EXPLAINING THE INTERNATIONAL COMMUNITY'S INSISTENCE ON REAL PROPERTY RESTITUTION IN BOSNIA-HERZEGOVINA AND CROATIA, 1995-2003: EXPLORING NORMATIVE FOUNDATIONS

by

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Abstract
The existence of post-conflict real property restitution regimes for refugees and
displaced persons in Bosnia-Herzegovina (BiH) and Croatia marks a dramatic shift from
the largely unredressed real property deprivations which occurred during the first half of
the twentieth century. Through a comparative analysis of the international community’s
policy on conflict-related dispossession in Europe and North America from 1913-1945
and its policy on dispossession resulting from ethnic cleansing in the former Yugoslavia
in the 1990s, I posit that contrasting norms lie at the heart of the different practices in
these two periods.

The massive property dispossessions of the first half of the twentieth century
occurred as a result of territorial conquest, discriminatory confiscation, wartime seizure
of enemy property, and mass population transfers. These dispossessions and their
consolidation were underpinned by ethnic nationalism, the malleability of borders, a
state-centric international legal system, the concept of collective responsibility, and weak
international protection for property rights. Conversely, calls for restitution in BiH and
Croatia are premised on civic nationalism, territorial integrity, the legal standing of the
individual in international law, a belief in individual responsibility, and the increasing
inviolability of property rights in international law.

To explain these normative changes and their apparent influence on the establishment
of restitution regimes in BiH and Croatia, I employ realist, rationalist, bureaucratic
organization, and constructivist theoretical models. The former three fail to account for
the international community’s insistence on and commitment to return and property
restitution. Ruling out the explanatory power of these three theories, I conclude that a
constructivist paradigm provides the most complete and accurate analysis.

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Within the framework of constructivism, the five normative changes identified are plausible causal factors in the establishment of restitution regimes. Through this paradigm, these norms coalesced to provide constraints within which a peace agreement had to fall. As human rights norms, predominantly, they are both constitutive and regulative for states which identify themselves as liberal democracies. The primary architects of peace were the US and the EC/EU. Their intersubjectively understood identity in international society as liberal democracies necessitated consideration, if not adherence, to these norms.
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Preface

From 1999 to 2002, I worked for the OSCE Mission to Croatia monitoring and reporting on the process of post-conflict property repossession. The work was frustrating because progress was extremely slow. I had many conversations with colleagues about why we were promoting return and restitution when our efforts often seemed futile. When I asked my colleagues why they thought the international community had embarked on such an ambitious program, I received answers like: “The international community holds Croatia and Bosnia to a higher standard than the rest of the world. They aren’t demanding a right of return in Cyprus or Israel; this is some kind of anomaly”; “Since the Cold war has ended, there is actually an ‘international community’ which can ensure compliance with international law—had there been such cooperation after WWII, the same thing would have happened”; “Obviously, the US has strategic interests in this region that we don’t know about”; and “This is a reflection of the increasing strength of neo-conservatism where private property is sacrosanct.”

I didn’t know why we were advocating return and repossession. In whose interest was it? Especially when ethnic tensions were often blamed for the outbreak of the war, why were we trying to reconstitute a potentially explosive situation? The OSCE, UN, and various humanitarian and human rights NGOs were investing large sums of money into return, striving to ensure that it would be based on “free and informed choice.” However, these efforts were not producing stellar results; many people had settled elsewhere and did not wish to return, while others perhaps dreamed of returning, but were unwilling to confront obstructive governmental bureaucracy and hostile communities. Repossessing or
getting one's house reconstructed often took years of persistence and many gave up in the process.

Our aims were idealistic, and I had no way to account for the costly idealism in which I was engaged...
Introduction

For centuries were a person, family or community—whether due to armed conflict, illegal expropriation or human rights violations—displaced from their places of habitual residence, and not on the side of those who either won the conflict or took or remained in power, it was virtually assured that those same homes and lands would, for all intents and purposes, be lost forever.¹

The existence of real property restitution regimes for refugees and displaced persons in Bosnia-Herzegovina (BiH) and Croatia mark a dramatic shift from the massive and largely unredressed real property deprivations which occurred during the first half of the twentieth century. From 1913 to 1945 territorial conquest, discriminatory confiscation, the seizure of “enemy property” during wartime, and mass “population transfers” resulted in massive derogations of property rights. For example, prior to World War I (WWI), the 1913 Convention of Adrianople between Bulgaria and Turkey decreed the voluntary exchange between Bulgarians in Turkey and Muslims in Bulgaria.² During the interwar period, the 1919 Treaty of Neuilly between the Allied and Associated Powers and Bulgaria provided for the voluntary transfer of 46,000 ethnic Greeks living in Bulgaria to Greece and 96,000 ethnic Bulgarians living in Greece to Bulgaria.³ The 1923 Treaty of Lausanne, sanctioned by the League of Nations, decreed the compulsory population exchange of over two million ethnic Greeks and Turks between Turkey and

³ Ibid.
Greece. During World War II, the 1941 Soviet-German agreement provided for the transfer of Germans from Lithuania, Latvia, and Estonia to German-controlled territory. Of these treaties, only the Treaty of Lausanne, made provisions for compensation to those who lost property as a result of the population transfer, and these provisions later turned out to be ineffective in providing compensation.

The seizure and permanent confiscation of “enemy property” during WWI hostilities was legitimized in the post-war peace treaties of Trianon and Versailles which stated that “all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures [...] hereto shall be considered as final and binding upon all persons.” These peace treaties codified and legitimized the concept of “victor’s justice.” Whereas a victorious state could legitimately retain property which it had seized during a conflict, a defeated state was obliged to return all property to the state of origin.

During WWI and WWII, seizure of property belonging to “enemy nationals” also occurred in North America. In 1920, the Canadian government enacted legislation which stated that “all property, rights and interests in Canada belonging [...] to enemies and in the possession or control of the Custodian at the date of this Order shall belong to Canada

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8 Ibid.
and are hereby vested in the Custodian."9 At the end of the war, the 1919 Treaty of Versailles entitled Canada to "keep and liquidate any German property in Canada."10 The treaty stated that Canada should compensate its own citizens in cases for which they suffered losses due to the liquidation of German-owned property. Accordingly, in cases which "enemy property" was owned jointly by "allied or neutral interests," the Canadian owners could claim and receive compensation from the Canadian government in accordance with the share owned.11 The 1919 Paris Peace Treaty, on the other hand, imposed the obligation of restitution upon the losers of WWI. It stipulated that "the Hungarian Government undertakes to restore to complete good order all property [...] to the United Nations nationals and in cases where property cannot be returned or where as a result of the war damage inflicted on his property in Hungary, the Hungarian Government undertakes to pay compensation."12

During WWII, the Canadian government decreed that 22,000 Japanese Canadians must register for evacuation and sign "voluntary" declarations turning over their property to the Custodian for safe-keeping.13 The state liquidated most of their property ostensibly because of the difficulties in protecting it.14 At the end of the war, those whose property had been confiscated received the proceeds from the sales minus administrative fees and

10 By 1924 the custodian held over $490,000 worth of enemy property in Canada and 7.3 million in enemy-owned securities. Ibid. 98.
11 Ibid.
12 Vásárhelyi, Restitution in International Law 47.
14 Ibid. 102.
any outstanding debts against the property. The only option for Japanese Canadians to recover their property was the possibility of repurchasing it.

Massive property dispossession occurred in the wake of WWII primarily as an accepted form of collective punishment. Article XIII of the 1945 Potsdam Treaty provided for the transfer of ethnic Germans from Poland, Czechoslovakia, and Hungary to Germany. Subsequently, Yugoslavia, and the Soviet Union claimed that the Potsdam Treaty sanctioned the deportation of ethnic Germans from their territories as well, and expelled their German minorities. As a result of these policies, up to fifteen million ethnic Germans were expelled from their homes throughout Europe without compensation or legal recourse.

The legitimization of seizure and confiscation which occurred after WWI and WWII marked a departure from previous practice. There are four approximate historical periods into which the concept of restitution in European international law can be divided: prior to the 1215 Magna Charta; from the Magna Charta to WWI; from the end of WWI until about 1948; and from 1948 until the present. Restitution refers to “the [release] of the property that was taken away, by discriminatory war measures, from the disposal of the persons entitled thereto.”

Prior to the 1215 Magna Charta, war was conceived of as bellum omnium contra omnes; that is, “every subject of the belligerent was at war with every subject of the other belligerent irrespective of sex or age, the property and the person of everybody was a free

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15 Ibid.
17 Ibid. 38.
18 Ibid.
prey, there was no difference between the members of the armed forces and the civilian population."²⁰ As material gains made in war were considered legitimate, there was no obligation for the restitution of confiscated property lost in war.

The 1215 Magna Charta provided that in the event of a war, the property of foreign nationals on English territory would be respected and protected.²¹ This principle was generally accepted until the 17th century when maritime law had gained greater prominence.²³ Maritime law provided for the “right to seize and confiscate all private sailing in enemy ownership, moreover to confiscate neutral property, too, if the latter was entrusted to the protection of an enemy flag.”²⁴

By the 19th century a divisive split had occurred between the Anglo-Saxon and continental Europeans’ conceptions of how private property should be treated during war.²⁵ The Anglo-Saxons espoused the principle of universal warfare, as codified in maritime law, whereas the Continental Europeans adhered to the older principle enshrined in the Magna Charta.²⁶ This division was played out at the 1907 Hague Conference. Article 46 of the Hague Convention IV stated: “Private property can not be confiscated”²⁷ and Article 23, paragraph h stated: “it is especially forbidden to declare abolished, suspended or inadmissible in a court of law the rights [...] of the hostile

¹⁹ Vásárhelyi, Restitution in International Law 9.
²⁰ Ibid. 21.
²¹ This provision was motivated by the wish to protect commercial interests. Ibid.
²² Ibid.
²³ Ibid.
²⁴ Ibid.
²⁵ Ibid. 22.
²⁶ Ibid.
²⁷ Ibid. 23.
party." The continental powers interpreted this clause to apply to private property while Great Britain refused to extend it to private property. Based on the principle of reciprocity, Article 53 of the 1907 Hague Convention called for the "restitution at the end of the war of all property seized and sequestrated lawfully by the enemy on the occupied territory in the course of the hostilities." Essentially, temporary seizure, in some cases, was legitimate while permanent confiscation was illegitimate.

The Paris Peace Treaties concluding WWI marked a new phase in the history of restitution in international law. They encoded the right for the victorious parties to keep and liquidate any enemy property seized whereas the losing states were required to return any seized property. This marked the demise of reciprocity as a guiding principle in favour of "victor's justice."

In contrast to the massive unredressed property losses of the first half of the twentieth century, the Yugoslav wars of secession ended November 21, 1995 with the initialing of the General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Peace Agreement) which stipulated the right for displaced persons "to return to their homes of origin [and] to have restored to them property of which they were deprived." As of October 1, 2003, 198,197 of 220,225 or 90% of claimed properties have been repossessed by their owners in BiH and 54 of 149 municipalities have now

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28 Ibid. 24.
29 Ibid.
30 Ibid. 42.
31 Ibid.
32 Ibid. 27.
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finalized all claims. The Office of the High Representative (OHR) anticipates that the process of repossession will be largely completed by the end of 2003.

In Croatia, while substantially fewer homes were taken over by the state—between 70,000 and 80,000—the repossession rate of repossession continues to be much slower than in BiH. 4271 of the 19,277 private properties “officially allocated” still remain occupied. Furthermore, Croatia has not yet established an effective regime to provide restitution for the estimated 50,000-60,000 Serb households who lost occupancy rights as a result of the conflict. Although in a recent development, Croatia has recognized the right of former occupancy right holders to compensatory housing if

35 The Office of the High Representative was established by the Dayton Peace Accords. The High Representative has an extensive mandate which includes monitoring implementation of the peace agreement, ensuring the compliance of elected officials, holding the final authority to interpret the Dayton Accords. Annex 10, Articles 2-5 in Dayton Peace Agreement.
37 This includes both private and socially-owned properties. This figure is derived from NGO estimates that 50,000-60,000 Serb households lost occupancy rights as a result of the conflict and the almost 20,000 officially allocated by the state OSCE. "Report of the OSCE Mission to the Republic of Croatia on Croatia's Progress in Meeting International Commitments since 18 April 1996," (Zagreb: OSCE, 2001), 6-7.
38 In addition to properties officially allocated by the state, an unknown additional number was spontaneously occupied—"illegally occupied." Ibid. 8.
40 Occupancy rights were a unique institution in the Socialist Federal Republic of Yugoslavia (SFRY). They were the predominant type of real property in SFRY Generally they were assigned to individuals by their employers and held almost all attributes of a property right (for example, the rights to bequeath or to exchange) barring the right to sell or leave vacant. They could be cancelled if the assigned occupant did not inhabit the apartment for more than six consecutive months without justified reason. Marcus Cox and Madeline Garlick, "Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina," in Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons, ed. Scott Leckie (Ardssley, New York: Transnational, 2003), 67.
they return to Croatia.\textsuperscript{41} Despite the markedly different progress in BiH and Croatia, it is significant that both recognize the right of displaced persons to return to their homes, and failing return, the right to maintain control over their private property.

In addition to Croatia and BiH, restitution regimes have been established in a host of other cases since 1991. These include Guatemala, Rwanda, Kosovo and South Africa.\textsuperscript{42} This is occurring within an overall context of the increase in reparations worldwide in the post-Cold War era.\textsuperscript{43}

Reparations, defined as “compensation, usually material, for some past wrong,”\textsuperscript{44} have become common for such issues as slavery, apartheid, recent gross human rights violations, and private and communal property confiscation.\textsuperscript{45} Elazar Barkan attributes the rise of reparations to an increased legitimacy afforded to moral and ethical considerations particularly since the end of the Cold War.\textsuperscript{46} This new international morality is underpinned by such ideals as “opposition to genocide, support for human rights, and the fear of being implicated in crimes against humanity (even by inaction).”\textsuperscript{47} Barkan notes that these ideals now have palpable effects on decision-making at the international level.\textsuperscript{48} Within this overall framework, restitution, a specific type of

\textsuperscript{45} Ibid. 12.
\textsuperscript{46} Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices xv.
\textsuperscript{47} Ibid. ix.
\textsuperscript{48} Ibid.
reparations, refers to "the return of specific items of real or personal property." This raises two questions. Firstly, what is the content of this new international morality? And, can it explain the emergence of restitution regimes in the former Yugoslavia?

