDELINES AND PROCEDURE (1999)).

restitution system for people “arbitrarily or unlawfully deprived of their former homes . . . regardless of the nature or circumstances by which displacement originally occurred.”²⁹ This language conceivably could include displacement caused by natural disasters, armed conflict, peaceful regime change, or large-scale development projects.³⁰ Similarly, the Principles can be applied to isolated instances of forced displacement, rather than mass population displacement, which is the focus of this Article.³¹

II.

THEORETICAL FRAMEWORK

A systematic property restitution process in the aftermath of violent conflict involves actors in the international community external to the actual conflict. International actors may play a role in implementing a negotiated peace agreement, which itself might include a right to property restitution.³² Indeed, the Pinheiro Principles advise that peace agreements should include restitution procedures, institutions and mechanisms.³³ Moreover, because the return of refugees and IDPs, as well as the establishment and implementation of a process to restore property rights depend on international financial, technical, and

29. *Pinheiro Principles*, *supra* note 18, ¶ 1.2.

30. A U.N. precursor to the Pinheiro Principles addressed the rights of IDPs and declared those rights to be the same whether displaced persons were forced to leave homes or places of habitual residence because of “natural or human-made disasters.” *Guiding Principles*, *supra* note 17, Annex ¶ 2. Human-made disasters include large-scale development projects not justified by compelling and overriding public interests. *Id.* principle 6, 2.c. For a discussion of the Pinheiro Principles in the context of natural disasters, see Gould, *supra* note 21, at 194-198.

31. The scope of this Article is also general, inasmuch as the critiques of restitution it presents are not tailored to apply to any particular aspect of a variety of possible post-conflict situations. It does not address details of specific conflicts that would have import in designing a restitution procedure. For example, the Article does not distinguish between types of property (agricultural or urban, for example); legal interests in property (leasehold, fee, or communal interests, for example); or various origins of conflicts (ethnic, religious, or other class struggle). A restitution process for urban residential property may look different from one where the displaced were primarily from rural areas. Likewise, the process of restitution may be constructed differently depending on whether it aims to restore mostly property rights to tenants, those who hold property communally, or fee holders. Finally, restitution following conflict caused primarily by ethnic or religious divisions may be constructed differently than a restitution process following some other manifestation of political struggle. Nonetheless, the Pinheiro Principles themselves are general about the types of property and conflicts to which the restitution guidelines apply. *See infra* notes 81-95 and accompanying text discussing the Principles in more detail. This Article addresses post-conflict property restitution on a more abstract level to highlight the overarching limitations and inconsistencies that seem inherent to application of the remedy to instances of mass displacement caused by armed conflict.

32. The United States, for example, was instrumental in brokering the agreement ending the war in Bosnia. *See infra* note 69. This agreement included a right to property restitution. *See infra* note 70.

33. *Pinheiro Principles*, *supra* note 18, ¶ 12.5.

personnel resources,³⁴ the Pinheiro Principles call on the international community to “work with national Governments and share expertise on the development of national housing, land and property restitution policies and programs”³⁵

While international support for post-conflict restitution seems benign, if not laudable, it can lead to significant international influence over domestic legal affairs. Bosnia’s experience in creating and implementing its property restitution scheme illustrates that international actors can be involved in drafting, adjudicating, and enforcing local property laws.³⁶ In this manner, property restitution to remedy mass forced displacement gives rise to potential law exportation. There is, however, very little consensus on the merits of importing or exporting law or legal processes across borders.

The history of law is marked by substantial borrowing or transplanting of substantive elements and processes from other legal systems.³⁷ Some scholars have posited that one of the objectives of the evolution of law should be to produce unified legal theories to elevate law across different systems.³⁸ Others criticize the value of legal transplants claiming that law is so embedded in its social setting that imports and exports of foreign legal principles are misguided or futile.³⁹ Indeed there is a significant history of transplanted law and

34. See *infra* notes 71-74, 181-82 and accompanying text (describing the international resources required to create, execute, and enforce Bosnia’s restitution process); see also INT’L ORG. FOR MIGRATION, *supra* note 10, at 87-94 (discussing international support for restitution in Bosnia, Kosovo and South Africa).

35. *Pinheiro Principles*, *supra* note 18, ¶ 22.3.

36. See, e.g., *infra* notes 71-74 and accompanying text.

37. For example, Roman law spread throughout Western Europe in varying degrees in the 12th and 13th centuries. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 9-10 (2007). German legal thought took over from 1850 to 1900, followed by the predominance of French legal thought, both influencing the development of legal systems beyond their borders. Duncan Kennedy, *Three Globalizations of Law and Legal Thought*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 23 (David M. Trubek & Alvaro Santos eds., 2006); see also ALAN WATSON, *COMPARATIVE LAW: LAW, REALITY AND SOCIETY* 5, 22 (2008) (declaring that “Borrowing is the name of the game and is the most prominent means of legal change” and that the majority of the private law found in most of the legal systems of the West derives from Roman civil law or English common law).

38. See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 24-25 (3d ed. 1998) (discussing the advantages of unified law and asserting that comparative law plays a significant role in this regard); PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 506 (3d ed. 2007); P.G. Monateri, *The Weak Law: Contaminations and Legal Cultures*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.*, 575, 579 (2003).

39. See, e.g., Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383 (2003); Pierre Legrand, *European Legal Systems are Not Converging*, 45 *INT’L & COMP. L.Q.* 52, 56-60 (1996); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 814 (1987). But see Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. PA. L. REV.* 1121, 1125 (1983) (stating that “a great deal, if not most, of law operates in a territory for which it was not originally designed, or in a society which is radically different from that which created the law”).

institutions resulting in harmful, unintended consequences.⁴⁰

“Law and development” efforts over the last fifty years provide recent examples of the unintended consequences of legal transplants. The initial law and development movement in the 1960s and 1970s sought to promote economic development primarily in Africa and Latin America by exporting a model of Western law that upheld “law as an instrument through which state actors could shape the economy.”⁴¹ Law and development programs attempted to transform legal education and institutions, in part, through transplanting legal institutions from the United States and Europe.⁴² No such transformation occurred. The initial law and development export of Western models of law largely failed.⁴³ In some cases, local political actors co-opted transplanted legal norms and used them to consolidate their own power.⁴⁴

A second wave of interest in law and development emerged in the 1980s in the context of increased international trade, global economic integration, and a

40. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1080-1085 (1974); Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3, 9-11 (Thomas Carothers ed., 2006) [hereinafter *Rule-of-Law Revival*] (commenting on the general failure of law reform in post-Soviet states; noting extensive Western assistance for law reform in those states; and suggesting that many Western advisors involved in such assistance “have not learned that aid must support domestically rooted processes of change, not attempt to artificially reproduce preselected results”); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD 31, 60-61 (Thomas Carothers ed., 2006) (suggesting that Western-backed law reform may create “worse, less liberal outcomes”); Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 77 (2008) (noting that law reformer’s rhetoric of failed law in Latin America serves to undermine imported models of law and legal institutions); Monateri, *supra* note 38; Thomas A. Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 Geo. Wash. Int’l L. Rev. 321, 364 (2007) (predicting that the result of Western-based law reform in Niger will create social unrest because it embodies a perspective of law and justice distasteful to most of the population in Niger). Criticism of transplanted law and institutions is not intended to suggest an isolationist approach to the resolution of humanitarian crises caused by international or civil armed conflict. This criticism, however, informs a cautious evaluation of any standardized legal approach to common problems experienced worldwide, including the restitution approach prescribed by the Pinheiro Principles.

41. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74, 75 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *Rule of Law*].

42. *Id.* at 77.

43. Trubek & Galanter, *supra* note 40, at 1080-1085; JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8-10 (1980) (concluding that “American legal assistance was inept, culturally unaware, and sociologically uninformed. It was also ethnocentric, perceiving and assisting the Third World in its own self-image.”); *see also* Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003).

44. GARDNER, *supra* note 43, at 11 (asserting that lawyers trained to be the “legal engineers” of development” all too often used the transplanted legal instrumentalism as technicians or apologists for authoritarian regimes). Trubek & Galanter, *supra* note 40, at 1083 (concluding that the initial law and development movement illustrated that “law may be used to justify and legitimate arbitrary actions by government rather than to curb such excesses.”).

spate of democratization worldwide.⁴⁵ In this context, governments aspired, in part, because of pressure by international development agencies, to adopt legal reform to facilitate and strengthen the growth of market institutions. International development agencies, in particular the World Bank, peddled a “one-size fits all” model of legal reform that emphasized the administration of justice.⁴⁶ This institutional focus on courts and judiciaries, however, may have missed the essence of the rule of law inasmuch as it did little or nothing to alter the perceived fairness and legitimacy of law.⁴⁷ Moreover, “transplanted laws, thought to reflect best practices, often did not take hold, or produced results diametrically opposite from what was intended.”⁴⁸ Even the World Bank has recognized the limitations of this approach:

[M]any of the assumptions underlying law and justice reform efforts have not been subject to rigorous questioning, theorizing, or testing. The lack of well-developed conceptual and empirical underpinnings is a serious concern, especially in light of past efforts to reform legal institutions—most notably the Law and Development Movement of the 1960s—that are widely believed to have failed due to flawed or insufficient theoretical foundations.⁴⁹

A third wave of interest in law and development is now emerging primarily from critiques of the first two law and development efforts.⁵⁰ One of the features of this third rendition is the view that development encompasses more than economic growth; it includes the recognition and protection of human freedom.⁵¹ A second hallmark of this revised vision of law and development is a “simultaneous presence of critique.”⁵² The purpose of simultaneous critique is to be more intentional about identifying potential deleterious consequences of

45. Some scholars refer to this second wave as the “Law and the Neoliberal Market” movement, others the “rule-of-law aid movement.” David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 5* (David M. Trubek & Alvaro Santos eds., 2006) (identifying the free market focus of this “second moment” of law and development); Thomas Carothers, *The Problem of Knowledge, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 15-16* (Thomas Carothers ed., 2006) [hereinafter *Problem of Knowledge*] and Carothers, *Rule-of-Law Revival, supra* note 40, at 5-6 (suggesting that this wave, which began in the early 1980s as dozens of countries experienced political democratization, had broad appeal as a means of shoring up democracy and market-oriented economic reform).

