



**Integrating Land Governance into the Post-2015 Agenda
Harnessing Synergies for Implementation and Monitoring Impact**

Annual World Bank Conference on Land and Poverty Washington DC, March 24–27, 2014

**PROPERTY RESTITUTION AND THE RULE OF LAW IN PEACEBUILDING:
EXAMINING THE APPLICABILITY OF THE BOSNIAN MODEL**

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**Paper prepared for presentation at the
“2014 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 24-27, 2014**

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Abstract

This paper discusses protection of property rights in a post-conflict society through restitution and the role that the rule of law plays in the process, taking Bosnia and Herzegovina (BiH) as a case study. This case is known for the successful restitution of properties to refugees and internally displaced persons. Against the virtual division of the country by ethno-politics, the international community created dynamism in property restitution through various measures. To some extent it succeeded in blocking legal pluralism and undermining the ethno-political control of divided territories and people. The process satisfied certain essential requirements of the rule of law including transparency, equality before the law and legal certainty. However, the applicability of the Bosnian model to other cases may be questioned due to specific conditions the country had, including the clarity of property rights, length of displacement and a strong international presence. While recognizing the exceptional conditions in BiH, this paper argues that the case still offers some important lessons. It particularly sheds light on the effectiveness of the rule of law approach, which encompasses not only proper legislation but also a dispute resolution mechanism, enforcement of decisions, as well as awareness and acceptance of the rule of law by members of society.

Key Words: property rights, restitution, rule of law, peacebuilding, Bosnia and Herzegovina

Property Restitution and the Rule of Law in Peacebuilding:
Examining the Applicability of the Bosnian Model

Introduction

In a mountainous country of approximately 51,000 km², located in Europe and inhabited by some 4.5 million people, almost half of the population was forced to leave their homes in the early 1990s. A total of 1.2 million people left the country, and 1 million people fled while remaining inside the country's borders (Bosnia and Herzegovina Ministry of Human Rights and Refugees, 2005: 21-2). The country used to be one of the republics of the Socialist Federal Republic of Yugoslavia (SFRY). The armed conflicts that occurred upon the collapse of the SFRY hit Bosnia and Herzegovina (BiH) particularly hard, due to its population mix: 37 per cent Bosniacs (Muslims), 28 per cent Serbs and 17 per cent Croats. The three ethnic groups are defined as "constituent peoples" under the current Constitution of BiH.

The massive forced migration of people is known as ethnic cleansing. The means used included verbal and physical threats and assaults, arson and killings. Ethnic cleansing involved the intent to grab the property of those who were being forced to leave. The victims were forced to sign a document declaring they abandoned their property before their departure (UN, 1992: 11). Tuathail and O'Loughlin (2009: 1046) describe the event as 'ethnoterritorial geopolitics, an attack on existing spatial order, and the imposition of one organized around ethnic division and segregation.'

This paper discusses the protection of property rights in a post-conflict society through restitution and the role that the rule of law plays in the process, taking BiH as a case study. This case is known for successful restitution of properties to refugees and internally displaced persons (IDPs), and considerable scholarly analysis has been made on how the process developed (Buyse, 2008; Philpott, 2005 & 2006; Waters, 1999; Williams, 2005). Some attributed the reason for success to the shift of the international community's approach, from a return-based to a rights-based approach; in other words, the rule of law approach. The international community initially aimed at enhancing return, and property restitution was a means for that purpose. Yet property rights were gradually recognized as the rights to be protected independent from return. The contribution of this paper is to continue that path and analyze the meaning of the rule of law in the restitution context and evaluate the process in light of peacebuilding. Furthermore, the applicability of the Bosnian restitution process to other cases will be examined. In regard to

methodology, this study is based on a literature review and field research conducted twice in October-November 2011 and June-July 2012, as well as a survey in the Sarajevo Canton.¹

The structure of the paper consists of five components. Following the introduction, the second part is a historical review of property in BiH. The third part explains the restitution process after the signing of the General Framework Agreement for Peace (GFAP), which ended the armed conflict in 1995. The fourth part analyzes the meaning of the rule of law in the restitution process and considers its contribution to peacebuilding. The fifth part discusses the applicability of the process in other conflict-affected countries, followed by the conclusion.

Historical Review of Land and Property in BiH

Property, particularly land, provides fundamental resources for people's livelihood in many societies. It may also bear spiritual meaning having been inherited from ancestors. In the history of BiH, property was subject to power relationships in society, often linked to ethno-politics. This section briefly reviews the history of property and land tenure in BiH.

Under Ottoman rule, tenure was based on military service and the land was the property of the sultan (Malcolm, 1996: 45-8). In the 17th century, local aristocracy holding large estates emerged and military-feudal tenure declined. According to Malcolm (1996: 94), a renowned historian, a long process of social and religious polarization took place, and by the 19th century, the big landowners were Muslims, while the great majority of the non-land-owning peasants were Christians.