This thesis seeks to explore the importance of normative factors in determining the international community's clear and persistent policy on the establishment of real property restitution regimes in both BiH and Croatia. I seek to demonstrate that the massive dispossessions during the first half of the century and the property restitution regimes in the former Yugoslavia have significantly different normative underpinnings, and that it is these differences that have played a significant role in the international community's policy on the former Yugoslavia. These differences are a preference for civic as opposed to ethnic nationalism; the strengthened norm of territorial integrity; respect for private property rights and the prohibition of arbitrary deprivation of property; the notion that individuals and not states exclusively are entitled to restitution and are subjects of international law; and the concept of individual as opposed to collective responsibility. I propose that these normative underpinnings are significant causal factors in the shape and outcome of the post-Dayton Agreement peace.

I have chosen to examine the cases of BiH and Croatia because they represent difficult test cases for the restitution of property. Fulfillment of the Dayton Peace Agreement in BiH has required vast military and financial commitments since 1995 and is likely to require these for the foreseeable future. Also, viewing BiH and Croatia comparatively illuminates the character of the norm of post-conflict restitution because of the shared similarities and striking differences between the two cases. The problems with

49 Torpey, Politics and the Past: On Repairing Historical Injustices 3.

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displacement and dispossession of property vary only in scale; the war in Croatia, in many ways, is a microcosm of the BiH conflict. The scale of the bloodshed led to significantly greater levels of foreign involvement in enforcing peace in BiH than it did in Croatia. Therefore the BiH restitution regime can be seen as a direct manifestation of the will of the international community, whereas in Croatia, the outcome can be understood as resulting from the interplay between both international and domestic factors. Given these two very different levels of international involvement, these two cases allow for a close examination of the strength of the post-conflict restitution of property norm.

My study is limited to property rights which have been derogated due to international or civil conflict or with the justification of ameliorating the threat of potential conflict. I do not examine the phenomenon of nationalization of private property due to socialist governmental policy or its restitution in states undergoing transformation. These are important events in the development of stronger international protection for property, but encompass an additional set of issues which are not within the scope of this thesis to address. I also focus exclusively on the restitution of habitable property placed under state control and do not explore the establishment of reconstruction programs. I exclude reconstruction because while it falls under the state obligation to facilitate return, it has a different set of problems associated with implementation.

Individuals were deprived of various types of property during the breakup of the former Yugoslavia including housing, business premises, agricultural land, moveable property such as farm equipment, furniture, and financial assets such as pensions. For the purposes of this paper, however, the term 'property' refers to housing only. The
deprivation of housing is key to achieving ethnic cleansing by physically preventing return to one’s home, and its restitution the most instrumental in facilitating return.

I have chosen to compare disposessions which occurred due to conflict or perceived potential conflict between 1913 and 1945 to the Yugoslav regimes because they occurred under markedly different normative conditions. Using these conditions as an independent variable allows us to view what occurred in the Balkans in their absence.

There is scant literature on the development of restitution regimes in the former Yugoslavia. Generally, the literature which addresses the breakup of the former Yugoslavia focuses on “the means that were used or could have been used to bring peace to south-eastern Europe,” and fails to answer the question of why the international community sought to reverse ethnic cleansing in both BiH and Croatia. Restitution of real property is a crucial part of the international community’s vision for an ethnically reconstituted south-eastern Europe, and additionally has allowed for restitution of property rights even when not tied to refugee return. However, there is a deficiency of normative inquiry into the underpinnings of the resolution to the conflict, generally, and into the issue of property restitution, specifically.

The literature on the international community’s response to the dissolution of the former Yugoslavia has two major shortcomings. It does not problematize the motivations of various actors in the international community, but largely takes them for granted. It fails, for the most part, to adequately place the restitution regimes within a wider

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historical context and thus does not fully elucidate their significance. This paper seeks to fill this void by establishing the normative shifts which have occurred since the end of WWII and by exploring the normative underpinnings of the international community’s insistence upon the establishment of restitution regimes.

This thesis is divided into three major parts. In the first part, I give a brief overview of the dissolution of the former Yugoslavia, the international community’s response, and the establishment of restitution regimes. Part II details five key normative differences that stand out between internationally sanctioned real property loss in the first half of the twentieth century and international demands for restitution in BiH and Croatia in the 1990s. Demonstrating a shift of normative underpinnings does not by itself establish that they are the sole cause of the restitution regimes in the former Yugoslavia. Jeffrey Legro critiques norm literature for neglecting to consider alternative explanations to norms as causal factors. I pay particular attention to this critique and therefore explicitly consider alternative explanations. In Part III of the thesis, then, I examine explanations for these changes, considering the expectations of different theories in international relations and assessing their strengths and weaknesses. I argue that alternative explanations focusing on security concerns, material self-interest and bureaucratic factors do not adequately explain the rise of restitution in the 1990s. Instead, I point to the centrality of changing norms, and assert that the theoretical lens of constructivism allows for an accurate interpretation of the international community’s motivations for constructing a certain character of peace in the former Yugoslavia.

Part I: A History of Property Loss, the International Community’s Response, and Restitution in the Breakup of the Former Yugoslavia

The breakup of the former Yugoslavia resulted in the large-scale displacement of up to four million persons between 1991 and 1995. Although massive displacement occurred continuously throughout the conflict it can be divided roughly into three periods. From June 1991 to November 1992, precipitated in part by Croatia’s and Slovenia’s declarations of independence on June 25, 1991, Serb-paramilitary and Yugoslav National Army (JNA) forces took control of almost thirty percent of Croatia’s territory declaring it the Republika Srpska Krajina or the Serbian Republic of the Krajina. This initial phase of the conflict resulted in the expulsion of about 200,000 ethnic Croats, Hungarians, and others from the Serb-occupied territory. The United Nations High Commissioner for Refugees (UNHCR) estimates that by February 1992 there were a total of 605,000 displaced persons throughout the former Yugoslavia. From March 1992 to August 1995, the wars in BiH resulted in the displacement of a total of 2.6 million persons: 1 million internally displaced persons within BiH; 1.1 million refugees who left BiH, but remained on the territory of the former Yugoslavia and approximately 500,000 people who emigrated out of the former Yugoslavia. Finally, from August to November 1995 the offensive launched by Croatia and the Bosnia-

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54 Ibid. 185.
55 Ibid.
56 Ibid.
57 Ibid.

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Croatian Federation together with NATO air strikes against Croatian and Bosnian Serbs resulted in the displacement of over 750,000.58

Allocation of Property

During the conflict and after the cessation of hostilities, political officials, military and paramilitary personnel, and individuals belonging to the ethnic majority of an area allocated "abandoned" housing to refugees, internally displaced persons and others of the majority's ethnicity.59 In many cases those who occupied properties were not refugees or Internally Displaced Persons (IDPs), but individuals from surrounding communities who sought to profit from the conflict.60 The take-over of "abandoned" property involved at least 220,220 properties in BiH61 and at least 70,000 properties in Croatia.62 In part, this served to ameliorate the imminent humanitarian crisis of the vast numbers of persons displaced from their homes, but also served to consolidate ethnic cleansing. While property seizure, confiscation, and destruction were legitimate practice during the first half of the twentieth century, the international community's reaction to these displacements and property violations were markedly different.

In contrast to internationally legitimized and sanctioned population transfers that characterized the first half of the 20th century, the international community sought to achieve the reverse in the case of the former Yugoslavia; that is, the re-creation of the

58 Ibid. 185-86.
60 Ibid.
61 A definitive figure for the number of properties occupied has never been established. This number is derived from the number of currently claimed properties—both private and formerly socially-owned. OHR/OSCE/UNHCR/CRPC, Implementation of the Property Laws in Bosnia and Herzegovina Reached 90 Per Cent (1[cited).
multi-ethnic pre-war configuration of the population. Key to this goal would be the ability of refugees to repossess their homes. The Dayton Peace Agreement not only specifies the right to return, but the right to return to one’s home.63 This goes beyond existing standards for the rights of the displaced.64 For example, the 1991 Final Act of the Paris Conference on Cambodia allows for “return to the place of [...] choice” and the “return to their homeland.” Likewise UNHCR Executive Committee conclusions on Afghanistan, Angola, Tajikistan, and Myanmar “extend[] the right to return to the whole country of origin.”65

The return of displaced persons to their homes was not an inevitability or necessity in terms of expediency. States could have simply supported resettlement of ethnic groups in their “kin-state” in the former Yugoslavia or in various regions of their country of origin. The international community’s insistence that displaced persons had the right to return to their homes required peace-keeping forces, international monitoring and enforcement agencies, and investment into economic assistance programs. As Mikulas Fabry notes, the policy pursued by the international community was one which did not favour an easy peace, but one which required that the international community pay a high price for the kind of peace that it wished to impose.66

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66 This is in specific reference to the insistence on territorial integrity. Fabry, "International Norms of Territorial Integrity and the Balkan Wars of the 1990s," 147.
Croatia

Prior to 1995, property take-over and allocation occurred on an *ad hoc* basis. Shortly after the military operations Flash and Storm during which Croatia retook two-thirds of its territory which had been held by Serb forces from 1991 to 1995, causing a mass exodus of Serbs from the government controlled territories of Croatia, the Croatian government passed legislation that regulated and legitimized this practice. Despite Croatia’s obligation prescribed by Dayton to facilitate refugee return and repossession of property, on August 31, 1995 the Croatian government adopted the Decree on the Temporary Take-Over of Specified Property and then on September 20, 1995 the Law on Temporary Take-Over of Specified Property (LTTP).\(^67\) The LTTP authorized the Government to take under public administration property that was:

> Abandoned by its owners and not personally used by them, situated in the previously occupied [….] territory of [Croatia], […] owned by the persons who left [Croatia] after 17 August 1990 or who [were] staying in the occupied area of [Croatia] or in the territory of Federal Republic of Yugoslavia or in the occupied territory of [BiH] or […] placed in the territory of [Croatia] and owned by the citizens of the Federal Republic of Yugoslavia.\(^68\)

The term “abandoned property” is not defined in the law, and therefore predominantly Serb individuals working abroad, on holiday, or away from their homes temporarily lost possession of their homes. Under the law this property could be temporarily allocated to:

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\(^{67}\) Joachim Carlson, "The Right to Property in Croatia in the Aftermath of the Dissolution of the Former Yugoslavia (Draft)" (Uppsala, 2000) 9.

\(^{68}\) Ibid. 10.
Displaced persons and refugees, returnees whose property has been destroyed or damaged during the liberation war, war invalids, families of Croatian defenders killed or missing in the liberation war, and other citizens performing duties vital for the security, reconstruction and development of the previously occupied areas.\(^69\)

The stated purpose of this legislation was to "regulate the temporary take-over, use, administration and supervision of the property of natural persons specified in [the] Law in order to protect this property and to safeguard the claims of creditors arisen in connection with it."\(^70\) Private property rights were further limited by the 1996 Law on Areas of Special State Concern (LASSC) which prescribed that temporary users could obtain an ownership title after ten years of uninterrupted use.\(^71\) The LTTP was abolished on July 10, 1998.\(^72\) However, the cancellation of the LTTP did not remedy the effects of the legislation. It only meant that new properties could not be allocated.

In 1998, under pressure from the international community, the government enacted the Program for the Return and Accommodation of Displaced Persons, Refugees and Resettled Persons (Return Program), which for the first time created a mechanism for the repossession of property.\(^73\) The Return Program established municipal Housing Commissions which were comprised of five individuals appointed by the municipal/town mayor to facilitate the restitution of property, stipulating that two of the five had to be

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\(^69\) *Law on Temporary Take-Over and Administration of Specified Property*, Art. 5, para 2. in Ibid. 11.

\(^70\) *Law on Temporary Take-Over and Administration of Specified Property*, art. 1 in Ibid. 10.

\(^71\) Ibid. 18.

\(^72\) Official Gazette, No.101/98.

\(^73\) Carlson, "The Right to Property in Croatia in the Aftermath of the Dissolution of the Former Yugoslavia (Draft)" 25.
minority members. This, of course, meant that the minority members—usually Serbs—could always be outvoted by the other three members—usually Croats.

The program states that, excepting cases of "illegal" or "multiple" occupancy, prior to the owner's repossession of his/her property, the Housing Commission must ensure the provision of "alternative accommodation" for the temporary user. This stipulation has served to make restitution largely ineffective in returning property to those from whom it was taken. Alternative accommodation has been understood to be permanent and of a high quality. It was not until summer 2001 that a standard for the type of alternative accommodation to be allocated was prescribed. The standard prescribed was higher than Croatia's standard of provision under its social welfare legislation. The OSCE criticized this requirement because of the privilege it afforded to secondary occupants and because little such accommodation was owned by the state and therefore rarely available. The requirement for the provision of this high standard of alternative accommodation effectively blocked the repossession of property process.

**Bosnia-Herzegovina**

During and after the war, all three sides used property laws to further ethnic cleansing and reinforce its outcome. The private property of those who had fled was declared "abandoned" and various authorities reallocated it for the use of others.

74 Ibid. 26.
76 Ibid.
77 Ibid.
78 Ibid.
79 Ibid. 7.
Authorities used the pre-existing Yugoslav Law on Housing Relations to cancel the occupancy rights of those who fled, which occurred in Croatia as well. Generally, “occupancy rights” had been assigned to individuals by their employers and held almost all attributes of a property right (for example, the rights to bequeath or to exchange) barring the right to sell or leave vacant. They could be cancelled if the assigned occupant did not inhabit the apartment for more than six consecutive months without justified reason.

Immediately after the signing of the Dayton Peace Agreement, the government issued a decree giving internally displaced persons eight days to return to their homes or fifteen days if they were abroad. Failing to return, they would permanently lose their occupancy rights. However, most of those displaced were not aware of the passage of this law and were unable to return at this time. In regards to restitution, the government issued decrees which made repossession dependent upon compensation or alternative accommodation to be provided to the occupant. With over half the housing stock either destroyed or occupied, this delayed repossession indefinitely.

However, in accordance with the Dayton Peace Accords, property rights in BiH were enshrined in the BiH constitution. The European Convention on Human Rights and all the additional Protocols were incorporated directly into the BiH legal system with priority over all other law. The constitution also established an Ombudsperson and a

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81 Ibid.
82 Ibid.
83 Official Gazette RBiH, 33/95 as cited in Ibid.
84 Ibid. 67-68.
85 Ibid. 68.
86 Ibid. 70.