46. Trubek, *Rule of Law, supra* note 41, at 86; Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT’L L. 230, 233 (1999); Carothers, *Problem of Knowledge, supra* note 45, at 20 (noting that the rule-of-law assistance focus on judiciaries was so ubiquitous that “the terms *judicial reform* and *rule-of-law reform* often [are] used interchangeably”).

47. Carothers, *Problem of Knowledge, supra* note 45, at 20-21.

48. Trubek & Santos, *supra* note 45, at 6.

49. The World Bank, *Rule of Law and Development, available at <http://web.worldbank.org/> (search for “Rule of Law and Development” and follow the first link to “Law & Justice Institutions: Rule of Law and Development”)* (last visited Apr. 15, 2010).

50. Trubek & Santos, *supra* note 45, at 7.

51. *Id.* at 8.

52. *Id.*

exporting Western models of law to further economic development and strengthen the rule of law. Another element of this third conceptualization of law and development is the recognition that no single vision of law reform will promote development.⁵³

The current emphasis on post-conflict property restitution shares with the first law and development movement an optimistic faith in law as a tool to foster economic and social development. Post-conflict property restitution also has much in common with the second law and development movement heralded by international development agencies as democratization spread in the 1980s. In the rush to avoid anarchy and poverty in newly democratized states, national and international actors from the West instituted rule-of-law programs globally without deep analysis of the ambiguous or conflicting goals of these programs.⁵⁴ Critics, and eventually rule-of-law practitioners, questioned the efficacy and propriety of attempting to promote the rule of law and economic development through a narrow focus on institutions.⁵⁵ In light of such concern, development agencies have refocused their assistance to incorporate social objectives into development policy, ushering in the third law and development movement.⁵⁶ Similarly, in an attempt to repatriate refugee populations in a manner that comports with international human rights norms, national and international actors from the West are backing property restitution as the solution to a number of different problems without sufficient analysis of the goals or limitations of restitution.

While the enthusiasm for post-conflict property restitution parallels the second law and development movement, this Article's critical analysis of restitution is consistent with the emerging "third moment" in law and development theory.⁵⁷ As international actors continue to emphasize property restitution to bolster the rule of law in, and legitimacy of, post-conflict societies, there needs to be a simultaneous critique to avoid the unintended consequences of earlier Western efforts to export law and legal processes as solutions to the various ills plaguing developing nations. The present critique indicates that post-conflict property restitution schemes could benefit from considering the third law and development movement's emphasis on broader human development and reconsideration of a one-size-fits-all model of law reform.

53. *Id.* at 9, 17.

54. Kleinfeld, *supra* note 40, at 64.

55. *Id.*; Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 206 (David M. Trubek & Alvaro Santos eds., 2006).

56. Trubek, *Rule of Law*, *supra* note 41, at 91 (quoting a World Bank critique of its earlier attempts to transplant a formalist vision of the rule of law to developing or democratizing countries) (citing World Bank, *Legal Institutions of a Global Economy* Homepage, <http://www1.worldbank.org/publicsector/legal/index.htm>); Rittich, *supra* note 55, at 203-04.

57. Trubek & Santos, *supra* note 45, at 7-8.

III.

PROPERTY RESTITUTION BACKGROUND: BOSNIA AND THE PINHEIRO PRINCIPLES

The property restitution process in Bosnia is important to an analysis of post-conflict property restitution for a variety of reasons. First, experts in the field have hailed the Bosnian program for the resolution of post-conflict property disputes as a model worldwide.⁵⁸ In addition, the institutions and procedures established to enforce restitution rights in Bosnia represented the most comprehensive and systematized post-conflict restitution effort ever implemented.⁵⁹ The most important reason to understand the context and implementation of restitution in Bosnia, however, is that the Pinheiro Principles borrowed significantly from Bosnia's experience.⁶⁰

A. *Bosnia's Restitution Experience*

The 1992-1995 conflict in Bosnia took place against the larger backdrop of the breakup of the Socialist Federal Republic of Yugoslavia involving several nationalist and ethnic offensives.⁶¹ Attempting to reconcile this fractionalization, the 1995 peace agreement ending the war created the new state of Bosnia and Herzegovina, comprised of two separate entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.⁶² By the end of the war, the conflict had displaced over two and a half million people in the area covered by this new state.⁶³ Ninety percent of the Serbs from the Federation of Bosnia and Herzegovina and 95 percent of the Bosniaks (Muslims) and Croats from the

58. Charles B. Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18 INT'L J. REFUGEE L. 30, 30 (2006) (noting that Bosnia serves as an example in both positive and negative aspects); Williams, *Significance of Property Restitution*, *supra* note 15, at 39 (declaring property restitution "highly successful" and suggesting it as a model for other post-conflict situations, but cautioning that its success rested on favorable domestic and international contexts unlikely to be replicated elsewhere); Das, *supra* note 9, at 430 (suggesting that the practice of the Bosnian and Kosovo property claims commissions can provide valuable lessons for the mechanics of property restitution schemes elsewhere).

59. Paglione, *supra* note 15, at 2 (asserting that the Dayton Peace Agreement, ending the hostilities in Bosnia, represented "the international community's first comprehensive attempt to enforce individual property restitution rights through the setting up of formal institutions and claims procedures."). While other states have established mechanisms for the return of property as part of negotiated peace agreements, no effort has been as far reaching and systematized as that in Bosnia and Herzegovina. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 443.

60. See *supra* note 27 for a discussion referencing Bosnia in the Working Paper and Preliminary Report.

61. Williams, *Significance of Property Restitution*, *supra* note 15, at 41 (noting that Croatia, bordering Bosnia and Herzegovina, seceded from Yugoslavia in 1991 and neighboring Serbia used force in both Croatia and Bosnia to try to prevent Yugoslavia's disintegration, to protect Serb minorities, and perhaps also to create a greater Serbia).

62. *Id.* at 42.

63. Philpott, *Dog is Dead*, *supra* note 4, at 1.

Republika Srpska had been displaced.⁶⁴ At the time of the peace accords, only 42 percent of the population remained in their pre-war residences.⁶⁵ More than half of the housing stock in Bosnia and Herzegovina was abandoned by forcible eviction.⁶⁶ Of the homes not destroyed in the conflict, many that remained habitable were occupied by non-owners, typically by those connected to the faction responsible for the expulsions.⁶⁷

The December 1995 Dayton Accords ending hostilities established the right of return for all refugees and displaced persons.⁶⁸ This peace agreement itself was the product of international influence.⁶⁹ The agreement set forth “the right to have restored to [refugees and IDPs] 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.”⁷⁰ To implement this mandate, the agreement established a quasi-international commission to “receive and decide any claims for real property in Bosnia and Herzegovina.”⁷¹

The restitution process in Bosnia—not only initially, but also ultimately—depended on international political control and financial as well as human resources. Directly after the signing of the Dayton Accords, local court officials and administrative authorities stalled and manipulated the restitution process for two years, resettling primarily majority populations to consolidate ethnic separation.⁷² The Office of the High Representative (OHR), an international

64. Rosand, *supra* note 23, at 1100 (citing the INT’L CENTRE FOR MIGRATION POLICY DEV., FRAMEWORK REPORT TO FACILITATE THE LAUNCHING OF THE COMMISSION STIPULATED IN ANNEX SEVEN CHAPTER TWO OF THE DAYTON AGREEMENTS ¶ 81 (1996)) (noting that an estimated thirty-nine percent of all Bosnian Serbs, sixty-seven percent of Bosnian Croats, and sixty-three percent of Bosniaks were dislocated because of the war).

65. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 478.

66. Williams, *Significance of Property Restitution*, *supra* note 15, at 43.

67. Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 478; Philpott, *Dog Is Dead*, *supra* note 4, at 2; Williams, *Significance of Property Restitution*, *supra* note 15, at 44.

68. The General Framework Agreement for Peace in Bosnia-Herzegovina, Bosn.-Herz., annex 7, art. 1, ¶ 1, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter Dayton Accords], *reprinted in* HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAWS, CASES, AND MATERIALS 31 (Scott Leckie ed., 2007) [hereinafter HOUSING, LAND, AND PROPERTY] (stating in art. 1, ¶ 1, that “[a]ll refugees and displaced persons have the right freely to return to their homes of origin.”).

69. It took place in Ohio and was a product of negotiations sponsored by the United States and a number of mostly European states. Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT’L L.J. 759, 760 (1997); *see infra* Part IV.E. for a discussion of the problems posed by international involvement in post-conflict property restitution programs.