Although Austro-Hungarian authorities occupied BiH in 1878, the feudal relations inherited from the Ottoman period were preserved (Ljubojevic, 2011: 353). The dual land registration system in BiH today originates from the Austro-Hungarian period. While the land register (land book) is maintained in the local court, the cadastre is kept in municipalities (Rose et al., 2000: 12-13).

During the First World War, the property of Muslim feudal lords was destroyed, grain, houses and towers were burnt, and land was appropriated by ordinary people (Ljubojevic, 2011: 349). The Kingdom of Serbs, Croats, and Slovenes, which was established in 1918, carried out the first major land reform.

¹ The research was conducted as a project of the Research Institute of Japan International Cooperation Agency, "Land and Property Problems in Post-conflict State-building and Economic Development." The project results are going to be published as a book (Takeuchi, forthcoming) and a part of this paper is based on one of its chapters (Katayanagi, forthcoming).

The land reform from 1919 to 1930 addressed different problems depending on the region. In the western and southern parts (BiH, Kosovo, and Macedonia), land ownership was transferred from the Turkish *aga*² to peasants, resulting in the dissolution of the share tenancy systems. In the northern areas (Slovenia, Croatia, and Vojvodina), Austrian and Hungarian landowners retained relatively significant holdings (Dovring, 1970: 1 & 16). The land reform meant transfer of land from wealthy Muslim landowners to poorer Orthodox Serb peasants (Greble, 2011: 9). The government under King Aleksandar also shut down mosques and turned some Islamic religious institutions into military warehouses (Greble, 2011: 31).

In April 1941, the Independent State of Croatia (Nezavisna Državna Hrvatska (NDH)) was founded, and Hitler and Mussolini let an ultra-radical pro-Nazi group, the Ustasha Party, govern it. Under this regime, the properties of Jews in Sarajevo were confiscated, while the Slovenes were brought in as ‘colonists’ and given priority for prime agricultural real estate in the Sarajevo vicinity. Dozens of Muslims who owned property in Belgrade, who wrote in Cyrillic or who were ‘Serb-oriented,’ were arrested (Greble, 2011: 98–101). In May 1941, the Ustasha regime appointed local Aryan trustees, namely, Catholics, Muslims and Volksdeutsche, to oversee approximately 200 Jewish and Serb businesses, factories and organizations in Sarajevo. The assigned Catholic and Muslim organizations were not enthusiastic about the appointments, but ultimately justified this confiscation in humanitarian terms, claiming that their use of the property would best serve the citizens of Sarajevo (Greble, 2011: 105–6).

The second major land reform took place after the Second World War in the Federal People’s Republic of Yugoslavia.³ The reform of 1945 expropriated all land beyond the prescribed area, in the range of 25 to 45 hectares depending on the region. Of some 1.2 million hectares of confiscated farmland, about half was distributed to poor or landless households, and the rest became state property. The Law on Agrarian Reform and Resettlement laid down the principle that land belonged to those who cultivated it, and it was to be registered as private property (Dovring, 1970: 1–2, 17–18). In the same year, every building containing more than two apartments was transferred to public ownership (Simmie, 1991: 173). Prior to the land reform, nationalization of all property owned by enemy nationals, collaborators and war criminals, which accounted for 80 per cent of Yugoslav industry, was carried out under the Law on Nationalization (Simmie, 1991: 172). In 1953, the maximum size of farms was reduced to 10 hectares (in some areas 15 hectares), and the expropriated farms became a “land fund”, which was managed by district committees and utilized by local agricultural organizations (Dovring, 1970: 2, 18).

² An owner of an estate in the Ottoman period.

³ The country led by Josip Broz Tito was renamed the Socialist Federal Republic of Yugoslavia (SFRY) in 1963.

The Yugoslav economy was known for its workers' management system, of which the essential element was socially owned property. According to Mirković (1987: 321), "social ownership means that resources, productive capacities, and capital goods were owned by the society at large and not by any agency or individual."⁴ In regard to housing, socially owned enterprises and non-economic institutions were authorized to establish housing enterprises, taking responsibility for the construction and maintenance of socially owned apartments. In 1959, the Law on Housing Relations introduced the "occupancy right," which became vulnerable in the armed conflict in the 1990s, as we will discuss later. The right was not entirely individual-based but rather family-based. Spouses living in the same apartment were considered to be occupancy rights holders. If other members of the household were users of the apartment, they were entitled to use it permanently. If the original occupancy rights holder(s) ceased to use it, another household member could become the occupancy rights holder. The allocation itself took into account the needs of the household members, including their income and health conditions (UN-HABITAT, 2005: 22 note 31; Williams, 2005: 479–80).