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Human Rights Chamber to have jurisdiction over human rights violations committed by the state or either of the two entities.87

From 1995 to 1997 return results were limited. Largely uncoordinated, hundreds of Non-Governmental Organizations (NGOs) and International Organizations (IOs) had conducted various ad hoc return projects.88 These limited results prompted coordination of activities and prioritization of "minority return"—that is, return of ethnic groups to areas where they were not the ethnic majority.89 This resulted in an increased reliance on the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), a new approach of the international community taken against uncooperative municipal officials, and a change in the policy on reconstruction.

The Dayton Agreement established CRPC as a domestic/international property claims tribunal. The nine-member tribunal is comprised of three international staff, two Bosnian Serbs, two Bosnian Croats, and two Bosnian Muslims. In practicality, though, the commission is an international organ. The commission verifies claims to properties and is authorized "to disregard any legislation which is discriminatory or contrary to the right to return."90 The CRPC has assumed a prominent role in restitution of property operating with a six million USD annual budget by 1999 and having issued 217,000 decisions on property by April 2002.91 Although CRPC decisions recognized the right of the owner to his/her property, a CRPC decision did not necessarily mean that the owner could in fact repossess his property when the property was occupied by someone else.

87 Ibid.
88 Ibid. 72.
89 Ibid.
90 Ibid.
91 Ibid. 73.
The CRPC did not have an enforcement arm or control over the municipal or state-owned housing stock, which in practical terms meant that owners did not in actuality have access to their properties. Furthermore, the police and local officials were often hostile to minority return and thus refused to assist with repossession.\textsuperscript{92}

In 1998, the High Representative gained the authority to impose laws and dismiss elected officials.\textsuperscript{93} The High Representative then imposed the Property Law Implementation Plan (PLIP)\textsuperscript{94} which prescribed stringent standards for the provision of alternative accommodation for secondary occupants. To qualify for alternative accommodation one must:

Fall below a certain income threshold, have no assets, including allocated land, and have demonstrably made...every effort in their power to gain repossession of their pre-war property. This includes making efforts to reconstruct this property, if uninhabitable. Temporary occupants who have at any point rejected any offer of Alternative Accommodation, either from the local authorities or from the claimant, or any offer of housing construction assistance, have no right to Alternative Accommodation. Nor do those whose parents, children, spouse, or family household members of any date since 1991 have regained access to pre-war accommodation, or who have found accommodation anywhere in the same Entity of displacement, or the pre-war city or municipality. Temporary occupants who were

\textsuperscript{92} Ibid.
\textsuperscript{93} OHR, Office of the High Representative: General Information (OHR, 2003 [cited November 1 2003]).
\textsuperscript{94} Ibid.
subtenants before the conflict also have no right to Alternative Accommodation.  

PLIP also prescribed that the secondary occupant did not have to be provided with alternative accommodation prior to repossession by the owner. These laws also obliged the police to carry out forcible evictions.  

PLIP has been extremely successful in facilitating repossession for owners. By 2002, about 8000 claims per month were being implemented. This does not mean that all decisions resulted in owners returning to their properties; in many cases owners chose to sell or rent their properties, or wait until the market improved to do so.

The Response of the International Community to the Conflict

Although the repossession regimes are clearly imperfect, their existence and the persistence of the international community in implementing them represents a dramatic departure from the policies of the first half of the twentieth century. While previous population transfers were perceived as inevitable and necessary to promote peace, the international community took a very different stance when it came to the former Yugoslavia. The international community could have allowed the consolidation of ethnic cleansing, stating that it was a necessary evil or that ethnic homogeneity would bode well for peace in the long term. Yet instead, the international community actively tried to reverse it. This policy begs an explanation.

Although there were disagreements amongst the international community regarding the imposition of sanctions, arms embargoes, and military intervention, there

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were consistent and widespread calls for the right of displaced persons to return to their homes or to receive compensation should they be unable or unwilling to do so. This position is borne out in all of the peace proposals during the conflict, UN Security Council (SC) resolutions, and the statements of various governments. This high degree of agreement and consistency indicates both the strength and clarity of the right of restitution of property as an international norm.

In a preliminary attempt to end the unfolding crisis, on September 7, 1991 the EC convened a peace conference in The Hague. The EC stated that it would accept any outcome of negotiations that adhered to four principles: the use of force was unacceptable in achieving objectives; any forcible border changes were unacceptable and would not be recognized; the rights of all those who lived in Yugoslavia must be respected; and it was necessary to take account of all legitimate concerns and aspirations of all parties involved. This was also articulated in a September 25 Security Council resolution sponsored by Austria, Belgium, France, the USSR, and the UK as well as a September 3 Conference on Security and Cooperation in Europe (CSCE) Declaration. The international community consistently reiterated these principles throughout the conflict. As there were still no major population displacements, the principle of the right of return to the home was not yet articulated.

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97 Ibid.
99 Ibid.

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Prompted by reports of ethnic cleansing, the UN and the EC convened the London Conference from August 26-27, 1992 in London.\textsuperscript{102} The conference established the Steering Committee chaired by Lord David Owen, representing the EC presidency and Cyrus Vance, representing the UN Secretary General. The Steering Committee also comprised an EC troika, a CSCE troika, the five permanent members of the UN Security Council (P5), a representative of the Organization of the Islamic Conference (OIC) and two representatives from neighboring states.\textsuperscript{103} The Steering Committee’s task was to supervise six working groups on issues ranging from humanitarian to ethnic to economic concerns. The working groups would meet in continuous session at the UN in Geneva.\textsuperscript{104}

The conference resulted in all Yugoslav republics recognizing the territorial integrity of BiH and pledging guarantees for minorities. Other outcomes were the establishment of an international peacekeeping force (UNPROFOR), the establishment of the permanent International Conference of the Former Yugoslavia (ICFY), and the declared right of return for all displaced persons and refugees.\textsuperscript{105} The right of return entailed the right of all displaced persons to return to their homes, and if they chose not to return they were entitled to receive compensation for their properties.\textsuperscript{106} The establishment of UNPROFOR, it was hoped, would put in place conditions which would allow return to occur.\textsuperscript{107}

\textsuperscript{104} Ibid. 22.
\textsuperscript{105} Allcock, Milivojevic, and Horton, \textit{Conflict in the Former Yugoslavia: An Encyclopedia} 160.
There was also a strong condemnation of the possibility of partitioning BiH along ethnic lines. At this conference, the Bosnia Working Group presented a paper entitled "Options for BiH" which eventually evolved into the Vance-Owen Peace Plan.\(^{108}\) It envisaged seven to ten multi-ethnic regions, constitutionally designed as multi-cultural with a federal government.\(^{109}\) Although this proposal envisaged cantonization based upon majority ethnicity, it also envisaged the right of individual return and respect for minority rights within each canton. It was believed that this proposal would prevent the partition of BiH into three regions premised on ethnicity. It is significant that the principles of the preservation of multi-ethnicity and the right of return were articulated so early in the conflict and were agreed to by not only the international community as represented by the UN and the EC, but also by the former Yugoslav republics. This indicates a strong acceptance within the international community that an individual’s property rights could not be violated legitimately due to conflict or ethnic identity.

The International Conference for the Former Yugoslavia (ICFY) convened in Geneva in September 1992, meeting in continuous session, to provide a framework for ongoing peace negotiations.\(^{110}\) In October 1992, the conference called for the “reversal” of ethnic cleansing.\(^{111}\) That is, the conference not only condemned forcible expulsions, but called for their undoing. The conference produced the Vance-Owen Plan from 1992 to 1993. The plan sought to ensure territorial integrity of BiH, to resist “ethnic purification,” and to deny the Bosnian Serbs contiguous territories.\(^{112}\) It comprised three


\(^{109}\) Ibid.

\(^{110}\) Allcock, Milivojevic, and Horton, *Conflict in the Former Yugoslavia: An Encyclopedia* 124.


\(^{112}\) Gow, *Triumph of Lack of Will* 309.
components: military, political, and a map.\textsuperscript{113} The map envisaged the administrative division of a federal BiH into ten provinces governed by proportional representation based on the 1991 census.\textsuperscript{114} Nine of ten would have a governor who belonged to the majority ethnicity and a vice-governor belonging to the ethnicity of the second largest ethnic group.\textsuperscript{115} The tenth, Sarajevo, would have a separate status. The Vance-Owen Peace Plan ambitiously envisaged that the local police would be responsible to ensure that the reversal of ethnic cleansing was carried out and that the UN Civilian Police would be responsible for monitoring the local police’s fulfillment of this requirement.\textsuperscript{116}

The Vance-Owen Peace Plan failed when the signature of Radovan Karadzic, leader of the Bosnian Serbs, was nullified by a vote in the self-proclaimed Bosnian Serb Assembly on May 5, 1993.\textsuperscript{117} Karadzic had signed with the caveat that should the assembly reject the proposal, his signature would be annulled. Some analysts attribute the Bosnian Serbs’ thwarting of the Vance-Owen Peace Plan to the US’s lukewarm response to it.\textsuperscript{118} Although the US did not condemn the proposal, it did not heartily endorse it because it believed that the plan “rewarded aggression and condoned ethnic cleansing,”\textsuperscript{119} was “a thinly disguised partition,” and violated the principle of self-determination.\textsuperscript{120} The US’s response encouraged Karadzic to hold out for better options.\textsuperscript{121} The US’s primary

\textsuperscript{113} Ibid. 235.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
\textsuperscript{118} Gow, \textit{Triumph of Lack of Will} 313.
\textsuperscript{119} Ibid.
\textsuperscript{121} Gow, \textit{Triumph of Lack of Will} 241-42.
objection to the plan was that it did not go far enough to ensure multi-ethnicity, even though its implementation would have ended the conflict.

The Contact Group, comprised of France, Germany, the UK, the Russian Federation, and the US, was established in 1994 to take the lead in reaching a peace settlement.\textsuperscript{122} Within the Contact Group, the US and Russia played a greater role and its establishment signified the failure of European leadership and the necessity of US leadership.\textsuperscript{123} The Contact Group developed a proposal which adhered to the principles set out since the beginning of the conflict—including the right of return and restitution of property—and proposed that BiH be divided into two “entities;” the Muslims and Croats would share the Bosniac-Croat Federation comprising 51% of the territory and the Bosnian Serbs would have the Republic of Srpska which comprised 49% of the territory of BiH.\textsuperscript{124} The Contact Group put forth both incentives and disincentives to encourage acceptance of the proposal. However, the Serbs rejected the proposal in the spring of 1995.\textsuperscript{125}

Proposals that advocated partition and the acceptance of ethnic homogeneity received little currency throughout the conflict. At the 1992 London Conference, the Dutch Presidency proposed that any solution to the conflict would be acceptable if it resulted from a peaceful process and was based on the consent of all parties, even if that process meant partition based on ethnic boundaries.\textsuperscript{126} This proposal was rejected by the eleven other EC members because it was believed that it would open a “Pandora’s box”

\textsuperscript{122} Allcock, Milivojevic, and Horton, \textit{Conflict in the Former Yugoslavia: An Encyclopedia} 124.
\textsuperscript{123} Ibid.
\textsuperscript{125} Ibid.

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of border disputes, that the various pockets of ethnic minorities would make redrawing boundaries difficult, and that “it was considered out of date to draw state borders along ethnic lines.”

Through the conflict, a host of Security Council Resolutions condemned the practice of ethnic cleansing and called for its reversal through the voluntary return of all those who had been displaced to their homes. For example, April 18, 1993 Resolution 820\(^{128}\) sponsored by nine SC members including P5 members France, the UK, and the US, stated in the preamble that “any taking of territory by force or any practice of “ethnic cleansing” is unlawful and totally unacceptable, and insisting that all displaced persons be enabled to return in peace to their former homes.” And in point 7: “The Security Council reaffirms its endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so.”\(^{129}\) Resolution 1009 adopted on August 10, 1995 states in point 2:

> The Security Council demands further that the Government of the Republic of Croatia, in conformity with internationally recognized standards [...] respect fully the rights of the local Serb population


\(^{127}\) Ibid.


\(^{129}\) S/RES/820 reproduced in Ibid. 37.
including their rights to remain, leave or return in safety [...] and create
conditions conducive to those persons who have left their homes.\textsuperscript{130}

Other Security Council resolutions, such as 752, 757, 771, 787, and 819, demonstrate the
consistency of the absolute denunciation of ethnic cleansing throughout the conflict.
Language in these resolutions and statements made during Security Council debates
reveal the widespread revulsion of ethnic cleansing, and the adamant resolve for its
771, Austria stated:

The international community has the clear obligation to assist displaced
persons in returning to their homes and regaining their property. Many
persons have been forced to sign documents renouncing their property
rights. There can be no doubt that such documents are null and void
and that compensation should be given for property that has been
destroyed.\textsuperscript{131}

Lord Owen, addressing the Security Council on November 13, 1992 on the
Vance-Owen Peace Plan stated:

Our constitutional proposals for Bosnia make clear there is not going
to be a crude division of Bosnia and Herzegovina into three separate
provinces, because such an arrangement would simply endorse ethnic
cleansing [...] A vital aspect of our constitutional proposals [...] is the
powerful interlocking mechanism for the reversal of ethnic cleansing.

\textsuperscript{130} S/RES/1009 as cited in Scott Leckie, \textit{Housing and Property Restitution for Refugees and Internally
Displaced Persons: International, Regional and National Legal Resources}, vol. 7, \textit{Sources} (Amsterdam:
Primavera, 2001) 15.
\textsuperscript{131} S/PV.3106, 13 August 1992 in Bethlehem and Weller, eds., \textit{The 'Yugoslav' Crisis in International Law: General Issues}, Part I 199.
People who wish to return to their homes or land will be able to call on an ombudsman for help in negotiating with local authorities and, if need be, help in going to court.\textsuperscript{132}

The same day, UN High Commissioner for Refugees Sadako Ogata addressed the Security Council stating:

I take part in the condemnation by the entire international community of [the] abhorrent practice [of ethnic cleansing], emphasizing the rights of people to stay where they are, in conditions of full security, and stressing the responsibility of everyone to ensure respect for this right...I sincerely hope the day will come when refugees and displaced persons on all sides will be able to return to their homes.\textsuperscript{133}

Japan stated:

Japan denounces the practice of ‘ethnic cleansing’ perpetrated by Serbian military and paramilitary forces in Bosnia and Herzegovina, and insists that the resulting change in the ethnic composition of the territory must not be accepted as a \textit{fait accompli}.\textsuperscript{134}

On November 16, 1992 Lithuania stated, “Even though the Bosnian Serbs may have valid political aspirations, nothing can justify the armed aggression, massive expulsions and killing of innocent civilians taking place in Bosnia and Herzegovina.”\textsuperscript{135}

The principle of the right of post-conflict return and repossession of property was finally implemented in BiH once the Dayton Peace Accords were signed. Until Dayton,

\textsuperscript{132} S/PV.3134 reproduced in Ibid. 126.
\textsuperscript{133} S/PV.3134, 13 November 1992 reproduced in Ibid. 129.
\textsuperscript{134} S/PV.3134, 13 November 1992 reproduced in Ibid. 134.