70. Dayton Accords, *supra* note 68, annex 7, art. 1, ¶ 1, *reprinted in* HOUSING, LAND, AND PROPERTY, *supra* note 68, at 31. The entire text of the Dayton Accords is reproduced on the United States Department of State web site and available at <http://www.state.gov/www/regions/eur/bosnia/bosagree.html>.

71. *Id.* art XI.

72. Philpott, *Dog Is Dead*, *supra* note 4, at 3; Williams, *Significance of Property Restitution*, *supra* note 15, at 43.

body entrusted with legislative authority, later imposed new restitution legislation and amendments to existing property laws.⁷³ Various international agencies interpreted the legislation, imposed amendments, and oversaw implementation at the local level, which included canton and municipal officials in one part of the country and branch offices of the Ministry for Refugees and Displaced Persons in the other.⁷⁴ Ten years after Dayton, the real property of over 216,000 claimants had been returned to pre-war residents.⁷⁵

While property restitution did facilitate the return of some refugees and IDPs, it did not result in widespread return of people to areas where they represented a minority. In other words, restitution did not reverse ethnic cleansing.⁷⁶ Many who succeeded in reclaiming their property chose to sell or exchange it to facilitate relocation elsewhere.⁷⁷ In those situations where an individual did return to a sector in which they represented a minority, it was typically in isolated rural areas.⁷⁸ Of these minority returnees, many were elderly, retired people with an emotional connection to their land.⁷⁹ Younger

73. Williams, *Post Conflict Property Restitution*, *supra* note 10, at 497-98 (describing the “quasi-legislative” powers of the Office of the High Representative and noting twenty-eight OHR decisions in 1999 imposing “new legal instruments and amendments to existing legislation”). The Dayton Accords facilitated the creation of the OHR in 1995, a body representing the countries involved in the Dayton Accords. See also KETT & DALRYMPLE, *supra* note 25, at 7 (describing the OHR as “internationally appointed”); Philpott, *Dog is Dead*, *supra* note 4, at 7. While the OHR had no legislative power at the time of its creation in 1995, the internationally-comprised Peace Implementation Council granted significant authority to it by 1998. Gerald Knaus & Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY 60, 63-64 (2003).

74. Dayton divided the country between two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. See *supra* note 62 and accompanying text. The Federation contained ten “Cantons,” a territorial division that allowed Bosniaks and Croats to each remain in charge of areas they controlled. Williams, *Significance of Property Restitution*, *supra* note 15, at 42.

75. Philpott, *Dog is Dead*, *supra* note 4, at 1; Williams, *Significance of Property Restitution*, *supra* note 15, at 39. But see Black & Gent, *supra* note 12 (citing a UNHCR web page indicating that the total number of returnees is over one million); Daniela Heimerl, *The Return of Refugees and Internally Displaced Persons: From Coercion to Sustainability?* 12 INT’L PEACEKEEPING 377, 383 n. 22 (2005) (citing a 2004 UNHCR report announcing that over one million people had returned to their pre-war properties, but also noting that the exact number of returnees is difficult to calculate). See also KETT & DALRYMPLE, *supra* note 25, at 10 (reporting that about 1 million people were still living “in camps, collective centres and private accommodation outside their home communities,” presumably at the time their report was updated in August 2004).

76. Stefansson, *supra* note 16, at 131 (claiming that “property restitution in itself did not generally provide the basis for sustainable mass return of ethnic minorities” according to his study of the post-war city of Banja Luka). Philpott, *Dog Is Dead*, *supra* note 4, at 1, 18 (noting that restitution resulted in “lower” returns but asserting that the return that occurred in Bosnia would not have been possible but for property restitution) (citing a UNHCR report indicating that less than half of the Bosnian returnees were ‘minority’ returnees).

77. Marita Eastmond, *Transnational Returns and Reconstruction in Post-War Bosnia and Herzegovina*, 44 INT’L MIGRATION 141, 143 (2006); Williams, *Post-Conflict Property Restitution*, *supra* note 10, at 445 (commenting that “the return of property to people has not always resulted in the return of people to property” because many people opted to sell or rent returned properties).

78. Heimerl, *supra* note 75, at 385.

79. *Id.*

people opted not to return for the most part, due to security concerns and the dearth of economic and educational opportunities.⁸⁰

B. *The Pinheiro Principles*

While drawing from a number of sources, the Pinheiro Principles reflect many of the initial experiences of restitution in Bosnia.⁸¹ The Principles, which create guidelines addressing the legal and technical issues surrounding property restitution, are set forth in a preamble and seven sections.⁸² Sections II through IV establish the rights on which the Principles are based. These include, for example, a specific right to housing and property restitution,⁸³ as well as more general rights to be protected from displacement,⁸⁴ to adequate housing,⁸⁵ and to voluntary return in safety and dignity.⁸⁶

Section V of the Principles contains the core of the legal and technical guidelines for establishing a property restitution system and comprises nearly half of all of the suggested principles. The eleven principles in Section V recommend, for example, that states “establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims.”⁸⁷ Recognizing the difficulty of this task in the aftermath of war, the Principles advise that states should include property restitution procedures in peace agreements, following the restitution approach in Bosnia.⁸⁸ The Principles also suggest—again, tracking the experience in Bosnia—that:

[w]here there has been a general breakdown in the rule of law or where States are unable to implement the procedures, institutions and mechanisms necessary to

80. *Id.*

81. The Pinheiro Principles also borrow from the restitution experience in Kosovo, general precepts of international human rights and humanitarian law, and economic development theory. See, e.g., Smit, *supra* note 25, at 65 (stating that the restitution mechanisms adopted following the war in Kosovo “undoubtedly influenced” the Pinheiro Principles).

82. There are 23 principles divided among these seven sections. The section titles reflect the content of the principles: 1) Scope and Application, 2) The Right to Housing and Property Restitution, 3) Overarching Principles, 4) The Right to Voluntary Return in Safety and Dignity, 5) Legal, Policy, Procedural, and Institutional Implementation Mechanisms, 6) The Role of the International Community, Including International Organizations, and 7) Interpretation. *Pinheiro Principles*, *supra* note 18. The Principles speak broadly and consistently in terms of providing restitution for “housing, land and property.” The Principles themselves do not include definitions. The background documents supporting the Principles, however, incorporate the phrase “housing and property” and define it to mean housing, real property and land. *Working Paper*, *supra* note 14, ¶ 9; *Preliminary Report*, *supra* note 4, ¶ 4.

83. *Pinheiro Principles*, *supra* note 18, § II (referencing Principle 2).

84. *Id.* § III (referencing Principle 5).

85. *Id.* § III (referencing Principle 8).

86. *Id.* § IV (referencing Principle 10).

87. *Id.* ¶ 12.1.

88. *Id.* ¶ 12.6.

facilitate the housing, land and property restitution process in a just and timely manner, States should request the technical assistance and cooperation of relevant international agencies.⁸⁹

Other guidelines in this section advise independent and impartial decision making bodies,⁹⁰ protections for secondary occupiers,⁹¹ and caution in allowing the remedy of compensation to be used in lieu of restitution.⁹² The experience of Bosnia's restitution program likely influenced the inclusion of these guidelines as well. Pinheiro's Working Paper and Preliminary Report preceding his final Principles highlighted Bosnia's lack of independent local judicial systems and the problem of widespread secondary occupation.⁹³ The Working Paper also addresses potential problems where compensation is substituted for restitution because of a lack of legal or political will.⁹⁴ While the Dayton Accords stipulated that claimants could choose between restitution or compensation, a compensation fund was never established in Bosnia, in part, out of concern that doing so would minimize the will of refugees and IDPs to return home and thus undermine the goal of reversing ethnic cleansing.⁹⁵

While the heart of the Pinheiro Principles' legal and technical guidelines are traceable to the struggles of Bosnia's property restitution scheme, there are a number of flaws in the legal and theoretical bases underlying restitution as a remedy for mass forced displacement.

89. *Id.* ¶ 12.5.

90. *Id.* ¶ 13.1 (stating that those displaced from their property "should be able to submit a claim for restitution and/or compensation to an independent and impartial body, to have a determination made on their claim . . .").

91. *Id.* ¶ 17.1 (suggesting that "States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction").

92. *Id.* ¶ 21.1 ("States shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution . . ."). The Pinheiro Principles also include additional guidelines. *See, e.g., id.* ¶ 15.1 (advising that "States should establish or reestablish . . . appropriate systems for the registration of housing, land and property rights . . ."); *id.* ¶ 16.1 (States should ensure that restitution programs recognize the rights of tenants and other legitimate occupants); *id.* ¶ 18.1 ("States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law").

93. *See supra* note 27 (discussing *Working Paper, supra* note 14, ¶¶ 44-46); *see also Preliminary Report, supra* note 4, ¶ 28 (discussing the difficulty of evicting secondary occupiers in Bosnia); *id.* ¶ 27 (noting that a separate commission was established to process claims); *id.* ¶ 54 (stating that property commissions could help address the problem of a lack of an effective judiciary, which is especially prevalent in post-conflict societies).

94. *Working Paper, supra* note 14, ¶¶ 57-59.

95. INT'L ORG. FOR MIGRATION, *supra* note 10, at 89-90.

IV.

WEAKNESSES OF RESTITUTION AS A REMEDY FOR MASS FORCED DISPLACEMENT

To analyze the limitations of restitution, the discussion in this Part is divided into five subparts. Subpart A presents the legal foundations said to give rise to a right to restitution as a remedy for mass forced displacement. Subpart B discusses the weaknesses in these foundations. Subpart C identifies the non-legal, theoretical claims supporting restitution, which relate generally to the way in which restitution is said to promote the rule of law. Subpart D discusses the limitations of these theoretical claims. Subpart E analyzes problems related to the necessary internationalization of a post-conflict restitution process.