In 1991, 71 per cent of housing units were privately owned and 29 per cent were socially owned in BiH (Bosnia and Herzegovina Ministry of Human Rights and Refugees, 2005: 63). The private housing units were mostly in rural areas or on the periphery of urban areas, while most of the socially owned housing units were apartments in urban areas (Williams, 2005: 478). In the SFRY, the percentage of privately owned housing was high compared with other socialist countries, which signifies the limited control over housing on the part of the public authorities. This limited control was also visible in the phenomenon of "black housing," that is, self-built structures without planning permission (Simmie, 1991: 175). There is criticism that housing allocation under the socialist system was not egalitarian but favored elites. Politicians, bureaucrats, intellectuals and the better-qualified working class acquired a disproportionate share of social housing (Petrović, 2001: 213; Simmie, 1991: 179). A researcher calls this 'a system of income in kind' (Petrović, 2001: 213). Yet the scale of corruption and the consequent gap between the rich and the poor is much larger today than during the period of the SFRY.⁵

The Yugoslav system of social property was designed to limit the state's role. As mentioned earlier, in the mid-1960s, responsibility for housing provision was decentralized and borne by socially owned

⁴ Regarding various interpretations of social ownership, see van Doren, 1972: 83–91; Corona, 1985; and Mirković, 1987: 323–4.

⁵ This was pointed out at a few interviews in Belgrade and Sarajevo in June 2012. One interviewee mentioned that in the SFRY, a politician and an ordinary worker used to live in similar apartments, even if their size or location might have been somewhat different. The palace-like residences of politicians today are not comparable to the differences at the time.

enterprises. However, in the housing reform of the mid-1970s, municipalities came to play the role of coordinating housing supply and demand. It was a policy to increase state control over market actors (Petrović, 2001: 218). In this sense, the existing system was susceptible to the subsequent changes that enabled control of property by local ethno-political elites.

The desire of ethno-political elites to control territory fuelled the armed conflict in BiH in the 1990s, and the handling of property had a striking resemblance to earlier historical events in the area. The conflict caused physical destruction of properties and massive displacement. Humanitarian excuses were used to justify one ethnic group being deprived of properties and their allocation among the members of the other ethnic group that controlled a particular area. Ethno-politics was also used to enhance the private interests of those who held power.

Property Restitution after the GFAP

The GFAP was the first international agreement to provide for the “right to return home,” not only the right to return to one’s own country (Phuong, 2004: 183). The GFAP has ten Annexes; each sets forth the agreement over a particular issue. Annex 4 is the Constitution of Bosnia and Herzegovina; its Article II(5) says: “All refugees and displaced persons have the right freely to return to their homes of origin.” Annex 7 is the Agreement on Refugees and Displaced Persons and its Article I(1) begins with the same sentence on the right to return home. Both articles set forth that refugees and IDPs “have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them”. The rationale behind these provisions was that return was necessary in order to reverse ethnic cleansing and regenerate a multi-ethnic society. However, the GFAP also recognized a political structure consisting of two entities: Republika Srpska (Serbian Republic) dominated by the Serbs, and the Federation of Bosnia and Herzegovina mainly inhabited by the Bosniacs and the Croats. The structure based on ethnic division inevitably complicates the regeneration of a multi-ethnic society.

After the signing of the GFAP, the return process started with majority returns, where the returnees belonged to the majority ethnic group in the particular municipality. It took about five years until minority returns, the cases where the returnees would go back to a community whose majority population belonged to the other ethnic group, reached a noticeable number. Behind this increase in the number of minority returns, there were immense efforts to reconstitute property to pre-war owners. This section explains the complex operation that brought about successful property restitution in post-conflict BiH.

As briefly mentioned in the Introduction, the ethnic cleansing during the conflict forced people to leave their property behind. These properties were considered as “abandoned” by the local authorities and for “humanitarian” reasons allocated to incoming IDPs. In this way, people who had to leave their own property occupied someone else’s property in another municipality. When there was no private property to be allocated, people lived in collective centers. Some people who could afford to rent a house or an apartment did so as well. Despite the aforementioned provisions on the right to return home in the GFAP, local authorities were not committed to facilitate returns. On the contrary, IDPs were told to stay in the host community so that the more or less mono-ethnic composition would be maintained. To break such situation, the international community took various measures.

One of the reasons the international community could make the process successful was the existence of the extraordinarily strong powers conferred to the High Representative. According to Annex 10 of the GFAP, the parties to the agreement requested the designation of a High Representative as a facilitator of the parties’ own efforts, and also as a mobilizer and coordinator of international activities concerning the civilian aspects of the peace settlement. In December 1997, the Peace Implementation Council (PIC) welcomed the High Representative’s “final authority in theatre” regarding the interpretation of the GFAP on the civilian implementation of the peace settlement “in order to facilitate the resolution of difficulties by *making binding decisions* [emphasis added]” as the High Representative judges necessary, on certain issues. Such issues include “interim measures to take effect when parties are unable to reach agreement” and other measures to ensure implementation of the GFAP (OHR, 1997: XI). The PIC was established by the Peace Implementation Conference held in London on 8–9 December, 1995, and its steering board provides the High Representative with political guidance.⁶ The PIC conclusions of December 1997 reinforced the High Representatives’ powers, which are called ‘Bonn powers’. The powers were applied on a number of occasions in relation to the restitution process.

Below we are going to analyze the measures taken to carry out *restitutio in integrum* including the use of Bonn powers. Our focus will be on the laws and regulations, dispute resolution mechanism, enforcement monitoring, information campaign and removal of obstructive officials.