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the Bosnian Serbs had thwarted peace efforts primarily because, due to their military superiority, they would have been required to make the largest concessions.136 Changes on the ground reduced Serb territorial gains thus making negotiation more attractive.137 The US turned a blind eye to Croatia's importation of Iranian weapons138 and provided Croatia with military assistance.139 Croatia then launched successful offensives regaining two-thirds of its territory which had been held by Serb forces.140 NATO air strikes and the Bosniac-Croat gains in BiH were also successful in reducing Serb gains.141

The Dayton Peace Agreement was initialed by the Croatian, Bosnian, and Yugoslavian government on November 21, 1995 in Dayton, Ohio and signed in Paris on December 14, 1995. Annex 7 on Refugees and Displaced persons in Article 1 of Chapter 1 states:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.142

The agreement establishes the Commission for Displaced Persons and Refugees to implement property claims.143 Its mandate is to:

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135 S/PV.3137 reproduced Ibid. 175.
136 Hyland, Clinton's World: Remaking American Foreign Policy 39.
137 Ibid.
138 Ibid.
139 Gow, Triumph of Lack of Will 276.
140 Hyland, Clinton's World: Remaking American Foreign Policy 39.
141 Weiss, "Dealing with the Displacement and Suffering Caused by Yugoslavia's Wars," 186.
142 Dayton Peace Agreement.
Receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation *in lieu* of restitution.  

As detailed above, the Dayton Peace Agreement has been extremely successful in restituting property to its owners. The repeated calls for restitution of property throughout the conflict, their enshrinement in Dayton, and their subsequent implementation are curious because of the massive population transfers which occurred during the first half of the twentieth century. It is significant that there was widespread acceptance of this principle and that the international community has gone to great lengths at a great financial burden to implement this course of action. This change in behaviour from the first half of the twentieth century to the Yugoslav conflict requires explanation.

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144 Ibid.

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Part II: Key Normative Changes

There are five notable differences in the peace underpinning the Dayton Peace Accords compared to the peace agreements of the first half of the twentieth century. If Dayton were to follow the pattern of peace treaties of the first half of the century, then it would have been premised on the explicit notion of ethnic nationalism, allowed for partition, any reparations would have been paid by the losing states to the winning states, those belonging to the ethnicity of the losing state would be deemed responsible for the war, and the gains made in war would be kept by the winning state. Rather, the settlement saw something vastly different; that is, a preference for civic nationalism, territorial integrity, the individual’s right of restitution, individual as opposed to collective responsibility, and the affirmation of individual property rights.

1. Civic not Ethnic Nationalism

In 1998, William Montgomery, US Ambassador to Croatia from 1998-2000, stated:

“Croatia’s interest [...] must have a vision of how to build a better future [...] One path would continue the pattern of ethnic hatred and conflict that has characterized this region for the past century [...] The other path, which admittedly is more painful and more difficult in the short term, is to adopt the reconciliation processes implemented in Western Europe following the Second World War and which have led to the establishment of the European Union.”

Montgomery's analogy to WWII is somewhat fallacious, but illustrative of the rhetoric which seeks to justify the ethnic reconstitution of the former Yugoslavia. The path the international community insisted Croatia and BiH pursue after the conflict, namely ethnic reconstitution, was vastly different from the path taken in the aftermath of WWII to promote ethnic homogeneity. WWII had resulted in 40-50 million displaced persons and eighteen million alone after the war.\textsuperscript{146} A large number of these were the result of organized "population transfers" which were explicitly sanctioned and legitimized by the international community.\textsuperscript{147} The practice of ethnic cleansing, or "population transfer," as it had been called, was a legitimate means of nation building.\textsuperscript{148} In fact, it was believed that the transfer of ethnic minorities was a viable solution to "nationality problems,"\textsuperscript{149} and that creating ethnically homogenous communities would ease existing or potential ethnic tensions.\textsuperscript{150} The path to peace in post-WWII Europe was perceived to be in ethnically homogenous states whereas in Balkans it has been touted as being secured in a liberal multi-ethnic democracy.

Ethnic nationalism has been replaced by civic nationalism as an international norm. Civic nationalism is "predicated upon political rather than ethnic identity"\textsuperscript{151} making state territorial boundaries the legitimate division between political communities. Ethnic nationalism rests upon the notion that identity is determined by ethno-cultural

\begin{footnotesize}
\begin{enumerate}
\item Philipp Ther, "The Integration of Expellees in Germany and Poland after World War II: A Historical Reassessment," \textit{Slavic Review} 55, no. 4 (1996): 781.
\item Jackson-Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms."
\end{enumerate}
\end{footnotesize}
origin, and therefore underscores "the political ideal of the homogeneous nation-state."\textsuperscript{152} This normative change, in large part, delegitimized the aims of the warring parties in the dissolution of the former Yugoslavia to create ethnically homogenous states.

The concept of ethnic nationalism underscores the ideal of self-determination which Woodrow Wilson "hailed [...] as the organizing principle of the 1919 territorial settlement."\textsuperscript{153} The right of self-determination was granted to "peoples" who were understood to be "[inhabitants] of a particular area [having] a unique language and culture."\textsuperscript{154} This principle underpinned the post-WWI creation of new nation-states such as Poland, Czechoslovakia, Austria, Hungary, Romania, Albania, Finland, Estonia, Latvia, and Lithuania.\textsuperscript{155}

Germany employed ethnic cleansing to achieve ethnically homogeneous populations during WWII. Excluding the "final solution" for the Jews, Hitler's policy of \textit{Umsiedlung} or resettlement entailed the relocation of ethnic German minorities to secure areas for the expanding territory controlled by the Reich.\textsuperscript{156} Germany concluded bilateral agreements with the Baltic States, Italy, Romania, Yugoslavia, and Bulgaria for the transfer of their ethnic German populations who were then resettled in the Incorporated Territories of Western Poland, Upper Silesia, and East Prussia resulting in the displacement of the Slavs who had previously inhabited these areas.\textsuperscript{157}

\textsuperscript{152} Ibid. 820.  
\textsuperscript{153} Ibid. 818.  
\textsuperscript{154} Ibid. 823.  
\textsuperscript{155} Ibid.  
\textsuperscript{156} Ibid. 825.  
\textsuperscript{157} Ibid.  

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Over the past fifty years a normative shift has occurred rendering forced population transfers illegitimate. This is evidenced by the prohibitions and restrictions in humanitarian law, crimes against humanity, human rights texts and emerging law and standards.\textsuperscript{158} Ethnic cleansing is prohibited under humanitarian law by the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War and the 1977 Additional Protocols I and II which prohibit the forced movement of civilians.\textsuperscript{159} Thus, humanitarian law prohibits the practice of mass deportation in times of war.

Crimes against humanity are defined by the London Charter of the International Military Tribunal (IMT) which was adopted in order to lay the legal foundations for prosecuting alleged Nazi war criminals.\textsuperscript{160} Article 6 defines crimes against humanity as

\begin{quote}
"murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war."
\end{quote}

These prohibitions were reaffirmed by the UN General Assembly and the 1968 Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity.\textsuperscript{161} Law pertaining to crimes against humanity covers acts which are committed

\begin{footnotesize}
\textsuperscript{158} Ibid. 832.
\textsuperscript{159} Protocol II, article 17: "1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2) Civilians shall not be compelled to leave their own territory for reasons connected with the conflict." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). http://www.unhchr.ch/html/menu3/b/94.htm
\textsuperscript{161} Ibid.
\textsuperscript{162} Convention on the Nonapplicability of Statutory Limitation to War Crimes and Crimes Against Humanity of 1968 (entered into force 11 Nov. 1970), 754 U.N.T.S 73 in Ibid.
\end{footnotesize}
during peace as well as war, and are not exonerated even if they are sanctioned under domestic law.\footnote{163} Therefore, expulsions are prohibited during times of peace as well.

Various human rights texts provide both direct and indirect protection against expulsion.\footnote{164} The right to self-determination, protection against genocide and discrimination, freedom of movement, freedom of religious worship, freedom of assembly, freedom of expression, cultural identity, adequate housing, right to education, and protection against forced labour lend support to the prohibition of ethnic cleansing.\footnote{165}

These rights are found in human rights texts such as the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1992 Declaration of the Rights of the Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.\footnote{166}

Particularly, the delegitimization of population transfers has also been manifested in the development of the right of return. In contrast to the post-WWI and WWII treaties in which ethnic minorities were forcibly exiled and left without the possibility of return, the 1991 Paris Agreement on Cambodia, the 1995 Dayton Accords and various UNHCR Executive Committee conclusions on Afghanistan, Angola, Tajikistan, Myanmar and

\footnote{163} Ibid. 834-35.  
\footnote{164} Ibid.  
\footnote{165} Ibid. 835.  
\footnote{166} Ibid.  

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Georgia acknowledge the right of post-conflict return for those displaced as the result of a conflict.  

There is some suggestion that this shift in policy is not necessarily due to an ideational shift in favour of the human rights paradigm, but rather to the changed political reality in the post-Cold War World. In the context of the Cold War, “refugee law focused on the right of people to leave their home country and to seek asylum in another state. The right of return was generally not a true option.” Additionally, “the vast majority of refugees find asylum in developing countries, which often cannot absorb them [therefore] repatriation […] has become the most viable option.” According to Sadako Ogata, former UN High Commissioner for Refugees, in the post-Cold war world “refugees are victims of civil war and political conflict, rather than persecution.” Regardless of the reasons for this shift, within the post-Cold War paradigm, the right of return has solidified.

There are a number of human rights texts which directly prohibit forced expulsion. The 1950 Fourth Protocol to the European Convention for the Protection of Human Rights prohibits the individual or collective expulsion of citizens and the collective expulsion of aliens. The 1978 American Convention on Human Rights prohibit “against expulsion of individuals and mass expulsion targeting national, racial,

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167 It must be noted that these post-war agreements, with the exception of the Dayton Peace Accords foresee the return of refugees and displaced persons to their countries of origin and not their former place of residence specifically. Albert, "The Return of Refugees to Bosnia and Herzegovina: Peacebuilding with People," 10-11.
169 Ibid.
170 Ibid.
ethnic or religious groups."\textsuperscript{172} The Organization for Security and Cooperation in Europe’s 1990 Copenhagen Document states that “persons belonging to national minorities have the right to freely express, preserve and develop their ethnic, cultural, linguistic or religious identity […] free of any attempts at assimilation against their will.”\textsuperscript{173} The 1995 Council of Europe’s Convention for the Protection of National Minorities prohibits “practices aimed at assimilation of persons belonging to national minorities against their will” and “measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities.”\textsuperscript{174}

Throughout the 1990s there have been a variety of calls for further legal codification against ethnic cleansing. These have been manifested in various draft international agreements, statements by legal, humanitarian and international organizations.\textsuperscript{175} These call for further protections and guidelines prohibiting ethnic cleansing, state that compulsory transfer or population exchanges are “inherently objectionable,” and advocate “a specific legal instrument [to] clarify that population transfer is, \textit{prima facie}, unlawful.”\textsuperscript{176}

Clearly there have been violations of this norm such as the expulsion of Greek and Turkish Cypriots in Cyprus, expulsion of Bulgarian Turks in the 1980s, and the expulsion of various minorities in the aftermath of the breakup of the Soviet Union.

\textsuperscript{171} Article 3: “No one shall be expelled by means either of an individual or of a collective measure from the territory of a state in which he is a national,” Article 4 prohibits “collective expulsion of aliens.”
\textsuperscript{172} Articles 22 (3) and (4) cited in OCHA, \textit{An Easy Reference to Humanitarian Law and Human Rights Law: For Humanitarian Coordinators Operating in Situations of Internal Armed Conflict} (New York: United Nations, 1999) 2.
\textsuperscript{174} Ibid. 836-37.
However, as Legro notes "[v]iolations of a norm do not necessarily invalidate it, as is seen, for example, in cases of incest. The issue is whether actors are socially or self-sanctioned for doing so."\textsuperscript{177} These developments have not been sanctioned by the international community, which is evident by various denunciations of them as well as calls for their reversal.

In contrast to the rhetoric of ethnically homogeneous states during the first half of the twentieth century, those advocating peace in the Balkans employed a very different discourse. The international community stated many times that the return home of those displaced "lay at the heart of any possible long-lasting peace."\textsuperscript{178} For example, in a speech given during the Dayton negotiations Warren Christopher, US Secretary of State, stated that the US and the EU "share the conviction that Europe’s post-cold war peace must be based on the principle of multiethnic democracy."\textsuperscript{179} A US objective in developing and implementing the Dayton Agreement was the destruction of "the myth that Bosnians from different ethnic groups [could not] live together."\textsuperscript{180}

The extent of the delegitimized status of ethnic nationalism is further illustrated by the language employed by Security Council members during debate. In a debate in May 1992, Hungary stated: "At the end of our century, undisguised efforts to create so-called nation-states, incorporating all people belonging to the same ethnic background,

\begin{thebibliography}{9}
\bibitem{Ibid} Ibid. 838-39.
\bibitem{Rosand} Rosand, "The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent," 1114.
\bibitem{Fabry} Fabry, "International Norms of Territorial Integrity and the Balkan Wars of the 1990s," 173.
\end{thebibliography}

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and the blatant use of force to achieve this aim through territorial conquests, are completely inadmissible and inexcusable.”

The representative from Equador stated: “It is indispensable that the rights of ethnic minorities be respected. It is indispensable that the principle of the self-determination of peoples be respected. That right should be accorded to the political entities that can assert self-determination rather than to the minorities in those political entities.”

The representative from the Russian Federation stated that efforts must be taken in order to “put an end to the bloodshed which continues...on the basis of agreed-upon principles such as recognition of the territorial integrity and sovereignty of States and renunciation of the ‘ethnic purity’ of regions, and in order to protect the rights of national minorities and others.”

The United Kingdom stated that:

Enforced expulsions on the ground of ethnic origin [...] [is] an [affront] to morality and [is] contrary to all the provisions of international humanitarian law [...] It is appalling that in the last decade of the 20th century, [ethnic cleansing] should be prevalent. The forcible removal of civilian populations is wholly contrary to the accepted tenets of international humanitarian law.