A. Legal Bases for Restitution

The Pinheiro Principles' enunciation of a right to property restitution is premised on rights established by international law.⁹⁶ Arguably, the most significant preexisting right supporting restitution is the right of those who leave their country to return to it, initially articulated by the non-binding Universal Declaration of Human Rights.⁹⁷ Subsequent U.N. resolutions reaffirm this right to return.⁹⁸ This well-established right, however, does not necessarily lead to a

96. *Preliminary Report*, *supra* note 4, ¶ 79 (listing six "specific international human rights norms and standards underlying the right to housing and property restitution for refugees and other displaced persons"). In addition to being premised on a right to return, restitution is also based on international legal protections for housing rights. *See infra* note 121 and accompanying text discussing these protections. The Principles are also based on the right not to be forcibly evicted. A U.N. Commission on Human Rights resolution declares "forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing." *Preliminary Report*, *supra* note 4, ¶ 6 (citing U.N. Comm'n on Human Rights Res. 1993/77, U.N. Doc. E/CN.4/RES/1993/77 (Mar. 10, 1993)). Moreover, victims of human rights violations have a right to a remedy. *Id.* ¶ 7. Two additional rights underlie restitution, but these relate more to the manner in which the Pinheiro Principles recommend that a property restitution scheme be carried out, rather than the legal justifications for imposing restitution. These additional rights are the right to non-discrimination and the right to equality. The Pinheiro Principles prescribe, for example, that "restitution procedures, institutions and mechanisms are age and gender sensitive, and recognize the equal rights of men and women . . ." and that a restitution claims process be age and gender sensitive. *Pinheiro Principles*, *supra* note 18, ¶¶ 12.2, 13.2.

97. *Progress Report*, *supra* note 17, ¶¶ 26-27. The right to return is asserted in the Universal Declaration of Human Rights ("Everyone has the right to leave any country, including his own, and to return to his country."). Universal Declaration of Human Rights, G.A. Res. 217A, art. 13, § 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Closely related, the Working Paper highlights the identification by the UNHCR of "voluntary repatriation" as one of the three "key durable solutions" to the problems faced by refugees. *Working Paper*, *supra* note 14, ¶ 16 (citing U.N. High Comm'r for Refugees [UNHCR], Exec. Comm., *Conclusions Adopted by the Executive Committee: Durable Solutions and Refugee Protection*, No. 56 (XL) (Oct. 13, 1989)).

98. *See, e.g.*, G.A. Res. 51/126, U.N. Doc. A/RES/51/126 (Dec. 13, 1996); G.A. Res. 35/124, U.N. Doc. A/RES/35/124 (Dec. 11, 1980); S.C. Res. 1287, U.N. Doc. S/RES/1287 (Jan. 31, 2000); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1036, U.N. Doc. S/RES/1036 (Jan. 12, 1996); S.C. Res. 971, U.N. Doc. S/RES/971 (Jan. 12, 1995); S.C. Res. 876, U.N. Doc. S/RES/876 (Oct. 19, 1993); S.C. Res. 820,

right to restitution.

Because the legal justification for property restitution rests so heavily on the right to return, as do specific criticisms of restitution, an exploration into the history and parameters of this right is useful. The right to return is fraught with political considerations. The 1948 Universal Declaration of Human Rights stated that “Everyone has the right to leave any country, including his own, and to return to his country.”⁹⁹ Prior to this assertion, the general consensus of the international community allowed for significant population transfers as a means of solving ethnic tensions, and those forced to move had no right to return to their homes.¹⁰⁰

Between the end of World War II and the conclusion of the Cold War in the late 1980s, Western governments that supported the United Nations emphasized the right to leave much more than the right to return.¹⁰¹ These nations assumed that return was not an option for refugees fleeing communist regimes.¹⁰² The UNHCR assisted Soviet bloc refugees to resettle in the European and North American countries providing asylum.¹⁰³

The end of the Cold War brought a shift in strategy for dealing with refugee populations. U.N. agencies began to maintain that returning refugees to their countries of origin was necessary to promote post-conflict peace and development.¹⁰⁴ Beginning in the 1980s, the emphasis on repatriation was given further momentum by the increase of migration from poor to rich countries and the reluctance of wealthy nations to offer resettlement.¹⁰⁵ In 1989, the UNHCR identified voluntary repatriation as one of its three “key durable solutions” to the problems faced by refugees.¹⁰⁶

U.N. Doc. S/RES/820 (Apr. 17, 1993).

99. Universal Declaration of Human Rights, *supra* note 97, art. 13, § 2.

100. Rosand, *supra* note 23, at 1115-16 (reviewing the 1923 Treaty of Lausanne, involving the compulsory exchange of Greek Muslims to Turkey and Greek populations living in Turkey back to Greece, and the 1945 Potsdam Declaration, requiring the transfer of 15 million Germans living in other parts of Europe back to Germany).

101. *Id.* at 1119.

102. UNHCR, STATE OF THE WORLD, *supra* note 5, at 129; Patricia Weiss Fagen, *UNHCR and Repatriation*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES 41, 43 (Michael Dumper ed., 2006) (concluding that Western governments found repatriation of refugees from communist countries “unthinkable”); Black & Gent, *supra* note 12, at 16 (stating that “the ideological interests of the West meant that local integration in host countries in Europe, or resettlement to North America, were generally more attractive options” for refugees fleeing communist countries).

103. Fagen, *supra* note 102, at 43 (commenting, however, on UNHCR efforts during the Cold War to organize large African repatriations of refugees who had fled in light of pro-independence struggles in African countries); Black & Gent, *supra* note 12, at 16 (noting that labor shortages also paved the way for resettlement by shaping public policy to focus on resettlement and integration rather than encouraging return).

104. Fagen, *supra* note 102, at 46.

105. UNHCR, STATE OF THE WORLD, *supra* note 5, at 130.

106. See *Working Paper*, *supra* note 14, ¶ 16; U.N. High Comm’r for Refugees [UNHCR],

B. Critique of Legal Bases

Despite the creation of a right to return under international law, the degree to which this right supports a right to property restitution following mass displacement remains questionable.¹⁰⁷ A number of scholars interpret the international human rights conventions articulating a right to return—those on which the Pinheiro Principles are based¹⁰⁸—as guaranteeing the right for individuals asserting an individual right. Traditionally, the right to return did not apply to the claims of large numbers of people displaced *en masse*.¹⁰⁹ Instead, scholars assert that the return of masses of dislocated people is a problem in need of a political solution rather than a rights-based solution.¹¹⁰

In addition, the right to return has long been interpreted to mean the right to return to one's country of origin, not necessarily to a particular home.¹¹¹ The 1995 Dayton Accords ending hostilities in Bosnia was the first time the right to return was specifically established as a right to return to one's home of origin.¹¹² A progress report leading up to the Pinheiro Principles recognizes this shift away from the traditional understanding by acknowledging that "the right to return is increasingly seen as encompassing not merely returning to one's country, but to one's home as well."¹¹³ Since resolution of the conflicts in the former Yugoslavia, however, various international human rights bodies have

Exec. Comm. of the Programme of the UNHCR, *Addendum to the Report of the United Nations High Commissioner for Refugees: Report of the Executive Committee of the Programme of the UNHCR on the work of its fortieth session, 1989*, U.N. Doc. A/44/12/Add.1 (Oct. 30, 1989), available at <http://www.unhcr.org/3ae68c358.html>.

107. Not all scholars accept that international law provides for a right to property restitution. Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 7 (Pablo de Greiff ed., 2006).

108. See *infra* Part IV.A.

109. Rosand, *supra* note 23, at 1128 (quoting one author as stating that the International Covenant on Civil and Political Rights (ICCPR) section confirming the right to leave and to return "is intended to apply to individuals asserting an individual right. There was no intention here to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population The [ICCPR] does not deal with those issues and cannot be invoked to support a right to "return." These claims will require international political solutions on a large scale.") (citing Stig Jagerskiold, *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS* 166, 180 (Louis Henkin ed., 1981)).

110. Rosand, *supra* note 23, at 1128-29 (quoting Stig Jagerskiold, *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS* 166, 180 (Louis Henkin ed., 1981) and citing other authors). Interestingly, the restitution program in Bosnia initially failed because it was too politicized. The process became more productive when international involvement turned the focus to a "rule of law" or rights-based approach and away from a political approach. See sources cited *supra* notes 21-22.

111. Fagen, *supra* note 102, at 46.

112. Heimerl, *supra* note 75, at 378 (stating that Annex 7 of the Dayton Accords "provided a right to return unique in international law" inasmuch as it established a right to return to a displaced person's home of origin, not just country of origin) (citing Dayton Accords, *supra* note 68, annex 7, art. 1, ¶ 1, reprinted in *HOUSING, LAND, AND PROPERTY*, *supra* note 68, at 31).

113. *Progress Report*, *supra* note 17, ¶ 29.

viewed the right to return to include a right to have housing and property restored.¹¹⁴

Moreover, justifying a right to property restitution by reference to the right of return overshadows alternative remedies that victims of forced displacement might prefer. Not all refugees or displaced persons wish to return to a “home” altered by war; some may prefer other forms of reparations such as compensation.¹¹⁵ The Pinheiro Principles do authorize compensation when restitution “is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.”¹¹⁶ Yet the Principles also instruct that “states shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice.”¹¹⁷ Indeed, restitution is the only form of reparations through which return can be immediately advanced.