⁶ The PIC steering board consists of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, the United States, the Presidency of the European Union, the European Commission and the Organisation of the Islamic Conference represented by Turkey.

Housing-related laws and regulations

Being deprived of property in BiH did not happen during the vacuum of law. As mentioned earlier, some people were evicted after signing a document to declare that their property would be in the hands of local authorities. In case of socially owned apartments, the conditions of occupancy included the actual use of the apartment. Therefore, those who fled the apartments could be considered to have failed in satisfying the conditions. Even in the case of private properties, the vacated properties were deemed “abandoned” and allocated to incoming IDPs or those who enjoyed power, either according to newly adopted laws, decrees, or administrative procedures (Williams, 2005: 484). The country was de facto divided into three separate systems during the armed conflict and immediate post-Dayton period, and legal pluralism reigned.

Under strong political pressure from the international community, the Federation of Bosnia and Herzegovina abolished the law on abandoned properties in April 1998, and Republika Srpska followed in December 1998. The laws adopted by both entities for this purpose are collectively known as ‘laws on cessation,’ which cancelled discriminatory provisions (Williams, 2005: 489–90).⁷ Furthermore, when the BiH authorities failed to adopt the required property legislation, the High Representative introduced a package of property laws.

In April 1999, the High Representative set the principle that the property rights of the pre-war occupancy rights holders precede that of the secondary occupants, by considering the latter as the temporary occupants (OHR, 1999e & 1999f). A PLIP document, “Non-negotiable Principles in the Context of the Property Law Implementation” (PLIP, 2000b) explains the rationale:

..., unless people are leaving (voluntarily or forcibly) the property they are currently occupying, the real humanitarian issue is masked and can not [sic] be addressed! Durable solutions need to be found by the authorities for these people – such solutions will not be found as long as they are occupying others' properties. We are ultimately not assisting these vulnerable groups by protecting them as current occupants.

The policy was therefore to restitute property to the pre-war property owners and occupancy rights holders, and screen out those who would not find a solution to their housing problems and genuinely

⁷ Law on Cessation of the Application of the Law on Abandoned Apartments (Official Gazette of the Federation of Bosnia and Herzegovina no. 11/98); Law on Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens (Official Gazette of the Federation of Bosnia and Herzegovina no. 11/98); and Law on the Cessation of the Application of the Law on Use of Abandoned Property (Official Gazette of Republika Srpska no. 38/98).

required humanitarian assistance. In this way, manipulation disguised by humanitarianism could be rebutted.

On October 27, 1999, the High Representative issued 14 decisions in regard to property laws and the restitution process.⁸ The property law amendments created harmonized administrative procedures for property repossession in both entities so that claimants would be treated equally (Williams, 2005: 504). On December 4, 2001, the High Representative issued 13 decisions and the restitution procedure was further regulated in detail including various deadlines, which increased the transparency of the procedure. In particular, one of the important elements was the principle of chronological processing of claims (OHR, 2001a: Article 5; 2001b: Article 6; 2001c: Article 7). The effect of the December 2001 amendment package is thus evaluated by a close observer as shifting the process into a rule of law and a process-oriented phase (Philpott, 2006: 56).

Dispute resolution mechanism: Commission for Real Property Claims of Displaced Persons and Refugees

The GFAP had provided for the establishment of the Commission for Displaced Persons and Refugees as the dispute resolution body on property issues. It was later named the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). The CRPC consisted of three international members, four members from the Federation of Bosnia and Herzegovina and two from Republika Srpska, a composition to secure neutrality. The CRPC received property claims from people who wished to repossess their property, and when ownership was verified, it issued a certificate of ownership. There were also other institutions that dealt with property claims: courts, ombudspersons, the Human Rights Chamber and municipal authorities. Each body had its own strengths or weaknesses. For instance, the court handled complicated cases and could deliver a binding decision, but the process required a long time. The Human Rights Chamber, whose work was transferred to the Human Rights Commission in the Constitutional Court of BiH in December 2003, dealt with property-related cases to adjudicate violations of the European Convention on Human Rights and Fundamental Freedoms, and discrimination issues. An ombudsperson, both at state-level and entity-level, could recommend a policy adjustment to governments and also determine the violation of human rights. Municipalities were the authorities on the ground that were theoretically the closest to citizens. However, its most serious deficiency was often the lack of impartiality and political bias in the post-conflict environment.

⁸ All the High Representative decisions are available at: www.ohr.int

The CRPC was the body established for the specific purpose of handling property claims. The beginning of its work was not easy. It started with finding and copying cadastral data from files of local entity and municipal administrations, then processing and checking defects, and finally established a cadastral database (Garlick, 2000: 74). It handled massive cases and moved the process forward. Under Annex 7, it had the power to disregard any illegal property transactions, including any transfer that was made under duress in connection with ethnic cleansing.⁹ Its decision was final and binding and processed over 310,000 claims during its mandate from 1996 to 2003 (von Carlowitz, 2004: 603). By the end of 1999, the CRPC had over 400 staff and 22 claims collection facilities throughout BiH as well as abroad (Garlick, 2000: 75). However, the CRPC had no means of enforcement and its early decisions were rarely implemented. The weakness was rectified later through the aforementioned decisions of the High Representative in 1999. They enacted laws that incorporated CRPC decisions into domestic claim procedures (OHR, 1999a & 1999b) and also introduced other measures including a monitoring mechanism to be discussed below.