In April of 1994, Turkey stated “never in history has peace prevailed where injustice, aggression, and racism were rewarded. For a just and viable peace settlement, the

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184 S/PV.3106, 13 August 1992 in Ibid. 102.

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consequences of ‘ethnic cleansing’ and genocide should be reversed without further delay.”\textsuperscript{185}

During the drafting of the Dayton Accords, some individuals within the US administration suggested that a peace approach based on the interwar transfers (as specified in the treaties of Neuilly in 1919 and Lausanne in 1923) be adopted to resolve the Yugoslav crisis.\textsuperscript{186} However, this approach was rejected because it was believed that this would “aid and abet ethnic cleansing, while rewarding and legitimizing Serb aggression […] [and the US was].\textsuperscript{[u]}nwilling to accept that it might not be possible to lead the parties to live together in multiethnic harmony.”\textsuperscript{187}

The concept of civic nationalism meant that individuals could not be legitimately deprived of their rights nor afforded preferential treatment on the basis of their ethnicity. Specifically, it meant that people could not be legitimately deprived of their homes on the basis of their ethnicity.

2. Territorial Integrity

The concept of territorial integrity had a significant bearing on the outcome of the peace agreement. Upholding this norm meant that borders could not be legitimately altered by force and any legitimate changes had to fall along existing internal administrative boundaries.\textsuperscript{188} Accordingly, while the international community accepted the right of the former Yugoslav republics to secede (Slovenia, Croatia, BiH, and

\textsuperscript{185} S/2PV.3370 in Ibid. 429.
\textsuperscript{187} Ibid. 72.
\textsuperscript{188} Fabry, "International Norms of Territorial Integrity and the Balkan Wars of the 1990s," 145.
Macedonia) it repudiated attempts of sub-republic units, such as the Krajina Serbs, the Bosnian Croats and the Bosnian Serbs, to secede.\textsuperscript{189} In justifying this distinction, four arguments were made: the second wave of secessions were motivated by ethnicism; did not take place along administrative borders; secession for republics only was foreseen under the Yugoslav constitution; and that it is international recognition which makes borders inviolable.\textsuperscript{190}

The Serbs and Croats, conversely, wanted a tripartite partition of BiH into Serb, Croat, and Muslim parts creating a \textit{de facto} Greater Serbia and Greater Croatia.\textsuperscript{191} The statement of the Dutch Presidency of the EC, in closing the London Conference, exemplified this inconsistency: "The principle of self-determination cannot exclusively apply to the existing republics while being deemed inapplicable to national minorities within those republics [...] if the aim is to reduce the number of national minorities in every republic, better borders than the present ones could be devised."\textsuperscript{192} However, the proposal to allow changes in republic borders was rejected by the eleven other EC member states because of three stated reasons. They believed it could open a Pandora’s box of borders disputes; it was “out of date” to draw state borders along ethnic lines; and separate pockets of ethnic groups throughout BiH would make deciding on border lines difficult.\textsuperscript{193}

After WWI and less so after WWII, borders were redrawn to reward victors or better reflect ethnic composition. Mark Zacher details the development of the norm of territorial

\textsuperscript{190}Ibid. 
\textsuperscript{191}Gow, \textit{Triumph of Lack of Will} 253. 
\textsuperscript{192}Owen, \textit{Balkan Odyssey} 32. 
\textsuperscript{193}Ibid. 

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integrity from the seventeenth century to 2000 dividing its development into three major stages. The classical acceptance was that borders could be changed by force and/or without consent of the people who lived on the territory.\textsuperscript{194} Using Martha Finnemore and Kathryn Sikkink's three-stage model for norm development of emergence, acceptance, and internalization, Zacher outlines these three phases of the norm's development.

Zacher traces the emergence of the norm to the period between WWI and the end of WWII. During this period, the concept was articulated in Article 10 of the League of Nations Covenant: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."\textsuperscript{195} As a result of the post-WWI settlements, however, Italy was given a piece of Austro-Hungarian territory—South Tyrol—where few Italians lived, and Czechoslovakia and Poland obtained territories in which large numbers of ethnic Germans lived.\textsuperscript{196} This is illustrative of the classical practice of territorial conquest.

By the 1930s, the great powers were divided in their commitment to territorial integrity. The second period of norm development is acceptance, which is characterized by growing support for the norm and its integration into treaties to the point where it is viewed as legally binding by most countries.\textsuperscript{197} This period is from 1946-1976; beginning with Article 2:4 of the UN Charter and ending with the CSCE's Final Act.\textsuperscript{198} The norm became increasingly entrenched throughout the 1960s and 1970s and was manifested in such conventions as the 1960 UN Declaration which stated that colonies rather than

\textsuperscript{195} cited in Ibid. 219.
\textsuperscript{196} Ibid.
\textsuperscript{197} Ibid. 236.
ethnic groups were entitled to self-determination, the Organization of African Unity (OAU)'s 1963 Charter which supported respect for inherited boundaries, and the CSCE’s Helsinki Final Act.\(^{199}\) The third period, internalization, is designated from 1976 to the present in which there have been no major cases of territorial aggrandizement.\(^{200}\) Zacher states that the response of states to individual conflicts has strengthened the norm such as in Somalia’s war against Ethiopia from 1976-1980, Iraq’s invasion of Kuwait from 1990-1991, the dissolution of Yugoslavia in the 1990s, and the referendum in East Timor in 1991.\(^{201}\) During this period the International Court of Justice (ICJ) based a number of its decisions on the concept of *uti possidetis*, that is, states have rights to territories that were legally ceded to them by prior governing states and other states do not have the right to take them.\(^{202}\)

Zacher attributes the development of the norm in the international system to both instrumental and ideational factors. The ideational factors are “rooted in changing views of ethical behaviour toward other peoples and states.”\(^{203}\) Instrumental reasons include the perceived relationship between possible territorial aggressors and the major powers supporting the norm.\(^{204}\) The Western industrialized states have accepted them because they have associated territorial revisionism with major wars.\(^ {205}\) Non-western or developing states have accepted them due to “the existence of ethnic groups that overlap borders and can provoke territorial irredentism, the military weakness of many

\(^{198}\) Ibid. 276.  
\(^{199}\) Ibid. 237.  
\(^{200}\) Ibid.  
\(^{201}\) Ibid.  
\(^{202}\) Ibid.  
\(^{203}\) Ibid.  
\(^{204}\) Ibid.  
\(^{205}\) Ibid. 238.
developing states vis-à-vis Western supporters of the norm.” Zacher notes that “both instrumental and ideational factors influence the evolution of norms” and applying an ‘either/or’ approach...is wrong.”

The norm of territorial integrity was manifested in the many repudiations given by the international community in response to attempts by both Serbia and Croatia to alter the existing borders of the republics. Fabry notes “Whereas Western states and international organizations displayed plenty of expediency, inconsistency and wavering towards the Balkans, this position remained principled and consistent throughout the wars in the two republics.”

This norm re-enforced the norm of civic nationalism discussed previously. It was deemed illegitimate for Croatians, Serbs, or Muslims to demand their own homeland. Rather, the borders which became the international frontiers were those which had previously been the internal republic frontiers, in accordance with international customary law. Thus, the ethnic make-up and self-determination of peoples was not taken into account. This again indicates that the legitimate boundaries of political community are based on territorial divisions rather than ethnic demographics. Maintaining these borders required substantial commitment and resources from the international community. Partition along ethnic lines would have, in fact, required fewer resources.

In addition to reinforcing civic nationalism, it would seem that the norm of territorial integrity for states coupled with the human rights paradigm allows transference...
of the norm from the state to the individual level. The delegitimization of the use of force has made achieving objectives through its use dubious. This raises the question of whether the traditional rights of the states are becoming the rights of the individual. Although this issue is beyond the scope of this thesis to explore, it seems that both territorial integrity and increasing protection for individual property rights indicate the increasing inviolability of property generally—whether belonging to the state or individual.

3. Restitution to Individuals as Opposed to States

A major difference between the restitution regimes in the former Yugoslavia and previous restitution regimes is that restitution is being made to individuals as opposed to states. After WWI and after WWII “[restitution] was made to the government of the country from which the removal took place.”\(^{210}\) Restitution was a part of the larger concept of reparations which “referred to a fine among \textit{states}” and was levied by the winners of the war against the losers under the pretext that the losers had caused the war and were therefore obliged to compensate the countries which had suffered as a result.\(^{211}\) Consequently, “reparations were […] a relatively unambiguous and tangible form of ‘victor’s justice.’”\(^{212}\) This concept was reflected in the fact that states were the sole legitimate subjects of international law until after World War II.\(^{213}\)

Working within the paradigm, in the immediate aftermath of WWII, it was nations, not individuals that claimed reparations and restitutions. The Jews as a nation demanded

\(^{210}\) Vásárhelyi, \textit{Restitution in International Law} 169.
\(^{212}\) Ibid.

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restitution for property lost during the Nazi regime. Immediately after the war, Jewish organizations lobbied the Allies to force the Germans to pay reparations. However this was not a priority for the Allies and consequently the Allies did not invite Jewish representatives to attend the 1945 Paris Reparations Conference. Through intense lobbying Jewish organizations received unofficial status and were awarded minimal restitution which amounted to a few million dollars. This compensation was to come from German property held outside Germany. The Allies considered this small amount of compensation to have dealt with the issue of reparations.

In Germany, which had been divided into four zones occupied by the British, French, Soviets, and Americans, restitution was most successful in the American zone. In this zone, the US military government named the Jewish Restitution Successor Organization (JRSO) the legal successor of heirless property. The JRSO petitioned more than 100,000 claims, three-quarters of which were solved in a few years. Half of these were settled in one lump sum. In 1951, Jewish groups made a final attempt to have reparations imposed upon Germany. The Israeli government requested 1.5 billion dollars, which represented about one-quarter of all property seized, for the support of half a million Holocaust survivors to settle in Israel. Of the three types of property lost—1) Private 2) Heirless and 3) Communal—the Jewish representatives at the 1949 claims

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213 Ibid.
215 Ibid. 6.
216 Ibid. ix.
217 Ibid.
218 Torpey, Politics and the Past: On Repairing Historical Injustices 7.
220 Ibid. 8.
221 Ibid.
conference demanded restitution for the loss of types two and three.\textsuperscript{222} However, despite these claims, minimal restitution was made to the Jews initially. Elsewhere in Europe, Hungary was unwilling to compensate Jews until 1994,\textsuperscript{223} Poland allowed the return of Jewish religious property only in 1997,\textsuperscript{224} and as of 2000 "no meaningful private or communal restitution has taken place in the Ukraine, Belarus or Russia."\textsuperscript{225}

Another example which demonstrates state-to-state restitution was the revenue that Canada generated by liquidating—under the provisions of the Treaty of Versailles—German property it had seized during the war. The German citizens who lost property as a result of this seizure were not entitled to apply to the Canadian government for compensation, but the German government was responsible for compensating its own citizens for their losses.\textsuperscript{226} Additionally, the revenues gained by the Canadian government were available for Canadians to claim compensation for having suffered as prisoners of war, property damage, personal injuries etc.\textsuperscript{227} As the individual had no standing in international law he/she was unable to hold other states accountable for losses suffered at their hands. In short, an individual had a legitimate relationship with his/her own state, and states dealt with other states.

The concept of the individual as a subject of international law grew out of a response to the German atrocities against sub-national groups such as Jews, Gypsies,

\textsuperscript{222} Ibid. 4-5.
\textsuperscript{223} Ibid. 145.
\textsuperscript{224} Ibid. 146.
\textsuperscript{225} Ibid.
\textsuperscript{227} Ibid.

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homosexuals and the handicapped. “The human rights instruments promulgated by the United Nations after WWII were drafted to ensure that human beings would not, in the future, exercise their barbarous impulses on others without the latter having a juridical leg to stand on—especially when the perpetrator was the victim’s own government.”

The concept of human rights, which asserts that each individual has inalienable rights, is a significant paradigm shift. The human rights paradigm legitimizes claims of individuals, and does not allow them to be negated in the name of state interests. The regimes in the former Yugoslavia exemplify this point. The state has taken upon itself the obligation to restore the rights of individuals lost due to its own persecution of them. The property restitution regime solves each case individually. Unlike the reparations given to the Jews as a nation, the property restitution regimes in BiH and Croatia purport to solve each case on its own merits, restoring to each individual what s/he lost as a result of the conflict.

4. Individual as Opposed to Collective Responsibility

The insistence of the international community upon the establishment of property restitution regimes for all those who lost property, including Serbs, indicates a shift from the assigning of collective responsibility. The fifteen million ethnic Germans expelled throughout Europe after WWII without individual trial, were assumed to have collaborated with the Nazis and thus deemed collectively responsible for the Nazis’ atrocities. The Czechoslovak decrees, which called for the expulsion of three million

228 Torpey, Politics and the Past: On Repairing Historical Injustices 4.
229 Ibid. 5.
230 Ibid. 4.
Germans and the confiscation of their property, were explicitly based on the concept of collective guilt. In challenging their expulsion and deprivation of property a Czech court ruled that the expulsion of the Sudeten Germans and confiscation of their property had been legitimate because of their assumed collaboration with the Nazi regime. This illustrates the perceived acceptability of collective punishment. Due to the assumed guilt of the German nation, the question of paying reparations was deemed unnecessary.

The response to the various factions involved in the former Yugoslavia stands in contrast to the above-mentioned treatment of the ethnic Germans. Generally, the Serbs have received the lion's share of the blame for the conflict and the atrocities committed. Yet, the international community has made no distinction between those of Serb ethnicity and others regarding the right to reclaim their property.

5. The Strengthening of Property Rights and the Evolution of Restitution

The population expulsions and seizures of enemy property during the first half of the century did not envision allowing owners to retain control over, or in most cases to receive compensation for their losses. Although the Treaty of Lausanne offered compensation to those who had lost property as the result of the transfer, compensation is clearly a weaker form of property rights recognition than is the right to return and repossess. There was a recognition of the transferees' loss of property, but there was no consideration of restitution since the goal was to transplant the transferees with the

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232 Ibid. 729.
intention of them becoming part of another state. Nevertheless, the modern conception of property ownership includes the right not to use the property. With such a conception, transferees could have maintained control over their properties. However, they did not. This indicates that property rights were connected to property use.