While grounding a right to restitution in the right to return gives rise to the most significant potential legal deficiencies, there remains a question about the degree to which international law protects a general right to property ownership.¹¹⁸ A provision in the non-binding Universal Declaration of Human Rights states, “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”¹¹⁹ Yet international human rights law provides no solid interpretation of the substance of this right.¹²⁰ Human rights principles do protect housing; however, this right to housing is not expressly related to ownership interests in any particular housing.¹²¹ Both the Working Paper and Preliminary Report

114. See, e.g., S.C. Res. 820, *supra* note 98; *Guiding Principles*, *supra* note 17.

115. Paglione, *supra* note 15, at 7-8; see also Arraiza & Moratti, *supra* note 25, at 450.

116. *Pinheiro Principles*, *supra* note 18, ¶ 21.1.

117. *Id.* ¶ 2.2.

118. The regulations annexed to the Hague Convention protect public and private property during *international* armed conflict, but not during civil armed conflict. See Kagan, *supra* note 9, at 445-46 (addressing the status of the Hague Regulations as “binding customary norms” and their application to Israeli seizure of Palestinian property).

119. Universal Declaration of Human Rights, *supra* note 97, at 71.

120. Paglione, *supra* note 15, at 2-3 (pointing out the lack of clarity surrounding the extent to which international human rights law protects private property and highlighting that the two universal human rights conventions adopted by the U.N. in 1966 failed to include a right to private property in part because of ideological conflicts during the Cold War period). See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

121. See, e.g., the ICCPR, *supra* note 120, art. 17, which protects homes: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”; and the ICESCR, *supra* note 120, art. 11, which protects the right to adequate housing: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” In 1991, a U.N. Committee interpreted article 11 of the ICESCR to include a right to legal security of tenure. U.N. Comm. on Econ., Soc. & Cultural Rights

preceding the Pinheiro Principles acknowledge that international law protects housing rights, more so than private property rights generally.¹²² Presumably, unlawful interference with a right to housing could be remedied by ensuring access to equivalent housing rather than providing restitution for “housing, land and property,” as advocated by the Pinheiro Principles.¹²³

This is not to suggest that the Pinheiro Principles represent a violation of international norms. However, the right to property restitution following displacement caused by armed conflict should be viewed as a new right based on the evolution of international law, rather than one firmly grounded in international law.¹²⁴ Indeed, after the U.N. Sub-commission endorsed the Pinheiro Principles, the U.N. General Assembly adopted guidelines on reparations for victims of violations of international human rights law.¹²⁵ These guidelines suggest very generally that such victims be allowed restitution, “includ[ing], as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”¹²⁶

C. Theoretical Justifications for Restitution

Proponents of the Pinheiro Principles highlight a number of interrelated, theoretical bases supporting a right to property restitution. These claims generally pertain to the notion that a property restitution process can enhance the rule of law in a post-conflict society. In this way, proponents of property restitution link the remedy with promoting post-war peace and reconciliation

[CESCR], *Gen. Cmt. 4: The Right to Adequate Housing* (Art. 11 (1) of the Covenant), at 8, U.N. Doc. E/1992/23 (Dec. 13, 1991). Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination “in the enjoyment of . . . the right to housing.” International Convention on the Elimination of All Forms of Racial Discrimination [CERD], Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.

122. *Working Paper*, *supra* note 14, ¶ 10; *Preliminary Report*, *supra* note 4, ¶ 5.

123. *Pinheiro Principles*, *supra* note 18, ¶ 1.1 (“The Principles on housing and property restitution for refugees and displaced persons articulated herein are designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.”).

124. *See also* Paglione, *supra* note 15, at 3 (maintaining that property restitution to remedy forced displacement is an “evolving area of law” but that there is ample jurisprudence on the right to restitution to remedy forced evictions). *But see* Gould, *supra* note 21, at 195-97 (suggesting that the right to restitution is firmly established as a remedy for gross violations of international human rights and under the principle of unjust enrichment).

125. 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Right to a Remedy*].

126. *Id.* ¶ 19.

and bolstering economic and social stability.¹²⁷

At first glance, these bases do support property restitution. Deeper analysis, however, suggests the limitations of these claims.

The Working Paper on which the Pinheiro Principles are based states that the restoration of property rights is a “prominent component” of efforts to restore the rule of law in post-conflict societies.¹²⁸ Similarly, international actors increasingly view return and accompanying restitution programs as a means of validating post-conflict regimes.¹²⁹ In Bosnia, for example, property restitution was the lynchpin to re-mixing ethnicities separated by violence.¹³⁰ Restoring property rights through an established “legal” process was a way of diffusing the highly politicized concept of return and ethnic reintegration.¹³¹ The emphasis on a systematic process was equated with elevating the rule of law over local political tensions. To the extent that the new state could undo the effects of ethnic cleansing, it gained political legitimacy. In other words, the claim is that depoliticizing return through rights-based, rule of law rhetoric and processes lends political legitimacy to a new post-conflict government.

Closely related to the idea that a restitution process can promote the rule of law, reintegration of refugees into their homes is considered an integral part of the national reconstruction process.¹³² To gain this reconstitutive effect, the return and reintegration of refugees must be “sustainable.”¹³³ The sustainability of return rests in part on the resolution of property and housing rights.¹³⁴

Overlapping with the rule of law vision of restitution is the theory that restoring property rights to those displaced by armed conflict can build peace and deter retribution. The Pinheiro Principles state that establishing a property

127. See, e.g., Leckie, *Introduction*, *supra* note 13, at 4 (stating that the international community recognizes “the direct links between housing, land and property restitution and peace, stability, reconciliation and economic development” and that this recognition “bolstered support for the human rights remedies offered to the displaced by restitution rights.”).

128. *Working Paper*, *supra* note 14, ¶ 14.

129. Black & Gent, *supra* note 12, at 17.

130. Rosand, *supra* note 23, at 1110 (discussing U.N. Security Council resolutions tying the return of Bosnians to their homes with the reversal of ethnic cleansing).

131. See *supra* notes 21, 22 and accompanying text for a discussion of observers who hailed Bosnia’s de-politicization of return and reintegration by focusing on the procedural aspects of property restitution.

132. Black & Gent, *supra* note 12, at 24.

133. *Id.* at 25 (noting, however, that the “sustainability” of return is a “slippery” concept) (quoting R. B. GIBSON, SUSTAINABILITY ASSESSMENT: CRITERIA AND PROCESS 39 (2005)). The UNHCR has described sustainability to involve “a situation where—ideally—returnees’ physical and material security are assured, and when a constructive relationship between returnees, civil society and the state is consolidated.” Chimni, *supra* note 28, at 167-68 (quoting U.N. High Comm’r for Refugees [UNHCR], *Oversight Issues: Reintegration*, U.N. Doc. EC/48/SC/CRP.15 (1998)).

134. Chimni, *supra* note 28, at 168.

restitution plan “is essential to the resolution of conflict.”¹³⁵ Like the legal foundations for restitution, this reconciliation claim is grounded in the right of return. Beginning at the end of the 1980s, coinciding with the end of the Cold War and an emphasis on return, rather than integration into host countries, returning refugees to their countries of origin was viewed as key to post-conflict peace processes.¹³⁶ The UNHCR has posited that, “unless uprooted populations can go back to their homes and enjoy a reasonable degree of security in their own community, the transition from war to peace may be . . . delayed or even reversed.”¹³⁷

The Bosnia experience underscores the premise that a return of property rights is essential for lasting peace. A number of U.N. Security Council resolutions claimed that returning refugees and IDPs to their pre-war homes was an essential part of a lasting solution to that conflict.¹³⁸

Finally, and also closely related to the rule of law impact of restitution, is the idea that restitution establishes conditions for economic and social stability. Clear and undisputed property rights are correlated with economic recovery and growth, as well as social stability.¹³⁹ In some conflict situations, forced displacement from rural areas has resulted in unproductive agricultural property, further impairing a conflict-ridden economy.¹⁴⁰ Restoring rights to agricultural property can restore productivity. Moreover, facilitating the return of refugees and IDPs is premised on the notion that displaced populations will be better off when they can reintegrate themselves back into their societies generally, and to their homes, specifically.¹⁴¹ Thus, restitution implicitly assumes that

135. *Pinheiro Principles*, *supra* note 18, pmbl.

136. Black & Gent, *supra* note 12, at 17.

137. Richard Black, *Conceptions of ‘Home’ and the Political Geography of Refugee Repatriation: Between Assumption and Contested Reality in Bosnia-Herzegovina*, 22 APPLIED GEOGRAPHY 123, 127 (2002) [hereinafter *Home*] (quoting U.N. High Comm’r for Refugees [UNHCR], THE STATE OF THE WORLD’S REFUGEES: A HUMANITARIAN AGENDA 143 (1998)).

138. Rosand, *supra* note 23, at 1106 (citing five U.N. Security Council Resolutions from 1992 to 1996).

139. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5-7 (2000) (pointing out that a lack of security of ownership rights prevents people in many parts of the world from turning assets into capital). Das, *supra* note 9, at 429; *see also* Carothers, *Rule-of-Law Revival*, *supra* note 40, at 5 (noting that property rights comprise an element of a modern market economy).