Enforcement monitoring: Property Law Implementation Plan

On September 22, 1999, the Office of the High Representative (OHR), the Office of the UNHCR, the Organisation for Security and Cooperation in Europe (OSCE) and the UN Mission in Bosnia and Herzegovina (UNMIBH) set up the Property Law Implementation Plan (PLIP). Under PLIP, a well-coordinated monitoring scheme was established, in which the CRPC had observer status. One organization/field officer was designated as a point of contact in each municipality and the information was systematically shared among the PLIP organizations. This enabled close monitoring of the progress of property restitution. The PLIP agencies also issued monthly statistics of PLIP implementation by each municipality, which enabled the comparison of municipalities and identification of municipalities in which restitution was overdue (Philpot, 2005: 9; Williams, 2005: 509–13).

For evictions, the International Police Task Force (IPTF) of UNMIBH monitored the work of local police. Policemen who did not perform their duties and obstructed evictions could be dismissed through the IPTF Non-Compliance mechanism (PLIP, 2000a: IV. A. 2).

⁹ Annex 7, Art. XII.3.

Information campaign

While the international community was trying to enhance property restitution and return, the local authorities tried to maintain the existing population structure. The IDPs were told they had a right to permanently stay in the allocated property. Ethno-nationalist elites often used radio and television broadcasts to discourage return, “exacerbating fears of revenge or re-victimization among the displaced” (Tuathail & Dahlman, 2006: 251). Some spontaneous returnees in fact met with harassment and assault, and some lost their lives through explosions, arson and so on (Englbrecht, 2004: 104; Harvey, 2006: 92; Stefansson, 2006: 116; Toal & Dahlman, 2011: 190). Against the manipulation of IDPs, the international community conducted an information campaign, through various means including billboards, leaflets and radio and television broadcasts. The ‘*Poštovanje/Respect*’ campaign in 2000, which was conducted by the OHR and the OSCE with assistance from UNHCR, had a message that respect was essential in the property implementation process (OHR, 2000a):

respect for the right to property and respect for the right to return were the basis for amendments to the property legislation in Bosnia and Herzegovina; that the authorities in Bosnia and Herzegovina, as well as those who seek to repossess their property and those who have to vacate other people’s property must respect the law; and finally that respect for human rights and the rule of law are fundamental principles in any democracy.

This was followed by the ‘*Dosta je/It’s enough*’ campaign, expressing “the frustration felt by claimants waiting to repossess their homes, temporary occupants concerned about their future, and all those involved in the repossession process, who encounter the same obstacles day after day” (OHR, 2000b).

Removal of obstructive officials

Since the enforcement of CRPC decisions rested on the shoulders of municipal authorities, their obstructive behavior could easily block the restitution process. In manifest cases, the High Representative used his special power to remove public officials. In particular, there were two waves of removals concerning restitution and return. The first was in November 1999, which removed 22 officials, and the second was in September 2000, which removed 15 officials. The first group mainly consisted of politicians and the second group was mostly officials of housing offices (Moratti, 2008: 194–6).¹⁰ These

¹⁰ While those removed in 1999 were mainly officials suspected of directly obstructing the return process, the 2000 removals involved housing officials whose work was monitored by the international community. Moratti highlights

removals were publicly announced and demonstrated the firm commitment of the international community not to tolerate any obstruction of the return and restitution process.

Although we have so far focused on housing property, it is worth mentioning the general situation of property ownership and agricultural land. As mentioned in the historical review, land ownership was restricted in the SFRY. For this reason, large farms belonged to the state. JICA Research Institute conducted a survey in the Sarajevo Canton, where the capital is located. The canton represents some 2.5 per cent of the BiH territory. Property ownership in this canton is structured as 63.8 per cent public property, 34.7 per cent private property and 0.1 per cent the religious community's property; 1.4 per cent does not have ownership data (Čustović & Taletović, 2012).¹¹ The majority of public land is covered by forest. This survey also confirmed the land's fragmentation into parcels, as shown in Figure 1. Of the 275,274 parcels of land in the canton, 167,186 are smaller than 0.1 hectare. In general, small farmland was restituted along with housing property and it was a part of the restitution process. The Cessation Law set out that the deadline for returning arable land might be extended until harvest is completed (Article 12.a).