Throughout the conflict, there were repeated calls for allowing those displaced to be allowed to return or receive compensation if they did not return. It is significant that there was little controversy surrounding whether there should be return of displaced persons. The Security Council passed a number of resolutions which stressed that “the voluntary return of all refugees and displaced persons to their pre-war homes were to be part of the lasting solution to the conflict.” The Dayton accords were highly specific in specifying a displaced person’s right to return to his/her “home of origin.” The 1995 Dayton Peace Accords on the former Yugoslavia insists specifically upon not only the right to return to one’s country of origin, but the right to return specifically to one’s home: “All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”

The emerging norm of post-conflict repossession of property, although not codified as such, can be observed in international law, other post-cold war peace settlements, UN

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233 Ibid.
resolutions, and a developing body of ECHR jurisprudence. The deprivation of property during wartime as a means of ethnic cleansing is now clearly in violation of international law. The Universal Declaration of Human Rights grants the right to own property and prohibits the arbitrary deprivation of such property. However, the inclusion of this provision was controversial, and Article 17 is the result of a compromise. From the outset, many states were reluctant to include property rights in international legal instruments. Article 17 states: “1) Everyone has the right to own property alone as well as in association with others. 2) No one shall be arbitrarily deprived of his property.” The controversy surrounding private property was due to the fact that “[a] new social system which prevailed in many states proclaimed the eventual abolition of private property, and even the Western democracies readily recognized that if there was a right to private property, its scope was severely mitigated by the public interest.” The resulting provision was weak due to the use of the word “arbitrarily” which was understood to mean “unlawfully.” This provided for deprivation of property if it were in accordance with domestic law and therefore established no international standard at all. Compared to previous state declarations of property such as the US Bill of Rights which states, “no person [shall] [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation” or the Declaration des Droits de l’homme et du Citoyen which described life, liberty, and property as fundamental and inviolable rights, the provision in Universal Declaration of Human Rights is weak indeed.

238 Ibid.
239 Ibid. 135.
The controversial nature of a right to property is further illustrated by its absence in both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights. In fact, the UDHR’s provision on property has the distinction of being the only article in the Universal Declaration with no counterpart in the multilateral treaties which were intended to give it binding effect.”

In the drafting of the European Convention on Human Rights (ECHR) a provision relating to property was dropped. Later, Protocol 1 was added which states:

1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Since it is questionable whether the UDHR holds the force of customary international law, it affords little protection for property rights. Although the ICCPR does not have a clause specific to property protection, it does provide protection for the home. Article 17 states: “1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2) Everyone has the right to the protection of the law against such interference or attacks.” The allocation of one’s home to others and the denial of the right

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240 Ibid. 136.
to use it could fall under the ambit of this article. However, the law specifically prohibits “arbitrary” and “unlawful” interference. Therefore, it must first be determined whether the interference is justified under the given circumstances. This clause is mitigated by Article 4 which grants states a “margin of appreciation” in determining whether or not emergency conditions permit derogation for particular provisions. A state party could legitimately derogate from its commitments under the ICCPR, if it were in accordance with the procedural and substantial requirements set out by Article 4.

Article 4 states:

1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language or social origin.

2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11 15, 16, and 18 may be made under this provision.

3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

H. M. Kindred, ed., International Law: Chiefly as Interpreted and Applied in Canada (Toronto: M. Anderson 55
This article contains seven principles which must be satisfied in order for the derogation of provisions to be in accordance with the ICCPR. These are: exceptional threat; proclamation; notification; non-derogability of fundamental rights; proportionality; non-discrimination; and consistency.

Property rights are much stronger in regional conventions. Article 23 of the 1948 American Declaration on the Rights and Duties of Man states that "every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." The Organization of American State's Convention on Human Rights, Article 21 states:

1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3) Usury and any other form of exploitation of man by man shall be prohibited by law.

The Racial Discrimination Convention provides for "freedom from discrimination in the enjoyment of property ownership." The American Convention states that no person shall be deprived of his property "except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

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244 Article 5(d)(v)
established by law." Article 14 of the African Charter states: “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The European Convention on Human Rights grants the right to “the peaceful enjoyment of [...] possessions” and prohibits the deprivation of such possessions “except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” Therefore although states still retain the right to limit property rights in the course of an armed conflict “[a]ssuming that the existence of an internal armed conflict constitutes a public emergency satisfying the requirements for derogation,” deprivation must be justified and legitimized through the payment of compensation. Therefore, although there is not an absolute prohibition of the deprivation of property during a conflict, there are restrictions upon it.

A body of ECHR jurisprudence has developed which indicates that the peaceful enjoyment of possessions has been interpreted as a property right. The European Court of Human Rights has interpreted this article to contain three rules. The first one is that of

245 Article 21
247 Article 8
the right to peaceful enjoyment of possessions. The second rule concerns deprivation of possessions subjecting it to the conditions of being in the “public interest,” and in accordance with “law and the principles of international law.” The third rule stipulates that states may control the use of property in accordance with the “general interest.” Thus the second and third rules lay out specific conditions for legitimate state interference, in the forms of both deprivation and control, with the first. Therefore in any given case, in order to determine whether or not there has been a violation of the first rule, it is necessary to determine whether or not either the second or third rules are applicable. The court has specified the aspects of the difference between the two in the Air Canada judgment. In this case, United Kingdom customs authorities, having found a large quantity of drugs on an aircraft, seized it and returned it to Air Canada after it had paid the required fine later the same day. Subsequently, Air Canada brought a claim against the UK government alleging that the aircraft had not been “liable to forfeiture” and therefore constituted an unjust deprivation of property. A claim was eventually launched before the ECHR, which ruled that no deprivation had occurred because “the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership.” Therefore, the primary distinctions between deprivation and control are the length of time a restriction is placed upon the possession, and the whether there is a transfer of ownership.

A 1996 admissibility decision of the European Court of Human Rights in a case brought forth by a Turkish Kurd against Turkey alleging a violation of Article 13 of the

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251 Ibid.
252 Air Canada judgment of 5 May 1995, Series A no 316-A, paras. 33-34 in Ibid. 316.
253 Air Canada judgment of 5 May 1995, Series A no 316-A, paras. 33-34 in Ibid.
ECHR—the right to an effective remedy—implied that the Turkish government was derelict in its duties by not offering redress to those displaced by the destruction of their villages by state security forces. In another judgment relating to a case brought against Turkey by an individual who lost access to her private property in Turkish-occupied Cyprus the court ruled that:

The complaint [was] not limited to access to property but [was] much wider […] because of the continuous denial of access the applicant had effectively lost all control, as well as all possibilities to use, to sell, to bequeath, to mortgage, to develop and to enjoy her land […] The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1.

The court's judgment infers that the European Convention obliges states to "institute property restitution procedures or to pay compensation in lieu of return and that failure to do so may constitute a violation of the right to peaceful enjoyment of possessions." Consequently, the court ruled that there had not been a change in ownership and the plaintiff remained the rightful owner of the property, but ordered Turkey to pay pecuniary damages "for the loss of rental value and increased market value

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254 "[T]he court considers it significant that the Government, despite the extent of the problem of village destruction, have not been able to point to examples of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or to prosecutions having been brought against them in respect of such allegations." In Akdivar and Others v. Turkey, Judgement of the European Court of Human Rights 16 September 1996, Reports 1996-IV, at para. 96. As cited in Simon Bagshaw, "Property Restitution and the Development of a Normative Framework for the Internally Displaced," Refugee Survey Quarterly 19, no. 3 (2000): 218.


256 Ibid. 219.
of the land" and non-pecuniary damages “for distress and anguish; costs and expenses; and interest on amounts unpaid.”

Although the arbitrary deprivation of property is clearly in violation of international and national legal norms, the post-conflict repossession of property is not as yet enshrined in international law. However, it may be argued that the norm is tending in this direction through the development of customary law, case law and practice. There is a current trend towards the establishment of the norm of restitution of property in addition to repatriation. The 1994 Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca states that “[a]n essential element of the resettlement process is legal security in the holding (inter alia, the use, ownership and possession) of land...[T]he Government undertakes to revise and promote legal provisions to ensure that such an act is not considered to be voluntary abandonment, and to ratify the inalienable landholding rights.”

The 1995 Dayton Peace Accords on the former Yugoslavia insist specifically upon not only the right to return to one’s country of origin, but the right to return specifically to one’s home: “All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities

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since 1991 and to be compensated for any property that cannot be restored to them.\textsuperscript{259}

This issue will be discussed further in Part III-4.

\textsuperscript{259} Annex 7: Article 1(1) of \textit{The General Framework Agreement for Peace in Bosnia and Herzegovina} 1995. www.ohr.int/dpa/default.asp?content_id=380
Part III: Explanations for Changes in Restitution Practices

The above sections established that there are far-reaching changes in how states and the international community more broadly have dealt with the issue of restitution following war. Restitution in the former Yugoslavia is a significant example of this change, but exists within a context of emerging regulations and other restitution regimes throughout the world which reveal that it is not just an anomaly. This paradigm change comprises a shift from ethnic to civic nationalism, border malleability to territorial integrity, state-to-state restitution to state to individual restitution, collective to individual responsibility, and dispossession without recourse to restitution as a right. These shifts are reflected in changing discourse about acceptable practices, and institutionalized in Security Council resolutions, peace treaties, IO policies and human rights case law. Not only has there been a change in rhetoric, but these changing ideas have had palpable effects on behavior. In short, this thesis establishes that there has been a significant normative change in how the international community deals with restitution. But this leads us to the question of the cause of those normative changes. Are they best understood as products of normative changes in the standards of behavior in international society, or better understood as the by-product of power politics and the pursuit of self-interest by the interested players? In this section of the thesis I analyze the explanations for these changes offered by the main theoretical approaches in the scholarly field of international relations. Much rests on this assessment, since the findings tell us the scope
for normative change affecting millions of people in an era characterized by civil and ethnic wars.

1. Rationalist explanations: Self-interest, Refugees and the Imminent US Presidential Election

In the field of international relations, rational choice theories posit that states act on the basis of their own self-interest defined in material terms. The state is conceived as a unitary actor. The state makes decisions by defining its goals and objectives, examining possible options to meet those objectives, forecasting the likely consequences of each alternative and then making a value-maximizing decision.\textsuperscript{260} Rational choice theory assumes that states act on their own self-interest defined materially. International events, then, are the outcomes of "aims and calculations of governments."\textsuperscript{261}

Through a rational choice theoretical lens, the establishment of restitution regimes is the result of key powerful states, such as Germany and the US, seeking to reduce the burden of supporting hundreds of thousands of refugees unable to return to their homes because of the conflict. Eric Rosand, John Scheib, and Richard Holbrooke suggest that such a concern played a role in the outcome. Rosand claims that the right of return originated from the concern to contain the conflict.\textsuperscript{262} Scheib and Holbrooke suggest that once the US took the lead in trying to find a resolution to the conflict, the German government pressured the US to ensure that "any agreement [would] [...] encourage the

\textsuperscript{261} Ibid. 13.
refugees to return home.\textsuperscript{263} With 300,000 refugees who had fled to Germany as of 1995, their inability to repatriate was extremely costly for Germany.\textsuperscript{264} Although this may be one of the factors which contributed to the policy of the overall right to return, it does not explain why refugees must have the right to return to their homes specifically. If habitable, they were usually occupied by other displaced persons of a different ethnicity. In practicality, the return home for one refugee meant the displacement of others, many of whom had already been displaced once themselves. Untangling chains of housing occupation has proved slow and difficult. If the primary objective had been to simply repatriate as many refugees as quickly as possible, other options would have achieved this objective much more easily—by, for example, allowing the consolidation of ethnic cleansing and encouraging refugees to return to areas of their ethnic majority. A system could have been established whereby refugees would receive compensation for their properties, and their house could then be assigned to someone of the “appropriate” ethnicity.

A second rationalist explanation for the US’s desire to intervene was that the US’s solving of the BiH problem was beneficial to President Clinton’s reelection campaign. This explanation holds that the motivation for the US’s intervention was due to Clinton’s presidency being at stake. According to William Hyland, by 1995 BiH had become a

\textsuperscript{264} Ibid.
\textsuperscript{265} John M. Scheib, "Threshold of Lasting Peace: The Bosnian Property Commission, Multiethnic Bosnia and Foreign Policy," \textit{Syracuse Journal of International Law and Commerce} 24, no. Fall (1997). More generally, it has been suggested that Western concern regarding refugee flows is “an ambiguous mixture of compassion for the plight of the unfortunates who have been case adrift and of fear that they will come pouring in.” Aristide R. Zolberg, Astri Suhrke, and Sergio Aguayo, \textit{Escape from Violence: Conflict and the Refugee Crisis in the Developing World} (New York: Oxford University Press, 1989) v.
symbol of Clinton’s failed foreign policy.\textsuperscript{266} Clinton’s foreign policy advisors believed that the US must end the war in BiH prior to the 1996 election campaign.\textsuperscript{267}

Domestic policy concerns may explain the timing for intervention. Although, they may be a factor in determining action, the precise nature of the action taken is not explained by this theory. Rather, the intervention taken by the Clinton Administration could have taken any number of forms. The long-term commitment to creating a viable and liberal democracy clearly exceeded a solution which would have sufficed to end the bloodshed during an election campaign. If the US had intervened solely to increase the Clinton administration’s chances of securing the 1996 election, it would be expected that immediately after an election victory, the US’s involvement would have diminished substantially. Instead, the US has followed through on a much longer-term commitment to BiH.

2. Realism and Security Concerns: Preventing a Precedent for Border and Ethnic Disputes

Realist theorists might offer an alternative account focusing on core security interests of states. Realism posits that the primary objective of states is ensuring their own survival. Therefore, states are concerned with their security defined as power where power is understood as material and military capability.\textsuperscript{268} Therefore states take whatever course of action which best ensures their survival. According to neo-realism, this is the result of a fundamentally anarchic international system. Neo-realism emphasizes the

\textsuperscript{266} Hyland, \textit{Clinton's World: Remaking American Foreign Policy} 39.
\textsuperscript{267} Ibid. 46.
structural realities under which states are defined. The anarchic system necessitates state self-help as states cannot be sure of assistance from any other state. As all other states are potential adversaries, states are concerned with any material or security gains made by other states (relative gains).

Assuming that national security concerns were at the heart of the motivations does not account for the liberal version of peace imposed on BiH. Holbrooke suggests that US negotiators believed that allowing territorial gains to be kept by the Serbs and the Croats “might unleash a new round of ethnic and border conflicts in Central and Eastern Europe” and in particular “serve as a precedent for ethnic groups in Russia to rise up against Moscow, risking widespread chaos in a region rich in nuclear weapons.” Within this framework, then, the insistence upon return to the home of origin is the result of the desire to prevent secession and consequently set a precedent for other regions. This concern is based on the fear of compromising the norm of territorial integrity. The international community could have continued to insist upon territorial integrity, however, without insisting upon return.