140. World Bank, Rural Development Unit, Latin America Region, COLOMBIA LAND POLICY IN TRANSITION, Report No. 27942-CO (Jan. 29, 2004) (concluding that displacement has contributed to a “significant and unproductive concentration of land in some areas” and that such unequal land distribution results in “foregone growth potential in rural areas, lack of sustainable management of natural resources, and failure to diversify”). *Id.* at 3, 16.

141. Black & Gent, *supra* note 12, at 20 (quoting a World Bank discussion paper that asserts “there can be no hope of normalcy until the majority of those displaced are able to reintegrate themselves into their societies”) (citing U.N. High Comm’r for Refugees [UNHCR], THE STATE OF THE WORLD’S REFUGEES 162 (1997)).

reintegration into a former community means attaining order and stability.¹⁴²

D. *Limitations of Theoretical Claims*

While these rule of law and related claims bolstering a right to post-conflict property restitution carry logical appeal, closer analysis indicates their flaws.¹⁴³

Scrutiny is merited given that reliance on a restitution process to help promote the rule of law represents an instrumentalist view of law promoted by Western legal actors, similar to the one that backfired in the first law and development movement. Likewise, suggesting that there is a universal approach to property restitution that can, in turn, enhance the rule of law in post-conflict societies, mirrors one of the failures of the second law and development movement: promoting a standardized rule of law formula.¹⁴⁴

142. *Id.* (citing Daniel Warner, *Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics*, 7 J. REFUGEE STUD. 160 (1994)).

143. While the focus of these critiques is on restitution—a specific method of reparations—it is worthwhile to mention that even the broad remedy of reparations has its detractors. Some observers have criticized a fixation on reparations as deterring the formulation of forward-looking policies. JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 5 (2006) (asserting that “The global spread of reparations demands and the preoccupation with the past to which it bears witness reflect an unmistakable decline of a more explicitly future-oriented politics”). Torpey defines reparations as “compensation, usually of a material kind and often specifically monetary, for some past wrong.” *Id.* at 42. His focus, and perhaps then, conclusion of the remedy as being backward looking, seems to be on reparations for distant past wrongs—historical injustices committed as early as the colonial period or during World War II—rather than very recent wrongs. Despite criticism of the approach, international law endorses reparations to remedy violations of international human rights and humanitarian law. *See, e.g., Right to a Remedy, supra* note 125. Reparations are said to forestall future wrongdoing and to mend past wrongs.

There is, however, an element of hypocrisy when Western governments craft a recipe for reparations for other states to follow. For example, some observers claim that the United States’ reparations efforts for wrongs committed against indigenous tribes were inadequate. *See, e.g.,* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 476–77 (1994). Critics may also point to attempts by the United States to remedy the internment of nearly 120,000 Japanese Americans during WWII. Many would posit that an apology and a \$20,000 payment 46 years later to surviving internees did not adequately redress the wrongs committed pursuant to President Roosevelt’s Executive Order 9066. John Torpey & Rosa Sevy, *Commemoration, Redress, and Reconciliation: The Cases of Japanese-Americans and Japanese-Canadians*, in *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 80–81 (2006). Other attempts at reparations subject to critique include the September 11th Victim Compensation Fund and the government’s response to the displacement caused by hurricane Katrina. From this perspective, prescriptions for reparations posited by Western states seem somewhat lacking in legitimacy.

144. One of the proponents of the Pinheiro Principles, who also served as a consultant to Pinheiro, characterizes the Principles as providing “a consolidated and universal approach” to restitution. Leckie, *Introduction, supra* note 13; *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Promotion & Prot. of Human Rights, *Housing and property restitution in the context of the return of refugees and internally displaced persons*, n. 1, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005) (*prepared by* Paulo Sérgio Pinheiro) (listing Scott Leckie as one of the participants in the “Expert Consultation” group).

1. *Restitution Meets the Needs of Western Asylum States*

One of the flaws underlying all of the theoretical claims regarding the value of restitution is the possibility that restitution schemes are geared to address the concerns of Western states and as such, may render return not entirely voluntary. Just as the return of refugees to their countries of origin became a priority after the Cold War when Western nations no longer wanted to provide asylum, so too might the remedy of restitution now be in vogue to meet the needs primarily of Western nations that are not interested in providing asylum to refugees. The return of refugees and emphasis on property restitution is fueled, at least in part, by the political and economic concerns of asylum countries.¹⁴⁵ For example, domestic unrest in Germany helped to prompt the return of more than a quarter of a million refugees to Bosnia.¹⁴⁶ Indeed, Germany's concern over the rapid influx of refugees near the beginning of hostilities in the former Yugoslavia resulted in a UNHCR plan that called for an early return of refugees to Bosnia.¹⁴⁷ At least one observer contends that this marked the genesis of a new right to return for victims of massive forced displacement.¹⁴⁸ Likewise, the prospect of a new wave of repatriations from Germany helped to spur international intervention in Bosnia's return process to remove local barriers to reintegrating ethnic populations.¹⁴⁹

Host countries in the West are not the only states anxious to resettle refugees. States and international organizations responsible for maintaining security in the aftermath of armed conflict may also have an incentive to speed up return to facilitate withdrawal of international peacekeeping forces. After the initial experience of restitution in Bosnia served to consolidate ethnic divisions, international agencies intervened in the repatriation process to coerce ethnic

145. Black & Gent, *supra* note 12, at 16 (noting that "although an emphasis on return can be seen as part of a restrictive attitude toward refugees and asylum seekers in the north, this is far from being a complete explanation."); *see also* Chimni, *supra* note 28, at 163 (asserting that "the return of refugees also coincides with the disinclination of states to host refugees."); Arraiza & Moratti, *supra* note 25, at 422 (reporting that U.N. authorities in Kosovo decided to instigate property restitution in part because of "the need to remove obstacles to refugee repatriation from Western countries).

146. Richard Black, *Return of Refugees: Retrospect and Prospect*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES 29 (Michael Dumper ed., 2006) [hereinafter *Return*]. Soon after the Bosnian conflict ended in 1996, Germany withdrew safe haven status for Bosnians. *Id.* at 50.

147. Rosand, *supra* note 23, at 1105-06. In response to Germany's failed 1992 call for quotas on the number of refugees that European countries had to admit, the U.N. High Commissioner for Refugees introduced a plan to contend with the refugee crisis that included the return and rehabilitation of refugees to Bosnia. *Id.* This was in the summer of 1992, over three years prior to the signing of the Dayton Accords that put an end to the armed conflict and established a right of return.

148. *Id.* at 1106-07.

149. Heimerl, *supra* note 75, at 382. *See also* discussion of the 1996-97 process of returns *supra* notes 72-74.

reintegration.¹⁵⁰ This intervention occurred within a context of international awareness that ethnic reintegration could help create the conditions for withdrawal of NATO-led security forces.¹⁵¹

Nonwestern states also push to repatriate refugee populations. The return of Rwandan refugees in 1996 reflected concerns in the asylum country of Tanzania regarding the large numbers of refugees and potential security risks associated with this refugee population.¹⁵² Following the Taliban's fall in Afghanistan, neighboring host countries became less hospitable to refugees, contributing to the return home of three million Afghans between 2001 and 2004.¹⁵³ Yet it was only after the large influx of refugees landed in Europe following the breakup of Yugoslavia that Western states began to push for a right to restitution.

If victims of mass forced displacement choose restitution for redress, it does not matter that host states might promote property restitution to address national political and economic difficulties. A problem arises, however, if pressure from host states causes return and restitution to be coerced rather than voluntary. The U.N. has declared that the right to return must be exercised voluntarily.¹⁵⁴ This means the "free and voluntary return to one's country of origin in safety and dignity."¹⁵⁵ One of the core components of voluntary repatriation is a guarantee that refugees and IDPs will have "legal safety" which encompasses "legal support for ownership of property, land and housing."¹⁵⁶ While the existence of a property restitution scheme may provide support for the legal safety required for voluntary repatriation, it may also provide umbrage for host states to maintain that repatriation is voluntary when, in fact, it may be coerced.¹⁵⁷

Furthermore, property restitution provides a convenient excuse for host nations granting temporary asylum to ignore compelling evidence regarding repatriation of refugee populations. The sustainability of return can be enhanced

150. Heimerl, *supra* note 75, at 381.

151. *Id.*

152. Black, *Return*, *supra* note 146, at 29.

153. Fagen, *supra* note 102, at 51.

154. G.A. Res. 428 (V), ¶ 2, U.N. Doc. A/1775 (Dec. 14, 1950).

155. UNHCR, HANDBOOK FOR REPARATION AND REINTEGRATION ACTIVITIES pt. A, module 1, at 2 (May 2004), available at <http://www.unhcr.org/411786694.html>.

156. *Id.* pt. A, module 1, at 3-5.

157. See, e.g., Heimerl, *supra* note 75, at 381 (noting the 1997 policy shift in Bosnia through which the international community directed a more coercive approach to return, "as distinct from a humanitarian or voluntary approach to minority returns"); see also Brad K. Blitz, *Refugee Returns in Croatia: Contradictions and Reform*, 23 POL. 181 (2003) (asserting that refugee returns "are rarely the product of voluntary decisions and many refugees return on the back of repatriation agreements and inter-state arrangements that restrict their rights to choose whether and when they should return home") (citing Khalid Koser, *Return, Readmission and Reintegration: Changing Agendas, Policy Frameworks and Operational Programmes*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 57 (Bimal Ghosh ed., 2001)).

by allowing refugees the ability to move freely between host countries and countries of origin.¹⁵⁸ Migration researchers have determined that a return structure that allows refugees to return temporarily to post-conflict countries while also maintaining the ability to stay connected to networks established in host countries is a better incentive to return than an economic return package.¹⁵⁹ To advance this open-ended approach to return, restitution may be more of a burden than compensation for some refugees. Moreover, a flexible approach to return likely does not meet the needs of host countries as neatly as being able to facilitate restitution then permanently close the doors. To the extent that property restitution schemes may facilitate returns that are coerced, the theory that restitution will promote the rule of law and a host of related benefits is flawed.