While the restitution process was ongoing, public land was allocated to IDPs, again for humanitarian reasons. Recognizing the spread of such practices, in May 1999, the High Representative suspended the power of local authorities to reallocate socially owned land that was used for residential, religious, cultural, private agricultural or private business activities as of April 6, 1992 (OHR, 1999d). The OHR explained the reasoning behind this decision as being that the land reallocation practice amounted to taking away the livelihood and cultural and religious heritage from refugees and IDPs, and threatened to undermine the processes of restitution and privatization (OHR, 1999c). Nevertheless, the practice continued in a number of places and, ironically, it consequently helped the acceleration of the return/restitution process since the temporary occupants of properties moved out of them when they succeeded in building their own houses (ESI, 2002: 27).

how those who were giving orders escaped removal due to lack of evidence, since the orders were given secretly (Moratti, 2008: 202).

¹¹ The survey was commissioned to Prof. Čustović and Dr. Taletović of the Faculty of Agriculture and Food Sciences, University of Sarajevo. The Sarajevo Canton was chosen because digitalized cadastral information was available in some parts of the canton.

Rights-based Approach and the Rule of Law

Against the virtual division of the country by ethno-politics, the international community created dynamism in property restitution. To some extent it succeeded in blocking legal pluralism and undermining the ethno-political control of divided territories and people. At the beginning of the process, the approach to promote return was perceived as political intervention and faced strong resistance from local authorities. However, the recognition and protection of property rights through harmonized laws and regulations, which was described as a rule of law approach, functioned much better. In this section, we will analyze the restitution process in BiH from the perspective of the rule of law.

The legal grounds for restitution of property for refugees and IDPs have been suggested to be twofold: one in relation to the right to return, and the other as an independent right to reparation for human rights violations (Buyse, 2008: 113–60; Williams, 2005: 457–61). The right to repatriation is set forth in the Universal Declaration of Human Rights, and has been reaffirmed by many UN resolutions. The linkage between the right to return and the right to restitution is now recognized by the “Principles on Housing and Property Restitution for Refugees and Displaced Persons,” known as the Pinheiro Principles, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005.¹² The recognition of property rights and their protection in accordance with law was referred to as the rights-based approach as well as the rule of law approach in the Bosnian restitution process.

The concept of the rule of law is defined in different ways and it is beyond the scope of this paper to seek one uncontested definition. A report of the UN Secretary General, for instance, defines it as “a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” It further describes the rule of law requirements as “adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency” (UN, 2004: para.6).

There are largely two schools of thought: one considers the rule of law from a formalistic aspect, and the other takes the nature of law into perspective. The aforementioned UN’s definition belongs to the latter. Belton (2005: 5-15) classified the definitions into two: institution-based and ends-based. The

¹² Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, Housing and Property Restitution in the context of return of refugees and internally displaced persons. UN doc. E/CN.4/Sub.2/2005/17 (2005).

institution-based rule of law concept concentrates on institutions such as laws, judiciary and law enforcement apparatus. In contrast, end-based definition concerns what the rule of law brings to society. Discussing the end-based definition from the perspective of international cooperation to build the rule of law, Belton argues that there are at least five separate meanings or end goals implied in the use of this term. The first means a government that abides by standing laws and respects judicial rule. The second means equality before the law, and the third is law and order. The fourth is predictable and efficient justice, and the fifth means lack of state violation of human rights.

We will review the Bosnian restitution process in light of the rule of law requirements under the UN's definition, and in terms of what the rule of law approach brought to Bosnian society in reference to Belton's analysis.

Williams (2005: 450), who was involved in the BiH restitution process as an officer of the OSCE and published a meticulous academic paper on the subject, states as follows:

A central lesson of Bosnian restitution is that adoption of a rights-based approach at the outset of restitution processes is more likely to ensure property repossession in a fair, efficient, and transparent manner for all victims of displacement.

The rights-based approach had a particular effect on the protection of occupancy rights (Williams, 2005: 519-520). Occupancy rights of a socially owned apartment were linked to one of the original conditions under the Law on Social Housing: the condition to live in the apartment. If this was locked with the return, those who used to live in a socially owned apartment and have no intention to return could lose any right in relation to the pre-war occupancy right. The recognition of occupancy rights as property rights prevented the suffering of many people which could have occurred owing to the peculiar housing system established under the socialist regime. The rights-based approach also conforms to the principle of voluntariness in return. Those who repossessed property have the right to decide whether to return to that property, or to dispose of it and choose another option, which may be integration in the place of displacement or resettlement.

The rule of law approach was explicitly mentioned in the March 2000 field implementation guide for Focal Points of the PLIP monitoring arrangement (Williams, 2005: 524). The PLIP Framework Document of October 2000 asserted this position (Williams, 2005: 526-527). The document (PLIP, 2000a: III. Methodology) describes the rule of law approach as follows:

By insisting that no deviation is permitted from the strict requirements of the law, it ensures that equal standards, procedures and international pressure are applied throughout the country.

The implementation of the property laws and regulations was enhanced from multiple directions. For instance, UNMIBH issued a ruling that police officers who wished to remain employed should vacate property belonging to others. Likewise, the Provisional Election Commission set a rule not to allow elected or appointed officials to continue illegal occupancy. The rule then triggered political parties' action to verify their own candidate lists so that no one on the list would be in violation of the ruling. It further led to vacation of contested property by candidates to avoid removal (PLIP, 2000b: 8). Furthermore, judges and prosecutors, as well as officers of international organizations such as the OSCE were scrutinized regarding their housing situation (Philpott, 2006: 60).