Realist tenets, it seems, called for quite the opposite approach in the midst of the war. In 1993 John Mearsheimer, a prominent realist, advocated the partitioning of BiH into three ethnically homogeneous states with mandatory population transfers under UN auspices. This would allow minority populations trapped within the new state borders to

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270 Holbrooke, To End a War 232.
271 Glitman, "Us Policy in Bosnia: Rethinking a Flawed Approach," 67.
join their respective “kinstates.”\textsuperscript{272} The Serb and Croat statelets, in turn, would be free to join Serbia and Croatia respectively—creating the Greater Serbia and Greater Croatia both Croats and Serbs sought to achieve through the war. Mearsheimer further proposed that the UN establish a “Balkan Population Exchange Commission” modeled after the Refugee Settlement which managed the transfer of over 1.5 million people between Greece and Turkey between 1923 and 1931.\textsuperscript{273} A realist solution would have called for expediency in securing state interests, in this case order, without regard to internationally held norms of appropriate behaviour. The liberal objectives of the Dayton Peace Agreement is not accounted for within a realist paradigm.


Theories of bureaucracy and diplomatic bargaining point us to important ways in which outcomes of diplomacy are rarely the result purely of domestic and international interests and values. That is, the process itself often matters for the outcome. Robert Putnam asserts that international agreements should be analyzed in terms of “two-level games” which are the result of the interaction between international and domestic factors.\textsuperscript{274} At the national level “domestic groups pursue their interests by pressuring their government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups.”\textsuperscript{275} At the international level, “national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing adverse

\textsuperscript{273} Ibid. 26.
\textsuperscript{275} Ibid. 434.
consequences of foreign developments." Peter Gourevich also notes that international factors can influence domestic factors. Allison outlines the organizational behavioural model which envisages organizations and bureaucrats as somewhat autonomous, possessing the scope to define their critical tasks in a way that serves preferences that arise from the organization itself and its managers. Essentially, the organizational behaviour paradigm sees decisions as constrained by the complexity and character of organization.

Ivo Daalder claims that the Dayton Peace Agreement was the result of a bureaucratic process in which the negotiating team on the ground enjoyed a good degree of autonomy from the US administration. This gave the negotiators a high level of freedom to draft the agreement with minimal interference from Washington. Daalder explains that within the administration there was both a "minimalist" and a "maximalist" position. The minimalist position, espoused by Washington, simply wanted an agreement which would end the war, reestablish the US’s leadership position in Europe and remove BiH as a pending issue in the upcoming presidential election campaign. Conversely, the maximalists, those drafting the agreement, “sought to build a viable and lasting peace within the basic contours of a single [...] Bosnia.” Holbrooke states that “the negotiators’ strategy was to achieve as much as possible in the Dayton Accords [...]”

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276 Ibid.
278 Allison, Essence of Decision: Explaining the Cuban Missile Crisis 110.
279 Ibid. 165-85.
280 “[W]e were concerned that if the unprecedented degree of flexibility and autonomy we had been given by Washington were reduced, and we were subjected to the normal Washington decision-making process, the negotiations would become bogged down.” Holbrooke, To End a War 170.
Our goals were ambitious: first, to turn the sixty-day cease-fire into a permanent peace and, second, to gain agreement for a multiethnic state.283 Excepting provisions regarding the operations of the Implementation Force (IFOR) and sanctions, the draft of the Agreement was not reviewed by other agencies in the US government until a few days before the Dayton peace conference began.284

Due to this particular bureaucratic arrangement, Holbrooke's ambitious aims had considerable latitude. And these aims had a significant bearing on the shape and content of the Dayton Peace Agreement. This suggests that the particularly liberal outcome is the result of a particular bureaucratic arrangement in which a group of idealistic lawyers had sufficient freedom to draft an agreement while relatively unfettered by bureaucratic constraints.285

The question remains, however, as to from where Holbrooke's team drew the principles which they promoted in Dayton. Although a bureaucratic examination of the outcome may shed light on the various influences of certain individuals, it does not account for where the norms came from which were implemented, unless, of course, Holbrooke's team is seen to be the norm entrepreneurs of post-conflict restitution of property. Rather, it would seem that Holbrooke's team developed a policy they believed to be in accordance with international law and norms and with ones they wished to promote. This policy received widespread support in the international community, as evidenced by UN Resolutions, Council of Europe accession agreements, and statements

282 Ibid.
283 Holbrooke, To End a War 232.
285 Ibid. 174.
by European politicians. It was also in accordance with the principles advocated throughout the conflict by the UN and the EC. Clearly this was not the result of a specific group of people, but rather a policy which enjoyed widespread support and had much resonance internationally. Therefore, considerations of a bureaucratic organizational model do not suffice to explain the rise of restitutions regimes in the Balkans in the 1990s.

The above explanations are not necessarily mutually exclusive with that of the pivotal role of norms. Most likely there are a range of factors which contributed to the specific outcome of the peace agreement in the former Yugoslavia. These hypotheses, while illuminating certain concerns of the international community, neglect to examine the normative underpinnings which make the Yugoslav case clearly different from previous cases of post-war settlements. The IR theories discussed above are inadequate in explaining normative change, or explaining the role of norms in determining the establishment of restitution regimes. I now turn to constructivism to explain this phenomenon.

**4. Constructivism**

This section gives a brief overview of the theoretical school of constructivism and details the development of the norm of post-conflict property restitution and the establishment of restitution regimes within its paradigm. I will discuss the international system, relevant actors, their interests and identity, and theories of norm development within constructivism’s framework.
Constructivism comprises two central tenets common to all critical theory. These are that "[t]he fundamental structures of international politics are social rather than strictly material,"286 and "[t]hese structures shape actors' identities and interests, rather than just their behaviour."287 These social structures comprise the three elements of shared intersubjective knowledge, material resources which are only meaningful "through the structure of shared knowledge in which they are embedded," and practices.288 Reality, then, is not divisible into material factors, on the one hand, and ideational components, on the other. Hence, constructivism focuses on the interaction between norms, interests, and power.289

Relevant actors are states, sub-state and transnational groups, and individuals embedded in a particular social structure of international society. Unlike the English School's conception of a society of states, constructivists envisage a transnational society, which comprises state and non-state actors.290 In contrast to a realist paradigm, states' interests are not only material or predominantly self-survival seeking, but also moral.291 States' embeddedness in international society requires that their interests be

287 Ibid.
288 Ibid. 73.
understood as contingent on their role within this society. Consequently, the sources of states’ preferences are not located solely within the state.292

The conception of an international society implies guiding principles, rules, and norms created by and constituting actors in that society. These norms influence the preferences and behaviour of actors in that they “provide [them] with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”293 That is, international society socializes them to want certain things.294 Therefore, states’ interests change depending on their self-perception and intersubjectively understood role in international society.

A norm is “a standard of appropriate behaviour for actors of a given identity.”295 Norms must be understood not just as subjective, but intersubjective.296 They are differentiated from ideas in that they hold prescriptive status. They are delineated further into regulative and constitutive.297 Regulative norms regulate and constrain behaviour. Constitutive norms “create new actors, interests and categories of action.”298 Norms are employed “to make demands, rally support, justify action, ascribe responsibility, and assess the praiseworthy or blameworthy character of an action.”299

293 Ibid. 15.
294 Ibid. 2.
296 Finnemore, National Interests in International Society 22.
298 Ibid.

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International norms are produced and reproduced via interaction "through cognitive and communicative processes by which actors try to determine their identities and interests and to develop collective understandings of the situation in which they act and of the moral values and norms guiding their interactions."\textsuperscript{300} This can result in the mutual transformation of interests.\textsuperscript{301} Identity defines a social "we" and "[delineates] the boundaries against the 'others.'"\textsuperscript{302}

Various theories of normative change emphasize the role of dominant states, pedagogical techniques employed by norm entrepreneurs, and socialization processes. Dominant states may play an important role in promoting normative change by imposing norms. Often, the norms they promote "reflect not only the economic and security interests of dominant members of international society but also their moral interests and emotional dispositions."\textsuperscript{303} Norm entrepreneurs may use various techniques to further certain norms. Richard Price notes four pedagogical techniques for stimulating normative change. These are: disseminating information, establishing networks for proselytizing to generate broad support for normative change, grafting a new norm onto existing norms, and demands on states to publicly justify their positions (Socratic method).\textsuperscript{304} In regards to change in the area of human rights, there are three types of socialization processes which are necessary (often taking place simultaneously): adaptation and strategic bargaining (instrumental adaptation to pressure for strategic purposes), moral

\textsuperscript{300} Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices," 7.
\textsuperscript{301} Keck and Sikkink, \textit{Activists Beyond Borders} 214.
\textsuperscript{303} Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society," 524.
consciousness-raising—"shaming", argumentation, dialogue and persuasion, institutionalization and habitualization—that is, a "taken-for-granted" quality.\textsuperscript{305} Margaret Keck and Sikkink note that "individuals and groups may change the preferences of not only their own states, but also of other states by persuasion, socialization, and pressure."\textsuperscript{306}

Constructivism provides the essential theoretical framework with which to understand the development of the norm of post-conflict property restitution from 1945 to the present, and the international community's unwavering position on the right of property restitution as evidenced by the extensive restitution regime established in BiH, and Croatia's eventual, if nonetheless sluggish, movement to acceptance and implementation of restitution. The principle of displaced persons' right of return to their homes of origin was vigorously promoted during and after the conflict. This stands in sharp contrast to the active promotion of population transfer and property dispossession during the first half of the twentieth century. Alternate explanations failing, this points to normative change since 1945. I propose that the aforementioned five norms coalesced to construct certain parameters into which fell the envisaged right of restitution for all those displaced from their homes as a result of the conflict.

Martha Finnemore and Kathryn Sikkink's three-stage model provides an explanatory framework within which to understand the development of the norm of post-conflict restitution of property from its birth in the aftermath of WWII to the current trend.

\textsuperscript{305} Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices," 12-17.
\textsuperscript{306} Keck and Sikkink, Activists Beyond Borders 214.
toward its institutionalization and internalization. Finnemore and Sikkink envisage a three-stage process of norm socialization: emergence; acceptance; and internalization.\textsuperscript{307}

Norm emergence, is characterized by “norm entrepreneurs” who, based on their own convictions and beliefs, create norms. In order to make their norms more attractive, or to “pitch” them to a wider audience, they attempt to frame them so that they resonate with broader public understandings. Once the norm reaches a “critical mass” or a “tipping point,” a norm cascade is created, propelling the norm to the next phase. The acceptance period is characterized by key countries and NGOs’ advocacy of the norm and the existence of some multilateral declarations.\textsuperscript{308} At this point, non-compliant states may change their behaviour in order to remain within what is considered the “civilized community of states.”\textsuperscript{309} The third and final phase is internalization. This phase is characterized by norms which have gained a taken-for-granted quality.\textsuperscript{310} Once socialization has occurred “external pressure is no longer needed to ensure compliance.”\textsuperscript{311}

In the case of the norm of post-conflict restitution of property, norm emergence occurred between 1948 and 1990. It was first expressly articulated in the 1948 General Assembly Resolution 194 on Israel which stated that:

Refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date,
and that compensation should be paid for the property of those

\textsuperscript{307} Finnemore and Sikkink, "International Norm Dynamics and Political Change," 897.
\textsuperscript{308} Zacher, "The Territorial Integrity Norm: International Boundaries and the Use of Force," 236.
\textsuperscript{309} Finnemore and Sikkink, "International Norm Dynamics and Political Change," 904.
\textsuperscript{310} Ibid. 897-901.
choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.\footnote{312}

This principle was reiterated in the case of Cyprus. The 1974 General Assembly Resolution 3212 states that: “all the refugees should return to their homes in safety and calls upon the parties concerned to undertake urgent measures to that end.”\footnote{313} As noted above, different ideological viewpoints during the Cold War prevented strong protection for property rights within international conventions, and the UNHCR Statute adopted by the UN General Assembly in 1950\footnote{314} used language advocating return to the country of origin rather than to one’s home specifically.\footnote{315} Furthermore, the political reality of the Cold War favoured an emphasis on asylum as opposed to repatriation. These factors meant that the norm of post-conflict restitution remained weak and had limited influence on state behaviour during this period.

The collapse of the USSR removed the ideological barrier to high standards of private property protection and changed the aims of the refugee regime. This new political reality, coupled with the explosion of regional conflicts, opened the door for widespread acceptance and has, unfortunately, provided many opportunities for its expression. The acceptance phase, throughout the 1990s, is characterized by explicit recognition of the right of restitution in voluntary repatriation agreements, ECHR

\footnote{312} UN Doc. A/RES/194 (III)(1948), adopted 11 December 1948.  
jurisprudence, and IO missions which promote, monitor, and often assist in the implementation of restitution for displaced persons.


Significant ECHR judgments are Lozidou vs. Turkey and Akdivar and Others vs. Turkey as discussed above in Part II-5 which demonstrate that, within the European human rights regime, the state is responsible for providing redress for lost property and that individuals cannot be legitimately deprived of property ownership due to conflict.

The norm is being increasingly incorporated in the policies of key IOs and may be moving toward explicit enshrinement in international law. UNHCR, for example, explicitly includes the issue of property restitution into its policies and actively promotes it. In 2001, UNHCR issued an internal memorandum to all its offices stating that:

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315 The resolution pledged member states to “[assist] the High Commissioner [for refugees] in his efforts to promote the voluntary repatriations.” UN Doc. A/RES/428 (V) (1950), adopted December 14, 1950 as cited in Ibid.
316 Ibid. 13-14.
317 Ibid. 15-16.
318 Ibid. 24.