2. Restitution May Not Foster Reconciliation

There are at least two ways in which restitution may fail to strengthen the rule of law and increase the prospects for sustainable peace. First, restitution may facilitate the political agendas of returnees and as such, set the stage for revenge rather than reconciliation. The Bosnia experience indicated that “for some return groups, the ‘right to return’ represented the concretization of a political strategy to ‘recapture’ for one ethnic group a town that had been lost to another during the fighting.”¹⁶⁰ Indeed, during the first two years of restitution in Bosnia, the international community allocated power to local authorities to match returnees with their property. Local authorities, however, created conditions for resettling only majority populations, consolidating the territorial separation of communities that had been initiated through violence.¹⁶¹ Manipulating restitution for retributive purposes can ultimately stunt the development of the rule of law and sustainable peace.¹⁶²

Second, the process itself may preclude displaced people from any

158. Black & Gent, *supra* note 12, at 21.

159. *Id.*

160. Black, *Return*, *supra* note 146, at 31 (recounting the *en masse* Serb return to the town of Drvar, previously captured by Croat forces, and the subsequent departure back to Croatia of many of the Croats who had taken the town during the war). In 1997, Croats burned down about 25 abandoned Serb homes in Drvar to obstruct the return of the original Serb residents. Rosand, *supra* note 23, at 1092.

161. Heimerl, *supra* note 75, at 380 (explaining that officials of all ethnic groups actively pursued policies of ethnic exclusivity to preserve their monopolies on power).

162. Restitution proponents likely would respond to this local manipulation of the restitution processes in the same manner in which the international community did in fact respond to this situation in Bosnia: impose international control over the process to prevent such manipulation. See text *supra* notes 72-73 (discussing how international agencies imposed and implemented new property laws after local authorities stalled and manipulated restitution). When international actors assert law and legal processes in a national context however, a host of potential problems arise. See *infra* Part IV. E.

meaningful participation and, as such, can limit the potential for reconciliation and restorative justice. The Working Paper that served as a precursor to the Pinheiro Principles defines restitution as a form of restorative justice.¹⁶³ Restorative justice initially focused on repairing the social connections between perpetrators and victims of ordinary crime, rather than simply punishing an offender.¹⁶⁴ The approach has since been adopted as a means of providing justice in the wake of mass human rights atrocities, either in lieu of, or in addition to, prosecution.¹⁶⁵ One of the three elements of the definition and practice of restorative justice is the active participation of victims to find solutions to conflict.¹⁶⁶ Property restitution for mass displacement seems to preclude this opportunity for meaningful participation.

Settling property restitution claims following mass dislocation will depend largely on an administrative claims process rather than an adjudicative one. Research has indicated that in nearly every restitution program attempted to date, the large numbers of claims preclude the possibility of resolution within a domestic court system.¹⁶⁷ Administrative processes may not allow claimants a forum for recounting how their property was seized or the circumstances of their abandonment. In both the Kosovo and Bosnian restitution processes, for example, claimants only filed a claim and had little or no opportunity to recount the circumstances surrounding the loss of their home and no adjudicative proceedings to witness.¹⁶⁸

The Pinheiro Principles tacitly acknowledge the value of a claimant's participation in the restitution process, but they envision representation of displaced persons in crafting and implementing a program, rather than the

163. *Working Paper*, *supra* note 14, ¶ 11.

164. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 92 (1998).

165. *Id.* at 23 (discussing different approaches to reaching justice following incidents of mass violence, including, for example, the Truth and Reconciliation Commissions established in Chile and South Africa).

166. Chris Cunneen, *Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 84-85 (Heather Strang & John Braithwaite eds., 2001).

167. INT'L ORG. FOR MIGRATION, *supra* note 10, at 2. Even after the terrorist attacks in the United States on September 11, 2001, Congress quickly determined that courts were not the appropriate forum for resolving claims of the survivors and those injured. Samuel Issacharoff & Anna Morawiec Mansfield, *Compensation for the Victims of September 11*, in *THE HANDBOOK OF REPARATIONS* 284, 291, 295 (Pablo de Greiff ed., 2006). Some, however, claim that the decision to establish an administrative compensatory regime as an alternative to tort litigation was based more on fear that litigation would cripple the airline industry than a concern over inundating courts. *Id.* at 288-291.

168. Smit, *supra* note 25, at 68 (describing the administrative claims process in Kosovo, claiming it removed "anything more than token involvement on the part of the interested parties", but noting that claimants in Kosovo had more of an opportunity to participate in the claims process than did their counterparts in Bosnia). *But see* Das, *supra* note 9, at 436 n.33 (describing the claims process in Kosovo as "largely adversarial" and allowing parties to "participate in the procedures and submit written evidence and arguments").

individual participation of claimants in advancing their own claims. Principle Fourteen advises that, “voluntary repatriation and housing, land and property restitution programs be carried out with adequate consultation and participation with the affected persons, groups and communities.”¹⁶⁹ Commentary related to this principle, found in the 2004 Progress Report, elaborates that “affected communities should have a right to ‘an opportunity for genuine consultation’”¹⁷⁰ and that “‘special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and integration’.”¹⁷¹ The fact that the Principles suggest that states develop simple restitution claim forms also underscores the idea that the Principles envision meaningful participation in the creation of a process rather than in the presentation of each individual claim.¹⁷²

In resolving claims for mass violations of human rights and humanitarian law, individualized hearings for every claim will be impossible, particularly if the process takes into consideration the U.N. General Assembly’s pronouncement to provide a “prompt remedy” for gross or serious violations of human rights or humanitarian law.¹⁷³ Accordingly, restitution alone may be insufficient to advance significantly post-war reconciliation or peace, or contribute to building the rule of law in a meaningful way.

3. *Restitution May Not Advance Social and Economic Stability*

The claim that restitution will result in the spillover effects of building social and economic stability is also controversial. Return of property rights may be a component of constructing post-war social and economic stability, but restitution alone is insufficient. Refugees and IDPs returning to their homes also need physical security, access to jobs, educational opportunities, and social services.¹⁷⁴ Returnees in Bosnia who regained their homes in areas without this broader framework for socio-economic stability opted in some instances to relocate elsewhere.¹⁷⁵

Moreover, the very concept of “home” is altered by war. Returnees often face a home that has changed substantially in their absence, requiring a difficult process of integration into a new society.¹⁷⁶ Because the ideal of home is as

169. *Pinheiro Principles*, *supra* note 18, ¶ 14.1.

170. *Progress Report*, *supra* note 17, ¶ 38 (quoting the Committee on Economic, Social and Cultural Rights, general comment No. 7).

171. *Id.*

172. *Pinheiro Principles*, *supra* note 18, ¶ 13.7.

173. *Right to a Remedy*, *supra* note 125, ¶ 14.

174. *See, e.g.,* Stefansson, *supra* note 16, at 131 (finding that repatriated Bosniaks in the Bosnian city of Banja Luka who had returned to their homes lacked the social structures that would enable them to attain any sense of safety or socio-economic stability).

175. *Id.* at 120.

176. Black, *Return*, *supra* note 146, at 33 (citing L. Hammond, *Examining the Discourse of*

much about the memory of customs, traditions or beliefs as it is about a physical place, it may be impossible to return “home.”¹⁷⁷ Concern related to restoring a particular physical “home” has been criticized as representing a “white/First World take on things.”¹⁷⁸ In other words, Western notions of home, and equating home and property rights with citizenship and stability, do not necessarily reflect the reality of a post-conflict society.

The premise that reinstating property rights will lead to social and economic stability tracks an initial assertion of law and development: that economic growth would foster democracy and respect for human rights.¹⁷⁹ Just as economic growth alone proved insufficient for building democracy, reinstating property rights is not enough to foster economic and social stability.

E. Potential Problems with International Involvement

Caution in evaluating the remedy of restitution also is in order, given the degree to which post-conflict property restitution schemes depend on international resources.¹⁸⁰ Property restitution schemes with significant international involvement carry the risk of transplanted law and merit close and critical scrutiny. This is particularly true where international groups write and impose laws and where foreigners help adjudicate property claims.

Here again, the Bosnia experience is instructive. After local officials obstructed the return of ethnic minorities, the international community intervened in the process by, for example, imposing new property laws, dismissing noncompliant officials, and appointing an international officer to monitor implementation of the new laws.¹⁸¹ At least one report on Bosnia suggests that the unlimited legal authority of international actors strongly resembled “an imperial power over its colonial possession.”¹⁸² While ostensibly acting to strengthen the rule of law in Bosnia, the international community may have undermined the development of democracy.¹⁸³ Post-war

Repatriation: Towards a More Proactive Theory of Return Migration, in THE END OF THE REFUGEE CYCLE: REFUGEE REPATRIATION AND RECONSTRUCTION (Richard Black & Khalid Koser eds., 1999)).