On the whole, we may conclude that the restitution process met with the rule of law requirements: supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. The approach was perceived as legitimate by the public, because the same rule applied to everyone who had been deprived of his or her property during the armed conflict, and also to those who occupied someone else's property. In other words, it was an approach in which individual property rights were equally respected. The shortage of this process, however, was the weak presence of the state in guaranteeing these rights and therefore the legitimacy of the state was not reinforced.

What then has the restitution process brought to BiH? All agencies involved in the restitution process were obliged to abide by laws and rules. Public officials who did not do so were removed by the decision of the High Representative. The use of Bonn powers to exclude ethno-politics from the restitution process helped housing officials to do their job by relieving them from political pressure. Referring to chronological order, Philpott (2006: 58) says: "[A] clear, non-negotiable order for resolving cases also gave the housing officials the political cover vis-à-vis their nationalist political masters and the public to tackle politically difficult cases... ." By equal application of prescribed rules, people could predict how their property claims would be handled, and thus could plan for the future return or transfer of his/her property rights. This contributed to the stabilization and in turn peacebuilding of the country, particularly so because of the essential meaning of property for the livelihoods of ordinary people. Buyse (2008: 358) also points out that the restitution process more generally strengthened the rule of law in BiH: "The approach helped to support the notion that laws apply everywhere and to everyone, even to the powerful". This may be true, but given the corruption and widespread manipulation of legal loopholes, the present author believes that the rule of law established in the area of property rights has not reached much wider areas.

Applicability of Bosnian Model

As discussed above, the *restitutio in integrum* in BiH required a range of efforts as well as human and financial investment. In this section, we will examine the applicability of the Bosnian model in other conflict-affected situations. To do so, we will first look at the peculiar conditions in BiH.

Firstly, the property rights in BiH were more or less clearly determined prior to the conflict. There were limited problems associated to property documents being destroyed or burnt or going missing because of the armed conflict.¹³ For instance, Williams (2005: 505) describes: “Eligibility was generally easy to establish, given that most claimants could present documentation of their pre-war status and deconstruction of property records in Bosnia was relatively isolated phenomenon.” However, a contrary view should be noted: “Around 30% of the country’s original property books had earlier been destroyed during WWII; and in the 1992-95 conflict, many of the remaining property books and cadastre records were damaged, removed or rendered unusable by unlawful tampering” (Garlick, 2000: 74). Also, there were problems of updating the information in a land register including those on the part of the state. The SFRY government failed to register thousands of nationalized properties as being owned by the state, and such property remained under the name of the owner prior to nationalization (Directorate-General for Internal Policies, 2010: 48). These problems were nevertheless not significant in comparison with the situation in many developing countries where land registration is scarce and very few people possess titles. The main question in BiH was therefore whether to recognize the pre-conflict property rights or consider the rights that vanished due to the armed conflict.

Secondly, the period of displacement was relatively short, mostly within a decade. Obviously, even a month of displacement can be very long for those who were forced to leave. However, in comparison with decades of displacement, for instance, in the case of Rwanda or Cambodia, the limited length of displacement helped in applying the principle that the pre-conflict rights holder would recover the property, and that the secondary occupants would find another solution.¹⁴

Thirdly, the presence of the international community in the process of BiH peacebuilding was extraordinarily strong, including during the restitution process. The High Representative has enforcement power and applied it in amending and repealing discriminatory property laws and regulations, imposing

¹³ This was also the impression the author had through interviews in BiH, because none of the interviewees mentioned the problem.

¹⁴ On the question of the relationship between property rights and the passage of time since their deprivation, see Katayanagi (forthcoming).

new laws, and even removing public officials who obstructed the return and restitution process. These interventions unblocked the restitution process otherwise frozen by ethno-politics.

The above conditions lead us to think that the Bosnian model cannot be easily applied to other cases. Having said so, the obstacles that existed in post-Dayton BiH could be found in many other places. The PLIP Framework Documents classified the obstacles into three categories: political, institutional and housing (PLIP, 2000a: II). The political obstacles were the willingness of nationalistic politicians to keep BiH populations separate along ethnic lines. The institutional problems were the weak institutional capacity of administrative organs, particularly at the municipal level. The housing problem was obviously the shortage of housing due to the devastation by the armed conflict. The case provides at least two lessons for the general application of the BiH experience in other conflict-affected societies. The first is the importance to recognize the property rights of original rights holders as being equal to any member of the society, although the way of reparation may not be *restitutio in integrum*. As an example, Rwanda, where land is scarce and the population density is high, seems to have had no alternative but to opt for land sharing between the long-term secondary occupants and returnees (Takeuchi & Marara, forthcoming). What is important is equal treatment before the law and the search for a solution that is to be perceived as fair by the public. The second lesson is effectiveness of the consideration of the rule of law. The Bosnian case shows the complexity of the rule of law. It is not only about proper legislation but also a dispute resolution mechanism, enforcement of decisions, as well as awareness and acceptance of the rule by members of society. The Bonn powers efficiently facilitated realization of these factors, while such powers are normally not available. The policy implication is therefore the significance to find measures that bring about those essential factors in the absence of imposing powers.