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Recovery of refugees' homes and property in their countries of origin needs to be addressed consistently to ensure that effective solutions to refugee displacement are found. [...] Human rights law in relations to the right to adequate housing has evolved significantly over the past decade. The right of a refugee to return to her/his country is now increasingly coupled with her/his right to adequate housing. In this context, the right to adequate housing has developed to extend to the right not to be arbitrarily deprived of housing and property in the first place [...] UNHCR should attempt to play an active role in negotiations leading to peace agreements, with a view to ensuring that the housing and property aspects of voluntary repatriation are fully taken into account. UNHCR should seek to ensure that such agreements explicitly include provisions on the housing and property rights of those choosing to repatriate and that judicial or other mechanisms designed to ensure the implementation of such rights are established. Where refugees voluntarily settle elsewhere, it should be stipulated that this does not affect their right to property restitution or, should this not be possible, compensation or other form of reparation.\(^{319}\)

Recognizing that restitution was not explicitly recognized in international law, Principle 29 of the 1998 Guiding Principles on Internal Displacement\(^{320}\) state that:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the


extent possible, their property and possessions which they left behind or were disposed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.\textsuperscript{321}

The United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD)'s 1996 General Recommendation No. 22 states that:

All refugees and displaced persons, displaced by foreign military, non-military and/or ethnic conflicts, have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.\textsuperscript{322}

Rhetoric, court judgments, increasing implementation, inclusion of the norm into the policies of key IOs indicate the increased acceptance and a norm cascade. The right to restitution of property lost due to conflict is not only being touted rhetorically in a few instances, but is now widely referred to and having palpable effects on behaviour. The increasingly widespread recognition of restitution regimes, as well as growing numbers of cases in which they are established is propelling this "norm cascade" to the final phase of internalization—the "taken-for-granted" quality of the norm characterizing this phase. Internalization can be deemed to have occurred once restitution is explicitly enshrined in

\textsuperscript{321} Ibid. 379.
\textsuperscript{322} UN Doc. A/51/18 as cited in Ibid. 383-84.
international law, does not have to rely on the coalescence of the five norms cited in this thesis, and occurs, as a matter of course, in virtually all relevant post-conflict situations.

The cases of Israel and Cyprus in which the international community has called for, but failed to enforce, return and property restitution indicate that there are other factors at play in addition to normative constraints in determining whether these calls will be implemented. However, as final peace agreements have not been reached to resolve these conflicts it remains to be seen whether property restitution will follow a similar model to the one set out in the Dayton Peace Agreement. In fact, instead of weakening the norm, these cases may, in fact, serve to strengthen it if indeed the insistence upon a resolution for lost property serves to be an impediment for the conclusion of an agreement. This would indicate that the right of restitution has become a legitimate claim in international society and one which requires resolution before a comprehensive agreement can be reached.

The particularities of both post-war BiH and Croatia provide a number of factors which require interpretation through the lens of constructivism. BiH has the character of a semi-protectorate having a High Representative who can impose legislation and dismiss elected officials if they fail to comply with property restitution legislation. Conversely, Croatia has maintained a sovereign government and therefore possesses significantly greater independence in its interactions with the international community. Due to this fundamental difference, in examining the property restitution regime in BiH, the focus should be on the motivations of the international community in imposing and enforcing
the regime. In examining the development of the Croatian regime, Croatia’s identity and role in international society must be examined.

The EC/EU and US’s identities as liberal democracies moulded their options to those appropriate to or in line with norms, principles, and rules consistent with their interests intersubjectively understood as such. Although, the UN, the EC/EU and the US all promoted the principle of property restitution, the most insistent proponents of the right to restitution of property throughout the conflict were the EC/EU and the US which drafted the Dayton Peace Agreement and directed the peace negotiations at Dayton. Within the constructivist paradigm these actors can be understood to have promoted principles consistent with their perceived identity in international society; as liberal democratic states and as such proponents of human rights.

As post-conflict restitution of property is primarily a human rights norm, the dual role of human rights norms merits consideration. Human rights norms “have the dual role of both [prescribing] rules for appropriate behaviour, and [helping to] define identities of liberal states.”323 Through this lens, employing solutions consistent with human rights norms is both a reflection of the US and EU’s perceived identity as liberal democracies and consistent with rules that they must adhere to as such.

In explaining Croatia’s reluctant acceptance of the norm of post-conflict restitution of property, constructivism provides a tenable explanation that may be understood using Thomas Risse-Kappen and Kathryn Sikkink’s five-phase spiral model of normative change resulting in the socialization of the offending state into international society

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323 Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices."

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through the eventual acceptance of international norms.\textsuperscript{324} Risse-Kappen, Ropp, and Sikkink focus on the role of transnational advocacy networks in affecting change.\textsuperscript{325} They envisage a five-phase model which details how norm-violating states eventually succumb to rule-consistent behaviour. Although this model refers to the pressure of transnational advocacy networks in particular, parts of this model may be extrapolated to explain how states socialize other states to accept and implement various norms. Essentially, this model posits that states initially act in accordance with the norm out of self-interest to pacify advocacy networks, but eventually entrap and entangle themselves in a discourse which ultimately leads to their compliance.\textsuperscript{326}

Phase one is defined as "Repression and activation of the network."\textsuperscript{327} In Croatia's case, this phase is the government-supported expulsion of Serbs and allocation of their properties to ethnic Croats from 1991 to 1998. As detailed earlier, the international community castigated this process. Phase two is characterized by the norm-violating state being placed on the international agenda during which time the state denies the relevance of the norm.\textsuperscript{328} Croatia claimed that Serbs had voluntarily "abandoned" their homes and that the humanitarian crisis they faced legitimized using their homes to accommodate refugees and others—while at the same time prescribing that the secondary occupants would become the owners of the properties after a period of ten years. Phase three is characterized by tactical concessions—"the norm violating state seeks cosmetic changes

\textsuperscript{324} Ibid.
\textsuperscript{326} Ibid. 28.
\textsuperscript{327} Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices," 22.
\textsuperscript{328} Ibid.
to pacify international criticism."329 This explains Croatia’s enactment of the Return Program in 1998. Although the program prescribes a procedure for owners to repossess their properties, the program makes repossession contingent upon the provision of state-owned alternative accommodation, which is extremely limited, to the occupant. The stipulation for alternative accommodation has served to stymie the process of repossession almost indefinitely. Phase four is characterized by the norm acquiring prescriptive status for the previously norm-violating state.330 Although Croatia continues to insist upon the provision of alternative accommodation to secondary occupants prior to the repossession of property by owners, it has taken out substantial foreign loans to accelerate this process.331 It has also rescinded legislation which prescribed the ability of occupants to acquire ownership after a period of ten years of uninterrupted occupancy. This indicates that although Croatia recognizes the right of Serb owners to repossess their homes, it does not accept this as an absolute right such that it supercedes the interests of the secondary occupants to their homes. Within the five-phase spiral model concerning private property, Croatia may be placed in phase four. Regarding the resolution of occupancy rights, after denying any obligation for restitution or compensation, Croatia has now acknowledged that those former occupancy rights owners who do return are entitled to receive compensatory housing. On this issue, Croatia may be seen at phase three—making minor concessions, which are still ineffective, to pacify the international community.

329 Ibid. 25.
330 Ibid. 29.
Croatia’s gradual acceptance of the norm of post-conflict restitution of property may also be interpreted as a function of Croatia’s self-conception as a European state. Cornerstones of Croatia’s foreign policy are membership of the EU and NATO for reasons of both disassociating itself from other former republics of Yugoslavia and to realize its self-perceived identity as fundamentally ‘European.’ In this light, Croatia has accepted human rights norms, committing itself to vast array of human rights instruments, the attachment to which indicates its ‘European’ identity. Even if Croatia has signed on to a plethora of human rights instruments for instrumental reasons, it has entrapped itself in a discourse which requires eventual compliance.

Intersubjective understandings of a state’s identity allow other states to appeal to it to compel compliance. US Ambassador Montgomery, speaking in reference to Croatia’s bid to join Partnership for Peace stated: “We emphasize [the principle of equality] because it is a fundamental tenet of all western democratic societies, which value tolerance and diversity in and of themselves—that people be treated equally and as individuals regardless of their race, religion or ethnicity.” Montgomery was not only demonstrating the US’s identity as a liberal democracy, but also appealing to Croatia’s self-conceived identity as ‘western.’

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332 Montgomery, "Croatia's Roadmap to Partnership for Peace," 89.
Conclusion

This thesis seeks to explain the establishment of post-conflict property restitution regimes in BiH and Croatia. Their establishment is a dramatic departure from the European peace settlements of the first half of the twentieth century, raising the question as to what accounts for this change in policy. I have sought to extrapolate the relevant factors through a comparative analysis of dispossession in the two periods. I have found that contrasting norms lie at the heart of the different regimes.

The massive property dispossessions of the first half of the twentieth century occurred as a result of territorial conquest, discriminatory confiscation, wartime seizure of enemy property, and mass population transfers. The dispossessions were underpinned by ethnic nationalism, the malleability of borders, a state-centric international legal system, weak international protection for property rights, and the concept of collective responsibility. Conversely, in the Yugoslav cases, calls for restitution are premised on civic nationalism, territorial integrity, the legal standing of the individual in international law, the increasing inviolability of property rights in international law, and a belief in individual rather than in collective responsibility.

The concepts of civic nationalism and territorial integrity together legitimize the state as the viable political community. Thus, ethnically-motivated calls for partition are deemed illegitimate, and human-rights violations inflicted in the name of nationalism are considered abhorrent. The post-WWII human rights paradigm gives the individual legal standing in the international system. This has allowed a strengthening of individual rights generally. Coupled with a strengthening of property rights, the human rights paradigm
ensures a legitimate claim to restitution rights specifically. This focus on the individual is discordant with any notion of collective responsibility. Therefore, together these norms have created a framework where arbitrary conflict-related property seizure is illegitimate. And should it occur, restitution is necessary.

In searching to explain these distinctive normative changes, I employed various international relations theories to project expectations and assessed the explanatory power of each. Realism, focusing on security concerns, fails to explain the vision of ethnic reconstitution. It provides a plausible explanation for the maintenance of territorial integrity to avoid setting a precedent for secession based on ethnic demographics, but fails to account for the insistence upon the right of return to one’s home. Rationalist models, focused on material self-interest, project that the international community would have encouraged return to alleviate the refugee burden on key states such as Germany. However, this model again fails to explain the right of return to one’s home. In fact, the return process would have been smoother if ethnic cleansing had been considered a fait accompli and the international community had advocated return to a region of ethnic majority. A rationalist model does account for the US Administration’s concerns about an upcoming presidential election and its actions as an attempt to gain domestic popularity. Although this may explain the timing of US-led NATO intervention and the ensuing peace negotiations, it does not account for the US’s long-term commitment to return and property restitution, or the specific content of the Dayton Peace Agreement. A bureaucratic organization model posits that decision-making processes are relevant in shaping outcomes. Accordingly, this model concludes that the character of the Dayton Peace Agreement is the result of particular bureaucratic arrangements. Although it
explains the process, it does not address the content of the agreement which resonated internationally and was in accordance with proposals which were advocated throughout the conflict.

Ruling out the explanatory power of realist, rationalist, and bureaucratic organizational theories to provide a comprehensive account of normative change, I conclude that a constructivist paradigm provides the most complete and accurate analysis. Within the framework of constructivism, the five key normative changes I have identified are plausible causal factors of the restitution regimes in the former Yugoslavia. Through this paradigm, these norms coalesced to provide constraints within which a solution had to fall. Predominantly, these norms fit into the category of human rights norms, which makes them both constitutive and regulative for states which identify themselves as liberal democracies. The primary architects of peace proposals throughout the conflict were the US and the EC/EU. Their democratic liberal identity necessitated consideration, if not adherence, to these norms.

The very successful restitution regime in BiH is primarily the result of the international community’s resolve demonstrated through their military, material, and political commitment. Since BiH functions as a quasi-protectorate, the achievements made cannot be considered voluntary on the part of the BiH government. Rather, the restitution regimes are the manifestation of the perceived identities of the international community, in particular of the US and the EU. However, despite their political unpopularity, municipalities have become increasingly effective at implementing
property legislation initially due to foreign donors tying successful return and property restitution to international funding.\textsuperscript{333}

The sluggishness of Croatia to facilitate restitution is attributable to lingering ethnic tensions and hostilities and the unpopular nature of Serb return among the electorate. Although Croatia continues to impede restitution, it does not deny that Serbs have a right to repossess their properties. Its recognition of the norm is made evident by the fact that it employs extraordinary justification—its responsibility to the secondary occupants—to explain its delay providing property restitution to the owners. This indicates, in accordance with the five-step socialization process, that Croatia recognizes the norm, but has not yet reached the stage of internalization. It has made significant progress toward internalizing the norm of post-conflict restitution evidenced by its recognition of the right of Serb return, the renunciation of its initial pledge to give ownership rights to the secondary occupants after ten years of uninterrupted occupation, its substantial financial expenditure to build housing for secondary occupants so that they will vacate the properties of the owners, and its recent acknowledgement of the rights of former occupancy rights holders to compensatory housing should they return.

These developments, within the context of the post-Cold War rise of reparations regimes, and along with the establishment of property restitution regimes for displaced persons since the end of the Cold War, indicate the growing strength of the norm of the right of post-conflict restitution. With the increasing push to explicitly enshrine this norm in international conventions, justifications and calls for compliance will rely less on other

\textsuperscript{333} Garlick, "Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina," 76.
norms such as those detailed in this thesis and will be able to appeal to the norm of post-conflict restitution itself.

These case studies lend support to constructivism’s paradigm of a transnational society in which actors are socialized to have interests particular to their perceived identity. Sociology reparations literature provides content for constructivism’s structure in which reparations regimes are the reflection of a post-Cold War international morality “that privileges ethical along with traditional realpolitik considerations.”

There is compelling evidence that the norm of post-conflict restitution of property is nearing internalization. This will be marked by explicit enshrinement of the norm in multilateral conventions, and widespread compliance. The outstanding cases of Israel and Cyprus, with seemingly intractable restitution issues, provide hard test cases for the norm in the future.

The enthusiasm for the establishment of restitution regimes must be tempered by the reality of return for those formerly displaced. Every house repossessed does not correspond to a family that has returned. Many individuals formally repossess and then sell their properties, or sell their occupied properties at significantly reduced market prices. Some individuals return, but realize their communities have changed and so leave again. Of the estimated 300,000 to 500,000 Serbs displaced from Croatia, 105,800\(^{335}\) are registered as having returned (21-35%). This is a strikingly low figure compared to ethnic Croats who have returned: 209, 300\(^{336}\) of an estimated 220,000 displaced during the

\(^{336}\) Ibid.
conflict (95%). In BiH, of the estimated 2.3-3.2 million persons displaced, 976,810337 (31-44%) are estimated to have returned. These figures indicate that total ethnic reconstitution is illusory, despite the right to repossess one’s home. It also means, however, that the option exists to wait until conditions improve to return, or to sell or rent one’s property, while settling elsewhere.

The establishment of restitution regimes indicates the power of norms in international society. The cases of BiH and Croatia illustrate that norms may significantly influence the shape and content of peace agreements even when their implementation is extremely costly for those involved. This means that the effects of war do not provide justification to drive people out or does the threat of conflict justify expulsions to create ethnic homogeneity. For those who have lost their home during war, this represents increased hope that they will be able to return. This is a significant step forward for the implementation of human rights standards and the ability to obtain redress when they have been violated.


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