177. Black, *Home*, *supra* note 137, at 126.

178. *Id.* at 128 (quoting D. MASSEY, *SPACE, PLACE AND GENDER* 165 (1994)).

179. Trubek, *Rule of Law*, *supra* note 41, at 78-79.

180. Restitution claims programs are marked by a dearth of resources available for administration. INT’L ORG. FOR MIGRATION, *supra* note 10, at 2.

181. Heimerl, *supra* note 75, at 382.

182. Knaus & Martin, *supra* note 73, at 61-62; *see also* KETT & DALRYMPLE, *supra* note 25, at 7.

183. KETT & DALRYMPLE, *supra* note 25, at 7 (citing an unpublished report). Similarly, one faction of the U.N. mission in Kosovo argued that local courts ought to play a substantial role in later phases of property restitution in order to strengthen the capacity of the new judicial system, a suggestion ultimately rejected by a more dominant faction of the U.N. mission. Arraiza & Moratti, *supra* note 25, at 442-43.

political policies were established not by the people of Bosnia, but by international agencies.¹⁸⁴

The international community often inserts itself into the peacemaking process in general and the remedy of human rights violations in particular. However, the specific violation of human rights by home seizure is different from other forms of human rights violations because it is more local and less universal. Remedying forced eviction involves understanding local physical evidence, grappling with secondary occupation problems that have unique geographical and economic contours, and constructing a process that comports with local norms governing human relations with regard to property.

An additional problem with international involvement in restitution is that an emphasis on property restitution processes may cause the international community to give too few resources to help ease the transition for returnees once property rights are restored.¹⁸⁵ This failure potentially undermines the claims of restitution's beneficial role in a post-conflict society. In Bosnia, for example, international workers report that the focus on property restitution came at the detriment of international attention to constructing the context sufficient to support sustainable return—security, jobs, education, and public services.¹⁸⁶ The emphasis on property restitution has been criticized as providing a way for the international community and local actors to avoid addressing complex political issues.¹⁸⁷ “[T]he house” became the measure of success of the return process rather than the actual welfare of the people displaced from their homes.¹⁸⁸

Any rule of law benefit or economic boost from restitution will likely

184. See, e.g., *supra* notes 72-73 and accompanying text.

185. Black & Gent, *supra* note 12, at 20 (citing L. Hammond, *Examining the Discourse of Repatriation: Towards A More Proactive Theory of Return Migration*, in *THE END OF THE REFUGEE CYCLE? REFUGEE REPATRIATION AND RECONSTRUCTION* (Richard Black & Khalid Koser eds., 1999)).

186. Heimerl, *supra* note 75, at 384 (noting in the Bosnia context that “getting uprooted persons back home is only half the task of re-creating a functioning multi-ethnic society. The other half involves fostering the conditions in which returnees and especially minority returnees can survive and reintegrate themselves into their old/new communities.”); Philpott, *Dog Is Dead*, *supra* note 4, at 17-18 (stating that “the focus on restitution has distracted the international community from addressing other problems” but that this focus likely “did not divert significant funding intended to support the overall return process”).

187. KETT & DALRYMPLE, *supra* note 25, at 6-7 (stating that “a house has become a leitmotif for the return process – a material structure for the international agencies, organisations and local municipalities to focus on, a potential asset for the IDP, a quantifiable measure of the success of the return process and redress of property rights”); Stefansson, *supra* note 16, at 132 (stating that international organizations in Bosnia may “have been too preoccupied with the politics of the ‘small home’ [restitution], in their approach to the return of [refugees and IDPs], while downplaying the importance of normalizing the ‘big home’, that is the political and social structures at the local and national level”).

188. KETT & DALRYMPLE, *supra* note 25, at 6-7; see also Philpott, *Dog is Dead*, *supra* note 4, at 18 (noting that restitution was easier to measure than sustainable return).

depend on the success of reintegration programs. Repatriation and restitution of property is the beginning of a long process of building ties again in home communities in order to foster reconciliation and reestablish productivity.¹⁸⁹ The very strategy of focusing on a restitution process to depoliticize return can undermine efforts to build broader programs supporting reintegration. In Kosovo, for example, the restitution process was expressly delinked from return, resulting in a complete lack of coordination with agencies working on reintegration programs.¹⁹⁰ This intentional delinking appears to have prevented the return of some who actually succeeded in regaining their property rights because there was no support available for reintegration should those displaced return home.¹⁹¹ Without more of an infrastructure and reintegration program, the degree to which restitution can contribute to post-war rule of law, reconciliation, national reconstruction, and sustainable economic and social stability is limited.

From a practical perspective, moreover, reliance on the international community for construction and implementation of a property restitution scheme may not be an option in the aftermath of future conflicts. The level of international support that will be available following future conflicts is not clear.¹⁹² For example, where dispossession has been caused primarily by a government's inability or unwillingness to maintain the rule of law throughout its territory, and the need to establish restitution is not supported by gross violations of human rights law, international agencies may lack sufficient incentive or political will to lend technical or financial assistance.¹⁹³

V. CONCLUSION

Much can be said in support of a right to property restitution to remedy mass displacement caused by armed conflict. The worry is that its benefits will blind the international community to the limitations and unintended consequences of the remedy. The Pinheiro Principles prescribe a uniform property restitution process, primarily designed by Westerners with Western

189. UNCHR, STATE OF THE WORLD, *supra* note 5. Former U.N. High Commissioner for Refugees Sadako Ogata remarked that “[r]eturning refugees can only be properly reintegrated if there are comprehensive programmes for political, economic and social construction or reconstruction.” Fagen, *supra* note 102, at 47-48 (quoting Sadako Ogata, Speech at the University of Notre Dame on Sept. 14, 1991).

190. Smit, *supra* note 25, at 72.

191. *Id.* (reporting on an ethnic Serb IDP who chose not to return without knowing if others would also be returning).

192. See Williams, *Significance of Property Restitution*, *supra* note 15, at 40 (suggesting that international support for future conflict resolution will not be as high as was in Bosnia).

193. In Colombia, for example, some attribute the decade's long conflict to the government's lack of political will to impose the rule of law.

notions of property, law, process, and enforcement in mind.¹⁹⁴ This process may initially smooth the way for return by transforming the highly politicized right to return into a technical question of adherence to legal rules. A technical approach to restitution can give the short-term impression of strengthening the rule of law, promoting post-war peace and reconciliation, and developing economic and social stability.

Ironically, the Principles' technical approach may prevent the rule of law and associated benefits from setting root in the longer term. Remaking return into a technical process and divorcing it from political considerations of ensuring adequate security as well as social and economic support for returnees, may undermine the sustainability of return and thus impair the legitimacy of a post-war state and the development of peace and stability. This comes as no surprise to law and development scholars because there is a strong parallel here to critiques of the second law and development movement. In evaluating its own efforts within this movement, for example, the World Bank recognized the counter-productivity of its prior attempts to instill a formalist vision of the rule of law in developing countries—one that viewed institutional legal mechanisms as autonomous from politics.¹⁹⁵

There is also an analogy to the current coalescence of a third law and development movement. This new law and development paradigm cautions that development requires more than a focus on economic growth. Development must incorporate elements of political, social, and legal progress with the goal of facilitating human development.¹⁹⁶ Similarly, sustainable return, as an element in building new post-conflict societies, must focus not simply on technical rules of property restitution, but on the broader tasks of reintegration and building a new sense of home and community.

The potential of a technical focus on restitution to undermine long-term development of the rule of law becomes even more pronounced with direct international authority over local laws and legal processes related to restitution. Indeed, implementation of the Principles to remedy widespread forced displacement will necessarily involve international influence over law and legal processes. While international authority may be justified to prevent local actors from co-opting restitution for partisan political ends, international orchestration

194. Anthropologists studying property restitution similarly have warned of the unintended consequences of restitution programs: "Notions of property and ownership may be transformed, local bureaucracies may be entrenched, spatial patterns of land use that replicate older patterns of racial and economic segregation may be reinstated or consolidated. Moral discourses about righting past injustice through restitution may obscure its exclusionary aspects or its tendency to reinforce existing forms of social differentiation." Derrick Fay & Deborah James, *Restoring What Was Ours: An Introduction, in THE RIGHTS AND WRONGS OF LAND RESTITUTION: 'RESTORING WHAT WAS OURS' 1* (Derrick Fay & Deborah James eds., 2009).

195. Trubek, *Rule of Law*, *supra* note 41, at 91 (quoting World Bank, Legal Institutions of a Global Economy Homepage, available at <http://www1.worldbank.org/publicsector/legal/index.htm>).

196. Trubek & Santos, *supra* note 45, at 7-8.

likely does nothing to enhance state legitimacy or build democratic institutions. The sustainability of return and rule of law development may similarly be undermined to the extent that international involvement in restitution processes is prompted by the needs of host states wishing to repatriate refugees and results in coercing refugee communities into return.

Scholars, human rights workers, and international actors should critically analyze the merits of a uniform system of post-conflict property restitution, in a manner consistent with the third law and development movement's incorporation of simultaneous critique. Past law and development experiences have taught that well-intentioned efforts by Western actors to transplant a uniform vision of law to promote development and the rule of law can have unforeseen, deleterious effects. Further debate over the claims and limitations of property restitution may help avoid some of the unintended consequences that plagued the initial law and development reform movements. In this way, remedies to forced displacement can be modified to enhance the sustainability of return and resettlement of refugees and IDPs.