Let us also analyze the role of the CRPC in the rule of law framework. Although it was not a fully international institution, there were international members and it was internationally funded. Its neutrality against the prevailing situation where ethno-politics influenced all decision-making had an indispensable role in restitution. The CRPC's certification was used for reconstruction assistance because of its impartiality. Aid agencies sought information from CRPC so that their assistance would benefit the pre-war property owners, not the secondary occupants (Garlick, 2000: 83). There are positive assessments of the CRPC by close observers. Philpott (2006: 40) says: "it was the main defender of restitution rights at a time when the domestic authorities were intent upon consolidating and legalizing post factum wartime ethnic-cleansing," referring to the period before enactment of the Laws on Cessation. However, he is critical of CRPC's role in the later period when the local administrative bodies started their function in the restitution process. He is of the view that the CRPC should have tackled complex cases to add value (Philpott, 2005: 16-17). Garlick (2000: 75) affirmed the CRPC's role: "The decisions of the CRPC have

carried important symbolic and psychological as well as legal value” for many ordinary people who had lost their homes through the war. In her view, “[B]y receiving a document confirming their title, with the weight of international law behind it, they had something that could not be taken away on arbitrary or unlawful grounds” (2000:76). Another close observer, however, questions CRPC’s added value, because most claimants could claim and often actually claimed through both CRPC and the local housing authorities (Williams, 2005: 508).¹⁵ In retrospect, it would be fair to say that the CRPC played an indispensable role at the beginning of the process, but the certification procedure could be entirely handed over to the local bodies, once the process got on track, in other words, when the rule of law began to take root. This is another lesson that can be applied as a model.

There may be a view that such costly restitution operation as carried out in BiH should be replaced by market transactions. Prior to the restitution process, some sold or exchanged their properties at market under extremely disadvantaged conditions. However, many of them were cancelled following the High Representative’s decision to deem transactions under duress null and void. Market transactions may become an option once the rule of law is established, but not earlier. In this relation, Garlick’s observation (2000:81) also requires attention:

In the devastated economy of Bosnia and Herzegovina, money to buy and sell real estate was not readily accessible; and the risks associated with property transactions at that time hindered market functioning still further.

In a conflict-affected situation, the new government has a challenge to obtain legitimacy from the entire population. The handling of property rights that are essential for people’s livelihood provides a challenge and opportunity at the same time. With a limited number of properties available in a devastated country, what could be upheld is the recognition of property rights, a clear and transparent rule on how to protect or compensate the rights, and equal implementation of the rule. The perception of fairness and equality would move the process forward with considerably fewer individual conflicts. There may be a role for the international community to help the process, especially at an initial stage, to ensure the neutrality of the process.

¹⁵ In an interview conducted in Belgrade, a representative of an NGO working for the restitution of properties located in BiH to Serb owners commented positively about the CRPC, highlighting the fact that it worked together with the local bodies. It is noteworthy that even in Serbia the restitution process in BiH is deemed fair, although there are pending cases to be rectified. Interview on June 7, 2012.

Conclusion

This paper analyzed the Bosnian restitution process from the perspective of the rule of law and examined the applicability of the Bosnian model. The restitution process met the basic requirements of the rule of law, such as supremacy of law, equality before the law, fairness in the application of the law, legal certainty, avoidance of arbitrariness and transparency. The measures leading to establishment of the rule of law were various and laborious, but they contributed to stabilization and peacebuilding of BiH. Although BiH had peculiar conditions, namely, relatively clear property rights, relatively short displacement period and extremely strong international presence, there are some lessons to be learned for other conflict-affected cases. Firstly, it is important to recognize the property rights of each member of society equally. Secondly, the rule of law contains complex factors and there need to be measures that bring into being its essential factors. Thirdly, an independent dispute resolution mechanism to tackle mass property claims may play a valuable role in conflict-affected societies, which could be supported by the international community for the sake of impartiality. However, international involvement is best for a limited period of time so the operation can be taken over by domestic authorities.

In BiH, while post-conflict property restitution has been assessed as being successful, the consequent return of the displaced population was less than expected. In terms of peacebuilding, therefore, the restitution effects appear limited to the establishment of the rule of law in the area of property rights. Nevertheless, it contributed to the stabilization of the country and the limited scale of return realized by the restitution may have immeasurable implications for the future of BiH. Despite ethno-nationalistic politics, a multi-ethnic society does survive in a number of localities. Sarajevo, before the latest armed conflict, was a lively multi-ethnic city of which Sarajevans were proud, despite its multi-ethnic character having once been obliterated by the Ustasha regime during the Second World War. Given such historical experience, BiH may have preserved the potential for future social changes that can lead to solid peacebuilding, while the possibility that the country is heading in a completely different direction also remains.

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Appendix

Figure 1. Size of land parcels in the Sarajevo Canton

